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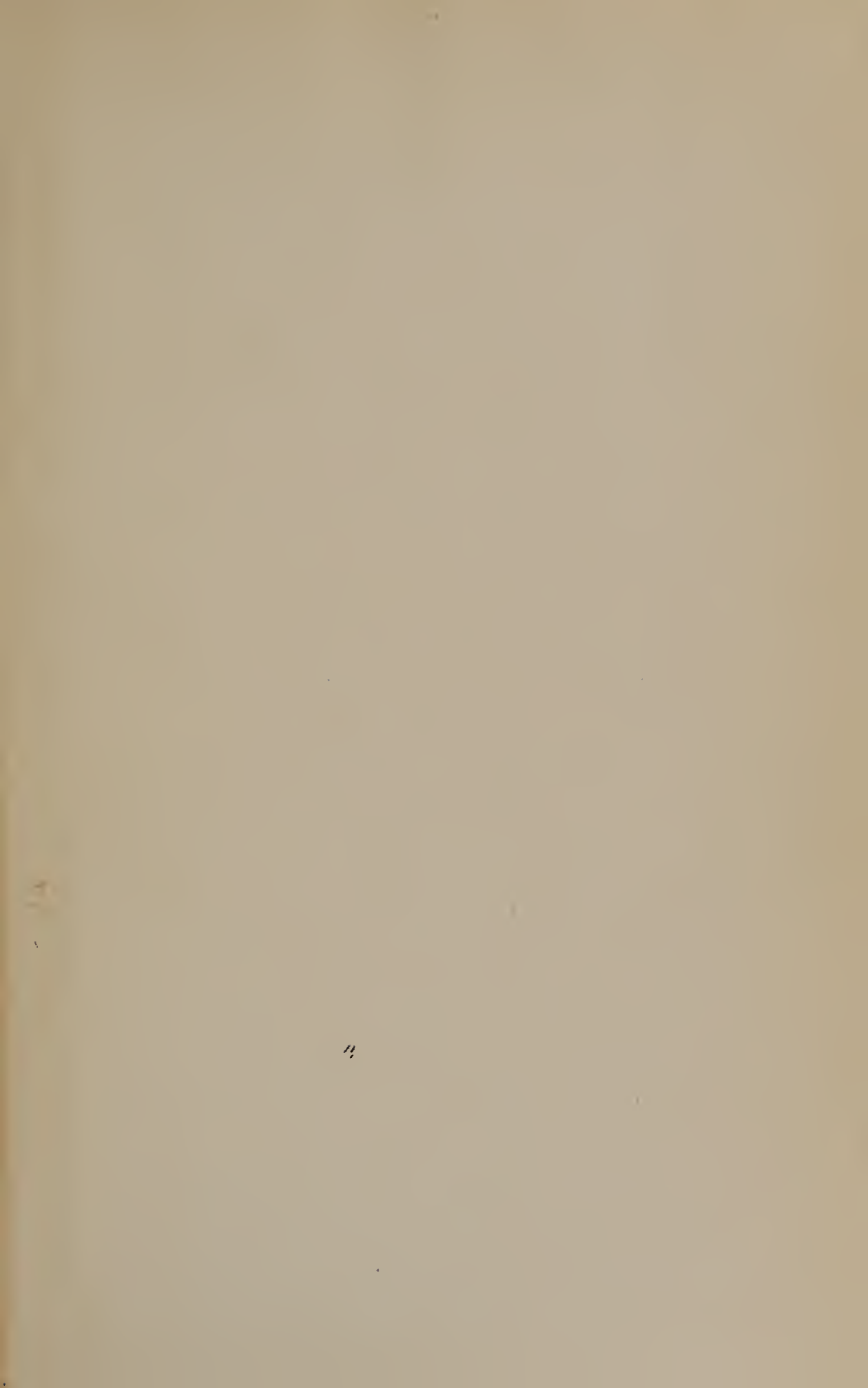
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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF THE
UNITED STATES

211, 212, 213, 214 U.S.

BOOK 53

LAWYERS EDITION,

COMPLETE WITH HEADLINES, HEADNOTES, STATEMENTS OF CASES, POINTS AND
AUTHORITIES OF COUNSEL, FOOTNOTES, AND PARALLEL REFERENCES.

BY

THE PUBLISHERS' EDITORIAL STAFF.

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v. 211-214

JUSTICES
OF THE
SUPREME COURT OF THE UNITED STATES

DURING THE TIME OF THESE REPORTS.

CHIEF JUSTICE,

HON. MELVILLE WESTON FULLER.

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HON. DAVID JOSIAH BREWER,

HON. EDWARD DOUGLASS WHITE,

HON. RUFUS W. PECKHAM,

HON. JOSEPH MCKENNA,

HON. OLIVER WENDELL HOLMES,

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MARSHAL,

JOHN MONTGOMERY WRIGHT, Esq.

¹Commission ordered recorded, March 8, 1909.

²Commission ordered recorded, April 5, 1909.

ALLOTMENT, ETC., OF THE

JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

December 24, 1906.

TOGETHER WITH THE DATES OF THEIR COMMISSIONS AND COMMENCEMENT
OF SERVICE, RESPECTIVELY.

For Order of Court Making Allotment, see 51 L. ed., Appendix I. p. 1193.

NAMES OF JUSTICES, AND WHENCE APPOINTED.	BY WHOM APPOINTED.	CIRCUITS. 1902-1903.	COMMIS- SIONED.	SWORN IN.
ASSOCIATE JUSTICE OLIVER WENDELL HOLMES, Massachusetts.	President ROOSEVELT.	FIRST. ME., N. H., MASS., R. I.	1902. (Dec. 4.)	1902. (Dec. 8.)
ASSOCIATE JUSTICE RUFUS W. PECKHAM, New York.	President CLEVELAND.	SECOND. VERMONT, CONN., NEW YORK.	1895. (Dec. 9.)	1896. (Jan. 6.)
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ASSOCIATE JUSTICE WILLIAM R. DAY, Ohio.	President ROOSEVELT.	SEVENTH. IND., ILL., WIS.	1903. (Feb. 23.)	1903. (Mar. 2.)
ASSOCIATE JUSTICE DAVID J. BREWER, Kansas.	President HARRISON.	EIGHTH. MINN., IOWA, MO., KAN., ARK., NEB., COLO., N. D., S. D., UTAH, WYO., NEW MEX.,* OKLA.*	1889. (Dec. 18.)	1890. (Jan. 6.)
ASSOCIATE JUSTICE JOSEPH MCKENNA, California.	President MCKINLEY.	NINTH. CAL., OR., NEV., MONT., WASH., IDAHO, ALASKA,* ARIZONA,* HAWAII.*	1898. (Jan. 21.)	1898. (Jan. 26.)

*Territories assigned to circuits by order of the Supreme Court.

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THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1908.

1] *HERMAN FRASCH, Appt. and Plff. in
Err.,
v.
EDWARD B. MOORE, Commissioner of
Patents.†

(See S. C. Reporter's ed. 1-11.)

Appeal — final decree — patent cases.

A decree of the court of appeals of the District of Columbia on an appeal from the Commissioner of Patents, which affirms the latter's decision and directs the clerk of the court to "certify this opinion and proceedings in this court in the premises to the Commissioner of Patents, according to law," is not "final" within the meaning of the act of February 9, 1893 (27 Stat. at L. 434, 436, chap. 74, U. S. Comp. Stat. 1901, p. 573), § 8, defining the appellate jurisdiction of the Federal Supreme Court, since, under U. S. Rev. Stat. §§ 4914, 4915, decisions on such appeals do not preclude any person interested from contesting the validity of the patent in court, and a remedy by bill in equity is given where a patent is refused.

[For other cases, see Appeal and Error, 20-313, in Digest Sup. Ct. 1908.]

[No. 14.]

Argued April 23, 24, 1908. Decided October 19, 1908.

†Made party in place of Frederick I. Allen, Commissioner, resigned.

NOTE.—On the appellate jurisdiction of the Federal Supreme Court over the courts of the District of Columbia—see note to United States ex rel. Taylor v. Taft, 51 L. ed. U. S. 269.

As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; *Gibbons v. Ogden*, 5 L. ed. U. S. 302; and *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001.

APPEAL from and in ERROR to the Court of Appeals of the District of Columbia to review a decision affirming a decision of the Commissioner of Patents, who had affirmed in part a decision of the examiners in chief on the question of uniting process and apparatus claims in the same application. Dismissed for want of jurisdiction.

See same case below, 27 App. D. C. 25.

Statement by Mr. Chief Justice Fuller:

Frasch applied for a patent for an invention of a new and useful improvement in the art of making salt by evaporation of brine. He expressed his alleged invention in six claims, three of which were for the process of removing incrustation of calcium sulphate from brine-heating surfaces, and three of them were for an apparatus for use in the process.

*At the time when the application was [2] filed, rule 41 of the Patent Office did not permit the joinder of claims for process and claims for apparatus in one and the same application. The examiner required division between the process and apparatus claims, and refused to act upon the merits. An appeal was taken to the examiners in chief, but the examiner refused to forward it. A petition was then filed, asking the Commissioner of Patents to direct that the appeal be heard. The Commissioner held that the examiner was right in refusing to forward the appeal. From that decision appeal was taken to the court of appeals of the District, which held that it did not have jurisdiction to entertain it. Frasch then filed a petition in this court for a mandamus, directing the court of appeals to hear and determine the appeal, which petition was dismissed. Ex parte Frasch, 192 U. S. 566, 48 L. ed. 564, 24 Sup. Ct. Rep. 424.

But in *United States ex rel. Steinmetz v. Allen*, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416, it was held that rule 41, as applied by the Commissioner, was invalid, and that the remedy for his action was by mandamus in the supreme court of the District to compel the Commissioner to act. Accordingly the proceedings in the present case were resumed in the Patent Office, and the applicant asked the Commissioner to direct that the appeal theretofore taken to the examiners in chief be heard by them. The Commissioner granted this petition. The primary examiner furnished the required statement and a supplementary statement of the grounds of his decision requiring division. The examiners in chief affirmed the decision of the primary examiner, "requiring a division of these claims for an art and for an independent machine used to perform the art;" one examiner in chief, dissenting, held that division should not be required. On appeal to the Commissioner, he affirmed the examiners in chief in part only; that is to say, he held that process claim No. 1 must be divided from the other process claims and the apparatus claims, but that process claims Nos. 2 and 3 and the apparatus claims Nos. 4, 5, and 6 might be joined in one application. Rehearing was denied, and an appeal was taken to the court of appeals for the District of Columbia, which affirmed the decision of the Commissioner of Patents, for reasons given at large in an opinion, and directed the clerk of the court to "certify this opinion and proceedings in this court in the premises to the Commissioner of Patents, according to law."

An appeal and a writ of error were allowed, the court stating through Mr. Chief Justice Shepard: "We are inclined to the view that this case is not appealable to the Supreme Court of the United States, but, as the question has never been directly decided, so far as we are advised, we will grant the petition in order that the question of the right to appeal in such a case may be directly presented for the determination of the court of last resort."

The record was filed January 25, 1907, and on February 4 a petition for certiorari was submitted.

Mr. Charles J. Hedrick argued the cause and filed a brief for appellant and plaintiff in error.

Solicitor General Hoyt argued the cause and filed a brief for appellee and defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

Section 8 of the act of February 9, 1893

(27 Stat. at L. 434, 436, chap. 74, U. S. Comp. Stat. 1901, p. 573), provides:

"That any final judgment or decree of the said court of appeals may be re-examined and affirmed, reversed, or modified by the Supreme Court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."

The decision of the court of appeals sought to be reviewed in the present case is not final, but merely ended an interlocutory stage of the controversy, and sent the applicant back to the Patent Office to conform to the meaning and effect of the rule on division of claims as construed by the Commissioner of Patents, and to pursue the application in the form required to allowance or rejection.

Section 780 of the Revised Statutes of the District of Columbia reads thus:

"The supreme court, sitting in banc, shall have jurisdiction of and shall hear and determine all appeals from the decisions of the Commissioner of Patents, in accordance with the provisions of sections forty-nine hundred and eleven to section forty-nine hundred and fifteen, inclusive, of chapter one, title 60, of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 3391, 3392), 'Patents, Trademarks, and Copyrights.'"

*Section 9 of the "Act to Establish a Court of Appeals for the District of Columbia, and for Other Purposes," approved February 9, 1893 (27 Stat. at L. 434, 436, chap. 74, U. S. Comp. Stat. 1901, p. 3391), is:

"Sec. 9. That the determination of appeals from the decision of the Commissioner of patents, now vested in the general term of the supreme court of the District of Columbia, in pursuance of the provisions of section seven hundred and eighty of the Revised Statutes of the United States, relating to the District of Columbia, shall hereafter be, and the same is hereby, vested in the court of appeals created by this act; and, in addition, any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said court of appeals."

Thus, the special jurisdiction of the District supreme court in patent appeals was transferred to and vested in the court of appeals, and decisions in interference cases were also made appealable, which had not been previously the case. Rev. Stat. § 4911. The law applicable is § 4914, Revised Statutes, which provides:

"The court, on petition, shall hear and determine such appeal, and revise the decision appealed from in a summary way, on the evidence produced before the Commissioner, at such early and convenient time as the court may appoint; and the revision shall be confined to the points set forth in the reasons of appeal. After hearing the case the court shall return to the Commissioner a certificate of its proceedings and decision, which shall be entered of record in the Patent Office, and shall govern the further proceedings in the case. But no opinion or decision of the court in any such case shall preclude any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question."

By § 4915 a remedy by bill in equity is given where a patent is refused, and reads as follows:

"Sec. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the supreme *court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not."

The final decision referred to is obviously the judicial decision on the bill in equity, while in interference cases and in all others going up from the Commissioner to the Court of Appeals there is no final judgment in the cause, but one interlocutory in its nature, and binding only upon the Commissioner, "to govern the further proceedings in the case." The opinion or decision of the court, reviewing the Commissioner's decision, is not final, because it does not

preclude any person interested from contesting the validity of the patent in court; and, if the decision of the Commissioner grants the patent, that is the end of the matter as between the government and the applicant; and if he refuses it, and the court of appeals sustains him, that is merely a qualified finality, for, as we have seen, the decision of that court may be challenged generally and a refusal of patent may be reviewed and contested by bill as provided.

The appeal given to the court of appeals of the District from the decision of the Commissioner is not, as Mr. Justice Matthews said in *Butterworth v. United States*, "the exercise of ordinary jurisdiction at law or in equity on the part of that court, but is one step in the statutory proceeding under *the patent laws whereby that tribunal is [10 interposed in aid of the Patent Office, though not subject to it. Its adjudication, though not binding upon any who choose, by litigation in courts of general jurisdiction, to question the validity of any patent thus awarded, is nevertheless conclusive upon the Patent Office itself; for, as the statute declares (Rev. Stat. § 4914), it 'shall govern the further proceedings in the case.'" 112 U. S. 60, 28 L. ed. 659, 5 Sup. Ct. Rep. 25.

In *Rousseau v. Brown*, 21 App. D. C. 73, 80, which was an appeal from the Patent Office in the matter of an interference between two applications, the court affirmed the decision of the Commissioner of Patents, ruling against one of the claims on the ground that priority of invention must be awarded to the other claimant, declined to allow a writ of error or appeal, and said, through Chief Justice Alvey:

"There is no final judgment of this court rendered in such cases, nor is there any such judgment required or authorized to be rendered, not even for costs of the appeal. This court is simply required in such cases, after hearing and deciding the points as presented, instead of entering judgment here, to return to the Commissioner of Patents a certificate of the proceedings and decision of this court, to be entered of record in the Patent Office, to govern the further proceedings in the case. But it is declared by the statute that no opinion of this court in any such case shall preclude any person interested from the right to contest the validity of any patent that may be granted by the Commissioner of Patents. D. C. Rev. Stat. § 780, U. S. Rev. Stat. § 4914.

"There is no provision of any statute, within our knowledge, that authorizes a writ of error or an appeal to the Supreme Court of the United States in such case as the present. It would seem clear that the case is not within the purview of § 8 of the

act of Congress of February 9, 1893, providing for the establishment of this court. That section only applies to cases where final judgments by this court have been entered, and not to decisions to be made and certified to the Patent Office, under the special directions of the statute."

11] *We consider these observations as applicable to the present case, and the result is appealed and writ of error dismissed, and certiorari denied.

Mr. Justice White and Mr. Justice McKenna dissent.

Mr. Justice Moody did not sit.

LUCINDA BRANDON, Personally and as Administratrix of the Estate of Alexander Brandon, Deceased, et al., Plffs. in Err.,

v.

NEWTON L. ARD.

(See S. C. Reporter's ed. 11-25.)

Public lands — railway land grants — withdrawal from settlement.

1. The withdrawal from sale, pre-emption, or settlement of lands within the indemnity limits of the railway land grant act of March 3, 1863 (12 Stat. at L. 772), which withdrawal was unauthorized, because the road had not then been definitely located, does not prevent a homestead claim or right from attaching to such land before definite location, and such right will be protected as against the subsequent selection of the land by the railway company.

[For other cases, see Public Lands, 234-242, in Digest Sup. Ct. 1908.]

Judgment — res judicata — parties.

2. A homestead claimant whose rights attached before any interest in the land was acquired by a railway company under a congressional grant is not concluded by an adjudication against the government in a suit brought by it to cancel certain patents issued to the railway company, including one for the land in question, to which suit he was not made a party, although he may have been an active member of a Settlers' Protective Association, which may have made such representations to, and brought such facts to the attention of, the government, as to induce the government to bring the suit.

[For other cases, see Judgment, 688-851, in Digest Sup. Ct. 1908.]

[No. 24.]

Submitted April 29, 1908. Decided October 19, 1908.

NOTE.—As to land grants to railroads—see note to Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 28 L. ed. U. S. 794.

As to conclusiveness of judgments generally—see notes to Sharon v. Terry, 1 L.R.A. 572; Bollong v. Schuyler Nat. Bank, 3 L.R.A. 142; Wiese v. San Francisco Municipal Fund Soc. 7 L.R.A. 577; Morrill v. Morrill, 11 L.R.A. 155; Shores v. Hooper, 11 L.R.A. 308; Bank of United States v. Beverly, 11 L. ed. U. S. 76; Johnson Steel Street Rail Co. v. Wharton, 38 L. ed. U. S. 429; and Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which affirmed a judgment of the District Court of Allen County, in that state, in favor of defendant in an action of ejectment. Affirmed.

See same case below, 74 Kan. 424, 118 Am. St. Rep. 321, 87 Pac. 366.

The facts are stated in the opinion.

Mr. T. A. Pollock submitted the cause for plaintiffs in error. Mr. L. W. Kepingler was on the brief:

The relations between the government and Ard with respect to this land, and Ard's relation to and connection with the suit, were such as to render the decree in the case of United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13, conclusive against Ard as to the equities now claimed by him.

Graham v. Great Falls Water Power & Townsite Co. 30 Mont. 393, 76 Pac. 811; Norton v. Evans, 27 C. C. A. 168, 49 U. S. App. 669, 82 Fed. 804; Kerrison v. Stewart, 93 U. S. 155, 23 L. ed. 843; Manson v. Duncanson, 166 U. S. 533, 41 L. ed. 1105, 17 Sup. Ct. Rep. 647; Freeman, Judgm. 3d ed. § 147; Black, Judgm. § 85; Hornsby v. City Nat. Bank (Tenn. Ch. App.) 60 S. W. 160; 24 Am. & Eng. Enc. Law, 2d ed. pp. 737, 738; Hauke v. Cooper, 48 C. C. A. 144, 108 Fed. 924; Theller v. Hershey, 86 Fed. 576; United States v. Beebe, 127 U. S. 338, 32 L. ed. 121, 8 Sup. Ct. Rep. 1083.

Ard could have appealed.

3 Dan. Ch. Pl. & Pr. 6th ed. p. 1461; Sage v. Central R. Co. 93 U. S. 412, 23 L. ed. 933.

The withdrawal of March 19, 1863, withdrew the land in question from the category of public lands.

Northern Lumber Co. v. O'Brien, 134 Fed. 303, 71 C. C. A. 598, 139 Fed. 614, 204 U. S. 190, 51 L. ed. 438, 27 Sup. Ct. Rep. 250; Wood v. Beach, 156 U. S. 548, 39 L. ed. 528, 15 Sup. Ct. Rep. 410; Spencer v. McDougal, 159 U. S. 62, 40 L. ed. 76, 15 Sup. Ct. Rep. 1026; Merrill v. Chicago, St. P. M. & O. R. Co. 17 C. C. A. 199, 34 U. S. App. 140, 70 Fed. 464; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 2 McCrary, 550, 13 Fed. 106; Wolcott v. Des Moines Nav. & R. Co. 5 Wall. 681, 18 L. ed. 639; Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 745, 23 L. ed. 639; Burlington & M. R. Co. v. Fremont County, 9 Wall. 94, 19 L. ed. 564; Nelson v.

Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302.

The withdrawal of March 19, 1863, withdrew the land from the category of "public land" within the meaning of the words as used in the homestead pre-emption acts, and such withdrawal constituted a "reservation" within the meaning of said word as contained in said act.

Ibid.; Patterson v. Tatam, 3 Sawy. 164, Fed. Cas. No. 10,830; Wolsey v. Chapman, 101 U. S. 770, 25 L. ed. 920; Weaver v. Fairchild, 50 Cal. 360; Vicksburg, S. & P. R. Co. v. Elmore, 46 La. Ann. 1237, 15 So. 701.

The rulings of the Land Department authorizing the decisions of this court sustaining withdrawals such as the one in question, and made prior to the time Brandon made his purchase, constitute a rule of property in his favor. See cases cited in 13 Century Dig. chap. 2163, § 336; and such rule, having been established by Federal authority, it is the legal duty of the government to uphold the title so acquired.

Mr. Oscar Foust submitted the cause for defendant in error. Messrs. Ewing, Gard, & Gard were on the brief:

The judgment against the plaintiff (the United States) and in favor of the railroad company, in the Federal case, is not *res judicata* as to the issues and parties in the case at bar.

Ard v. Brandon, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406; Black, Judgm. 540; 1 Freeman, Judgm. 4th ed. 188, 189; Hale v. Finch, 104 U. S. 261, 26 L. ed. 732; Patton v. Caldwell, 1 Dall. 419, 1 L. ed. 204; Litchfield v. Goodnow (Litchfield v. Crane) 123 U. S. 551, 31 L. ed. 201, 8 Sup. Ct. Rep. 210; Aspden v. Nixon, 4 How. 467, 11 L. ed. 1059; Northern Bank v. Stone, 88 Fed. 413; Australian Knitting Co. v. Gormly, 138 Fed. 92; Wilgus v. Germain, 19 C. C. A. 188, 44 U. S. App. 369, 72 Fed. 773; Pendleton v. Russell, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743; Central Baptist Church & Soc. v. Manchester, 17 R. I. 492, 33 Am. St. Rep. 893, 23 Atl. 30; Jones v. Vert, 121 Ind. 140, 16 Am. St. Rep. 379, 22 N. E. 882; Cannon River Mfrs. Asso. v. Rogers, 42 Minn. 123, 18 Am. St. Rep. 497, 43 N. W. 792; Park v. Ensign, 66 Kan. 50, 97 Am. St. Rep. 352, 71 Pac. 230; United States v. San Jacinto Tin Co. 125 U. S. 273, 31 L. ed. 747, 8 Sup. Ct. Rep. 850; Stryker v. Goodnow (Stryker v. Crane) 123 U. S. 527, 31 L. ed. 194, 8 Sup. Ct. Rep. 203; Brandon v. Ard, 74 Kan. 424, 118 Am. St. Rep. 321, 87 Pac. 366; Wilkie v. Howe, 27 Kan. 518; Keizer v. Remington Paper Co. 71 Kan. 305, 80 Pac. 570.

The letter of withdrawal issued by the Commissioner of the General Land Office March 19, 1863, was without authority of 53 L. ed.

law, and was ineffectual to withdraw the land in controversy from the class of lands subject to homestead, and is ineffectual to make good the legal title of Brandon as against the prior and superior equity of Ard in the land.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733-760, 23 L. ed. 634-645; Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 24 L. ed. 1095; Ard v. Brandon, *supra*; Clements v. Warner, 24 How. 394, 16 L. ed. 695; Duluth & I. Range R. Co. v. Roy, 173 U. S. 587, 43 L. ed. 820, 19 Sup. Ct. Rep. 549; Weeks v. Bridgman, 159 U. S. 541, 40 L. ed. 253, 16 Sup. Ct. Rep. 72; United States v. Missouri, K. & T. R. Co. 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13; Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; Hewitt v. Schultz, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; Nelson v. Northern P. R. Co. 188 U. S. 108, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; Sjoli v. Dreschel, 199 U. S. 564, 50 L. ed. 311, 26 Sup. Ct. Rep. 154; Southern P. R. Co. v. Bell, 183 U. S. 675, 46 L. ed. 383, 22 Sup. Ct. Rep. 232; Holmes v. United States, 55 C. C. A. 489, 118 Fed. 995; Moore v. Carmode, 180 U. S. 167, 45 L. ed. 476, 21 Sup. Ct. Rep. 324; Northern P. R. Co. v. Miller, 7 Land Dec. 100; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424.

Mr. Justice Harlan delivered the opinion of the court:

This case involves the title to a tract of land in Allen county, Kansas, containing 80 acres. It is described in the record as the northeast quarter of section 11, township 26, range 20, and will hereafter be alluded to as the tract in section 11. Adjoining that tract, in the same township, is another tract of 80 acres which will be hereafter referred to as the tract in section 2. The present writ of error does not involve the title to the tract in section 2, but it will conduce to a clear understanding of the questions raised as to the tract in section 11 if we recall certain acts of Congress, as well as the proceedings in the Land Department and the litigation that arose in the state and Federal courts about both tracts.

By an act of March 3d, 1863, chap. 98, Congress granted to Kansas every alternate odd section of public lands, for 10 sections in width on each side, to aid in the construction of railroads and branches, as follows: First, of a railroad and telegraph line from Leavenworth, Kansas, on a named *route, with a branch to the southern[15 line of the state in the direction of Galveston, Texas; second, of a railroad from Atchison, *via* Topeka, to the western line of the

state, with a branch extending to a named point on the first-named road; one of the roads becoming subsequently known as the Leavenworth road, and the other as the Missouri-Kansas road.

After making the grant in the usual words, the act proceeded: "But in case it shall appear that the United States have, when the limits or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid; which lands, thus indicated by odd numbers and selected by direction of the Secretary of the Interior, as aforesaid, shall be held by the state of Kansas for the use and purpose aforesaid: Provided, That the land to be so selected shall, in no case, be located further than twenty miles from the lines of said road and branches. . . ." 12 Stat. at L. 772.

By a statute passed in 1864 Kansas accepted this grant upon the conditions prescribed by Congress, and the Leavenworth and the Missouri-Kansas companies became entitled to claim the benefit of its provisions as to the lands on their respective routes.

A few days after the act of 1863 was passed,—indeed, before the state had formally accepted the benefit of its provisions,—the Senators and Representatives from Kansas requested the General Land Office to [16] withdraw the public lands *along the specified routes of the railroads and branches proposed to be constructed. Pursuant to that request, the Commissioner of the Land Office, on March 19th, 1863,—without having received any map of general route, much less of definite location,—sent to the register and receiver, at Humboldt, Kansas, a diagram showing the *probable* lines of the roads and their respective branches, as well as the 10-mile or place limits on each side, and directed that officer to "withhold from ordinary private sale or location, and also from pre-emption and homestead . . . all the public lands in your [his] district and lying within the 10-mile limits *are* [as] designated in said diagram." After referring to the acts of 1853 and 1854 [10 Stat.

at L. 244, 269, chaps. 143, 25] (pre-emption and homestead acts), the Commissioner proceeded: "You will, therefore, understand from the foregoing: 1st. That the odd sections within the limits of said railroads and branches are absolutely withdrawn from sale, pre-emption, or homestead entry, except so far as inceptive rights may have accrued prior to the receipt by you of this order. . . . This order will take effect from the date of its reception at your office, and you will advise this office of the precise time it may be received by you."

The order of withdrawal was approved by the Secretary of the Interior and was received at the local office May 5th, 1863.

After this withdrawal, Congress, by an act approved July 26th, 1866 (14 Stat. at L. 289, chap. 270), made a grant of lands to Kansas to aid in the construction of a southern branch of the Union Pacific Railway & Telegraph Company from Fort Riley, Kansas, down the valley of the Neosho river to the southern line of Kansas. This act is referred to in the record, but it does not seem to have any special significance in the present case. Suffice it to say, that it contained provisions substantially like those in the act of 1863, which made it the duty of the Secretary of the Interior to select for the railroad company public lands nearest the place limits, equal to such amount as the United States appeared, at the time of the definite location of the road, to have "sold, reserved, or otherwise *appro-[17] priated, or to which the right of homestead settlement or pre-emption has attached."

Under date of April 30th, 1867, the Land Office transmitted to the local land office at Humboldt, Kansas, a map of the actual location of the railroad for which the grant was made by Congress in the act of 1863. The diagram showed the 10-mile or granted limits of that road, and directed the withholding from sale or location, pre-emption, or homestead entries, all the odd sections within the limits of 20 miles as laid down on that diagram.

After the above withdrawal,—which, as we have stated, was made in 1863 solely at the request of the Kansas Senators and Representatives,—Ard, who was admittedly qualified to take the benefits of the homestead laws, went upon the above two tracts, in June, 1866, intending, in good faith, to perfect a title to them under the homestead laws. He made substantial improvements upon them, and in July, 1866, in the accustomed way, made a homestead application at the local land office for the 160 acres. These two tracts of 80 acres each were so situated that they could have been legally embraced in one homestead entry. Ard's application was denied by the local

office upon the ground, among others, that the land was within the place or granted limits of one of the aided roads. At that time the Missouri-Kansas Company—under whom the plaintiffs in error claim—had not filed any map of definite location. No such map was filed until December 6th, 1866. In the spring of 1867 Ard did further work on the land, building a house thereon, and about July 1st of that year he again applied at the local land office, under the homestead laws, for the land. This application was also denied on the same grounds as were assigned in reference to his original application. In 1872 he made a more formal application, but was again repulsed by the Commissioner of the Land Office. Yet he did not abandon his claim, but held steadily to the purpose of obtaining the entire 160 acres under the homestead laws, and remained in open, notorious possession, asserting *his right to the land. And he has continuously occupied the land ever since June, 1866.

It should be stated in this connection that, after the rejection of Ard's original homestead application upon the mistaken ground that the lands were within the place or granted limits of one of the roads, it was ascertained that neither of the tracts was within place limits, but both were within the overlapping indemnity limits of the respective roads. The tract in section 11 was selected as indemnity for lands lost jointly by the two companies, and was patented by the state to the Missouri-Kansas Company on May 19th, 1873. The company knew when it selected the land to supply alleged deficiencies in place limits, as well as when it took the patent from the state, that Ard was in actual possession, claiming the land under the homestead laws. The tract in section 2 was selected by the same company on April 14th, 1873, and on November 3d, 1873, it received a patent for it directly from the United States.

C. H. Pratt having purchased from the Missouri-Kansas Company the tract in section 2, and Brandon having purchased from the same company the tract in section 11, each commenced a separate action of ejectment against Ard in a state court. Judgment went against Ard in each case, and he was also unsuccessful in the supreme court of Kansas. *Ard v. Pratt*, 43 Kan. 419, 23 Pac. 646; *Ard v. Brandon*, 43 Kan. 425, 23 Pac. 648.

Ard then brought both cases here, and the judgments were reversed, further proceedings being ordered to be taken in accordance with the opinion of this court. *Ard v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406. What this court said bears directly upon the case as now 53 L. ed.

presented. Mr. Justice Brewer, delivering the judgment of the court, referred to the testimony—and the same facts appear in the present record—and observed that, by reason of his occupancy and improvement of the land for the purpose of a homestead, and by his homestead application,—all of which was prior to the withdrawal of the lands by the Land Department,—Ard, who had admittedly the requisite qualifications under the homestead laws, acquired an equitable *right to the land that could not be displaced by the wrongful act of the local land office. After referring to the case of *Shepley v. Cowan*, 91 U. S. 330, 338, 23 L. ed. 424, 427, the court proceeded: "Within the authority of that case we think the defendant has shown an equity prior to all claims of the railway company. He had a right to enter the land as a homestead; he pursued the course of procedure prescribed by the statute; he made out a formal application for the entry, and tendered the requisite fees, and the application and the fees were rejected by the officer charged with the duty of receiving them,—and wrongfully rejected by him. Such wrongful rejection did not operate to deprive defendant of his equitable rights, nor did he forfeit or lose those rights because, after this wrongful rejection, he followed the advice of the register and sought in another way to acquire title to the lands. The law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon. If he does all that the statute prescribes as the condition of acquiring rights, the law protects him in those rights, and does not make their continued existence depend alone upon the question whether or no he takes an appeal from an adverse decision of the officers charged with the duty of acting upon his application. 'The policy of the Federal government in favor of settlers upon public lands has been liberal. It recognizes their superior equity to become the purchasers of a limited extent of land, comprehending their improvements, over that of any other person.' *Clements v. Warner*, 24 How. 394, 397, 16 L. ed. 695, 696. There can be no question as to the good faith of the defendant. He went upon the land with the view of making it his home. He has occupied it ever since. He did all that was in his power in the first instance to secure the land as his homestead. That he failed was not his fault; it came through the wrongful action of one of the officers of the government."

Subsequently, after the return of the above cases to the inferior state court, Pratt, the claimant of the tract in section 2, abandoned his ejectment suit against Ard, and

20]the *United States brought an action in the United States circuit court for Kansas against the Missouri-Kansas Company and other railroad companies to cancel certain patents that had been issued for lands in Allen county, Kansas, including the one issued to the Missouri-Kansas Company for the tract in section 11. *United States v. Missouri, K. & T. R. Co.* 141 U. S. 358, 35 L. ed. 766, 12 Sup. Ct. Rep. 13. Brandon was made a defendant in that action because he asserted rights in lands covered by some of the patents sought to be canceled. But Ard was not made a party, although some of the evidence in the case had reference to the tract in section 11, as well as to the circumstances under which he occupied it. That action was brought by the Attorney General of the United States at the request of the Secretary of the Interior, who proceeded under the act of Congress of March 3d, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595). That act directed the Secretary "to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads, and heretofore unadjusted." In that action the government was unsuccessful in both the circuit court and in this court, but not, as we shall presently see, on any question determinative of the issue now presented as between Brandon's heirs and Ard.

Later on, the present case, so far as it involved the title to section 11, as between Brandon and Ard, was again heard upon its merits in the state court, and judgment went in favor of Ard. That judgment was affirmed by the supreme court of Kansas, which had before it the judgments in *Ard v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406, and in *United States v. Missouri, K. & T. R. Co.* supra.

Subsequently, after the decision in *Ard v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406, Ard renewed his application, under the homestead laws, for both tracts. Having made the proper proofs, and paid the required fees, his application was approved and a patent issued to him by the United States on October 17th, 1900, under the homestead law of 1862 and the 21]acts supplementary thereto. That patent was put in evidence at the last hearing of this cause in the inferior state court and was part of the record in this case when it was before the supreme court of Kansas, whose judgment is now here for review.

In our opinion the determination of the present case depends upon the conclusions that may be reached on two questions.

1. We cannot give to the withdrawal from sale, pre-emption, or settlement of the lands

upon which Ard entered in 1866 the legal effect which the plaintiffs in error insist must be given to it. It is conceded that the lands were not within the place or granted limits of either railroad, but were within indemnity limits. According to the decisions of this court, they were therefore open to settlement under the homestead laws up to the time of their being selected to supply deficiencies in place limits, with the approval of the Secretary of the Interior, after the filing of a map of definite location. The withdrawal of them from sale or settlement, simply at the request of Senators and Representatives from Kansas, prior to the definite location of the road, and before they were regularly selected to supply deficiencies in place or granted limits, was without authority of law. Such unauthorized withdrawal did not stand in the way of Ard, in virtue of his settlement on them in 1866, under the then-existing homestead laws, from acquiring such an interest in the lands as would be protected against their subsequent selection by the railroad company. The acts of Congress cannot be construed as actually granting lands to which had attached, before the definite location of the road, any claim or right under the homestead laws. A claim or right did attach to these lands in favor of Ard before any map of definite location was made or filed, and before they were selected for the railroad company to supply alleged deficiencies in place limits. What we have said is in conformity with numerous decisions of this court cited in the margin.†

†*Hewitt v. Schultz*, 180 U. S. 139, 45 L. ed. 463, 21 Sup. Ct. Rep. 309; *Nelson v. Northern P. R. Co.* 188 U. S. 109, 47 L. ed. 406, 23 Sup. Ct. Rep. 302; *United States v. Northern P. R. Co.* 152 U. S. 284, 296, 38 L. ed. 443, 448, 14 Sup. Ct. Rep. 598; *Northern P. R. Co. v. Sanders*, 166 U. S. 620, 634, 635, 41 L. ed. 1139, 1144, 17 Sup. Ct. Rep. 671; *Menotti v. Dillon*, 167 U. S. 703, 42 L. ed. 333, 17 Sup. Ct. Rep. 945; *United States v. Oregon & C. R. Co.* 176 U. S. 28, 42, 44 L. ed. 358, 364, 20 Sup. Ct. Rep. 261; *St. Paul & P. R. Co. v. Northern P. R. Co.* 139 U. S. 1, 5, 35 L. ed. 77, 79, 11 Sup. Ct. Rep. 389; *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.* 112 U. S. 720, 723, 28 L. ed. 872, 873, 5 Sup. Ct. Rep. 334; *Missouri, K. & T. R. Co. v. Kansas P. R. Co.* 97 U. S. 491, 501, 24 L. ed. 1095, 1098; *Cedar Rapids & M. River R. Co. v. Herring*; 110 U. S. 27, 28, 28 L. ed. 56, 57, 3 Sup. Ct. Rep. 485; *Grinnell v. Chicago, R. I. & P. R. Co.* 103 U. S. 739, 26 L. ed. 456; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.* 112 U. S. 414, 28 L. ed. 794, 5 Sup. Ct. Rep. 208; *Wilcox v. Eastern Oregon Land Co.* 176 U. S. 51, 44 L. ed. 368, 20 Sup. Ct. Rep. 269.

22] *The cases cited were referred to in a recent case in this court,—*Sjoli v. Dreschel*, 199 U. S. 565, 50 L. ed. 312, 26 Sup. Ct. Rep. 154. It was there held that those cases established, among other propositions, the following: "That the railroad company will not acquire a vested interest in particular lands, within or without place limits, merely by filing a map of general route and having the same approved by the Secretary of the Interior, although, upon the definite location of its line of road and the filing and acceptance of a map thereof in the office of the Commissioner of the General Land Office, the lands within primary or place limits, not theretofore reserved, sold, granted, or otherwise disposed of, and free from pre-emption or other claims or rights, become segregated from the public domain, and no rights in such place lands will attach in favor of a settler or occupant who becomes such after definite location; that no rights to lands within indemnity limits will attach in favor of the railroad company until after selections made by it with the approval of the Secretary of the Interior; that up to the time such approval is given, lands within indemnity limits, although embraced by the company's list of selections, are subject to be disposed of by the United States or to be settled upon and occupied under the pre-emption and homestead laws of the United States; and that the Secretary of the Interior has no authority to withdraw from sale or settlement lands that are within indemnity limits, which have not been previously selected, with his approval, to supply deficiencies within the place limits of the company's road."

23] *It is true that the cases above referred to arose under acts of Congress that did not relate in terms to grants of lands to the state of Kansas to aid in the construction of railroads. But they are none the less in point here; for the provisions in them as to homestead rights attaching prior to definite location are, in substance, the same as are found in the above acts of Congress relating to lands granted to Kansas.

2. When we recall what this court (as above quoted) said in *Ard v. Brandon*, 156 U. S. 537, 39 L. ed. 524, 15 Sup. Ct. Rep. 406, about Ard's rights in respect of these identical lands, there is no room to doubt the correctness of the judgment of the supreme court of Kansas in his favor, unless we hold, as plaintiffs contend we should, that Ard is concluded by the decision of the circuit court of the United States in the action brought by the United States to cancel certain patents issued to the Missouri-Kansas Company. But we cannot so hold. As already stated, Ard was not, and

was not sought to be, made a party to that action. He had no control of it, and was not entitled of right to be heard or to adduce evidence in it. He was not, in any legal sense, represented in the case, nor can he be regarded as privy to the issue between the United States and those whom it sued. His membership in the Settlers' Protective Association—which association, it is said, induced the United States to bring the action referred to—did not so connect him, in law, with the litigation, as that the judgment therein would bind him or be conclusive evidence against him. It must be assumed that the Attorney General of the United States sued the Missouri-Kansas Company only in the discharge of his official duty, and for the purpose of asserting the rights of the government *as against that company*. He could not have represented merely private parties in that suit; he represented only the United States. Ard was not, in any legal sense, a privy to the issue of record between the United States and its opponents, although the validity of the patent received by the Missouri-Kansas Company for the land here in question—under which company the present plaintiffs in error claim—*was directly disputed by the government in that case. It is said that Ard was an active member of the Settlers' Protective Association. But that is not a controlling fact. It may be, as alleged, that, in respect of the patents issued to it, the government was induced to proceed against that company by the representations made and the facts brought to its attention by that association. But that circumstance did not so connect the association with the suit as to make the judgment binding upon its individual members in a suit between other parties. In suing the Missouri-Kansas Company the officers of the government acted wholly upon their independent judgment as to the validity of the patents it had issued, and as to what was its duty to those who had previously acquired rights in the particular public lands covered by those patents. The issue in that case was only as to the respective rights of the United States and the Missouri-Kansas Company, *as between each other*. There was no issue between the company or those claiming under it and Ard, who was in actual possession, claiming equitable rights in the lands in dispute by reason of his occupancy of them under the homestead laws. In *United States v. Missouri, K. & T. R. Co.*, above cited, the bill referred to those acts of the land officers which had the effect to prevent settlers from acquiring rights which they were entitled to acquire under the homestead and pre-emption laws. The court, alluding to those

allegations, said: "If the facts are as thus alleged, it is clear that the Missouri-Kansas Company holds patents to land both within the place and indemnity limits of the Leavenworth road which equitably belong to bona fide settlers who acquired rights under the homestead and pre-emption laws, which were not lost by reason of the Land Department having, by mistake or an erroneous interpretation of the statutes in question, caused patents to be issued to the company. The case made by the above-admitted averments of the bill is one of sheer spoliation upon the part of the company of the rights of settlers; at least, of those whose rights attached prior 25] to the *withdrawal of 1867; whether of others, it is not necessary, at this time, to determine." And in *Ard v. Brandon*, 156 U. S. 537, 541, 39 L. ed. 524, 525, 15 Sup. Ct. Rep. 406, the court, referring to the language just quoted, and to the transfer of the legal title by the patent of the United States to the Missouri-Kansas Company, said: "But it is equally clear, under the authority of the last-cited case [*United States v. Missouri, K. & T. R. Co.*], as well as of many others, that no adjudication against the government in a suit by it to set aside a patent estops an individual not a party thereto from thereafter setting up his equitable rights in the land for which the patent was issued."

It results that, in the present case, involving only the title to the tract of 80 acres in section 11, that, by his rightful occupancy of that tract, under and in conformity with the homestead laws, before any interest therein was legally acquired by the railroad company, *Ard's* equitable rights, thus accruing and supported at the final hearing by a patent from the United States, must prevail.

For the reasons stated, the judgment of the Supreme Court of Kansas is affirmed.

Mr. Justice Brewer took no part in the decision of this case.

26]*FREDERICK M. STEELE and the Fidelity & Deposit Company of Baltimore, Maryland, Appts.,

v.

WILLIAM CULVER, Lester A. Taber, Thomas J. Cavanaugh, Frank McKeyes, Guardian of the Estate of William Culver, and the South Haven & Eastern Railroad Company.

(See S. C. Reporter's ed. 26-30.)

Appeal — from circuit court — frivolousness of jurisdictional question.

A decree of a Federal circuit court, dis-

missing, for want of the requisite diversity of citizenship, a bill by which, on the ground of fraud, injunctive relief against the collection of a judgment against a railway company and of a subsequent judgment against the surety on its appeal bond is sought by such surety and by the person who is, by contract, ultimately liable to pay the original judgment, is so plainly correct as to require the dismissal of an appeal to the Supreme Court, where such decree is based upon the proposition that such railway company, although insolvent, is an indispensable party, which must be aligned with the plaintiffs for the purpose of determining the question of jurisdiction.

[For other cases, see Appeal and Error, 879-937, in Digest Sup. Ct. 1908.]

[No. 393.]

Submitted June 1, 1908. Decided October 26, 1908.

A PPEAL from the Circuit Court of the United States for the Western District of Michigan to review a decree dismissing, for want of jurisdiction, a suit to enjoin the collection of certain judgments. On motion to dismiss or affirm, dismissed.

The facts are stated in the opinion.

Messrs. Edward Maher, W. J. Barnard, and Ernest Dale Owen submitted the cause for appellants.

Messrs. Thomas J. Cavanaugh and L. A. Tabor submitted the cause for appellees.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity to prohibit the collection of a judgment rendered by a Michigan state court against a railroad company, and also of a judgment against the plaintiff corporation upon a bond given by it as surety when the railroad took the case to the supreme court of the state. See *Culver v. South *Haven & E. R. Co.* 144 Mich. [29 254, 107 N. W. 908, 109 N. W. 256; *Culver v. Fidelity & D. Co.* 149 Mich. 630, 113 N. W. 9. The ground is that the original judgment was got by fraud. The plaintiff Steele had contracted with the surety company and also with purchasers of the railroad to pay the judgment against the latter if recovered, and joins as plaintiff on the footing that he is the real party in interest. The railroad company is made a defendant, but it is a Michigan corporation, and, as the other defendants are citizens and residents of Michigan, if it should be aligned with the plaintiffs the necessary diversity of citizenship would not exist. The circuit court dismissed the bill on demurrer for

NOTE.—On direct review of decisions of circuit or district courts, see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

want of jurisdiction, and allowed an appeal with a certificate that the want of the requisite diversity of citizenship and consequently of jurisdiction was the sole ground of the decree. The case is before us upon a motion to dismiss or affirm.

The appellants candidly admit that for a decision upon jurisdiction the parties may be arranged according to their real interests, and that, if the railroad company is an indispensable party, the decision below was right. But they urge that it is alleged that the railroad is insolvent, that no relief is asked against it, but it is left free to pay the judgment if it desires to and can, and that the real parties in interest are the plaintiffs, and especially Steele, upon whom, it is said, the burden ultimately must fall. These arguments do not seem to us to need an extended answer. With regard to the alleged insolvency, it is a strange proposition that a defendant is not an indispensable party to an attempt to stop the collection of a judgment against him because, at the moment, his property is not sufficient to pay his debts. The railroad was sole master of the litigation against itself, and we must assume is co-operating with the plaintiff in the present case. It seems to us equally strange to suggest that a contract of a stranger with a stranger can affect the interest of the party immediately concerned. The omission of any prayer for relief against the railroad simply shows that properly it is to be treated as a plaintiff in this case. *Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co.* 197 U. S. 178, 180, 181, 49 L. ed. 713, 715, 716, 25 Sup. Ct. Rep. 420.

30] *It is suggested that the controversy as to the judgment against the security company is separable, and that relief may be given against that, at least, without the presence of the railroad. But the only ground on which that judgment is complained of is that that against the railroad, upon which it is based, was obtained by perjury and fraud. So long as the judgment against the railroad stands, that against its surety cannot be impeached. By its bond the surety undertook to pay the judgment, if rendered, against its principal, whether right or wrong. If the principal remains liable under that judgment, the surety is bound to pay. *Krall v. Libbey*, 53 Wis. 292, 10 N. W. 386; *Piercy v. Piercy*, 36 N. C. (1 Ired. Eq.) 214, 218. But the principal cannot be relieved by a proceeding behind its back.

There is a further allegation in the bill that, pending the proceeding, Culver, the plaintiff in the original suits, was adjudged a spendthrift, and that a guardian was appointed, but was not substituted for Culver in these suits. A hope is expressed that, if

the case proceed to oral argument, some reason may occur for attributing more importance to these facts than is disclosed at present. But that is an illusion. The bill, as we have said, is founded solely on allegations of fraud in getting the first judgment, and must be maintained upon them, if upon any. The railroad company is an indispensable party if that issue is to be tried. It is unnecessary to consider other objections to the suit.

This court has jurisdiction to declare the circuit court's denial of its own jurisdiction correct. But we regard the decision of the circuit court as so plainly right that the appeal should be dismissed as frivolous.

Appeal dismissed.

*PEOPLE OF THE STATE OF NEW YORK EX REL. AUGUST SILZ, Plff. in Err.,

v.

HENRY HESTERBERG, Sheriff of the County of Kings.

(See S. C. Reporter's ed. 31-44.)

Constitutional law — due process of law — police power — game law.

1. The prohibition against the possession of game out of season, which is made by N. Y. Laws 1900, chap. 20, is a proper exercise of the police power, and does not deny the due process of law guaranteed by U. S. Const., 14th Amend., although such game may have been taken in foreign countries during the open season there.

[For other cases, see Game Laws, in Digest Sup. Ct. 1908.]

Commerce — state regulation — game law.

2. Foreign commerce is not unconstitutionally regulated by the provisions of N. Y. Laws 1900, chap. 20, under which the possession of game within the state during the closed season—except upon giving the bond provided by the statute against its sale—is forbidden, although the game may have been lawfully taken in foreign countries during the open season there.

[For other cases, see Commerce, 189, 190, in Digest Sup. Ct. 1908.]

[No. 206.]

Argued October 19, 1908. Decided November 2, 1908.

NOTE.—Game laws as affecting imported game.

NEW YORK EX REL. SILZ V. HESTERBERG negatives the suggested invalidity, under the Federal Constitution, of state statutes prescribing a close season for game, and prohibiting its possession during the close season. And this, too, without reference to the so-called Lacey act of Congress of May 25, 1900 (31 Stat. at L. 187, chap. 553, U. S. Comp. Stat. 1901, p. 290), which would seem to put at rest all question as to the

IN ERROR to the Supreme Court of the State of New York for the County of Kings to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had reversed the judgment of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of the Supreme Court, quashing a writ of habeas corpus to inquire into a detention for the alleged possession of game within the state during the closed season. Affirmed.

See same case below in Appellate Division, 109 App. Div. 295, 96 N. Y. Supp. 286; in Court of Appeals, 184 N. Y. 126, 3 L.R.A. (N.S.) 163, 76 N. E. 1032, 6 A. & E. Ann. Cas. 353.

The facts are stated in the opinion.

Messrs. **John Burlinson Coleman** and **Edward R. Finch** argued the cause and filed a brief for plaintiff in error:

The possessor of property is entitled to its beneficial use and free enjoyment, and such use and enjoyment of property cannot be directly or indirectly affected except by due process of law.

Forster v. Scott, 136 N. Y. 584, 18 L.R.A. 543, 32 N. E. 976.

Is it a fair, reasonable, and proper exercise of the police power of the state for it to prohibit the possession of a sound, wholesome, and inherently harmless article of food, such as was the imported game in this case, and to make such possession a crime and subject to heavy penalties?

Dobbins v. Los Angeles, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; *Lawton v. Steele*, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Holden v.*

Hardy, 169 U. S. 366, 398, 42 L. ed. 780, 793, 18 Sup. Ct. Rep. 383; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 558, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133.

The exclusion of foreign game in no way tends to the preservation of domestic game.

Guyer v. The Queen, L. R. 23 Q. B. Div. 106; *Territory v. Evans*, 2 Idaho, 658, 7 L.R.A. 288, 23 Pac. 115; *State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98; *Com. v. Wilkinson*, 139 Pa. 304, 21 Atl. 14; *Com. v. Hall*, 128 Mass. 410, 35 Am. Rep. 387; *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1; *Re Davenport*, 102 Fed. 540; *People v. Buffalo Fish Co.* 164 N. Y. 93, 52 L.R.A. 803, 79 Am. St. Rep. 622, 58 N. E. 34; *Com. v. Paul*, 148 Pa. 562, 24 Atl. 78; *Allen v. Young*, 76 Me. 80; *State v. Bucknam*, 88 Me. 392, 51 Am. St. Rep. 406, 34 Atl. 170; *Dickhaut v. State*, 85 Md. 451, 36 L.R.A. 765, 60 Am. St. Rep. 332, 37 Atl. 21; *Davis v. McNair* (1885; Canada) 7 Crim. L. Mag. 213, 21 Cent. L. J. 480; *State v. McGuire*, 24 Or. 306, 21 L.R.A. 478, 33 Pac. 666.

The provisions of the forest, fish, and game law are unconstitutional in that they unjustifiably restrict and interfere with foreign commerce.

Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S.

validity of such statutes so far as interference with interstate commerce is concerned.

The authorities are practically unanimous in upholding statutes of this character as against the objections that they deny due process of law, or infringe the commerce clause.

Ex parte Maier, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *Magner v. People*, 97 Ill. 320; *Merritt v. People*, 169 Ill. 218, 48 N. E. 325; *Re Schwartz*, 119 La. 290, 121 Am. St. Rep. 516, 44 So. 20; *People v. Lassen*, 142 Mich. 597, 106 N. W. 143; *People v. O'Neil*, 110 Mich. 324, 33 L.R.A. 696, 68 N. W. 227; *People v. Dornbos*, 127 Mich. 136, 86 N. W. 529; *Stevens v. State*, 89 Md. 671, 43 Atl. 929; *State v. Shattuck*, 96 Minn. 45, 104 N. W. 719, 6 A. & E. Ann. Cas. 934; *State v. Randolph*, 1 Mo. App. 15; *State v. Judy*, 7 Mo. App. 524; *State v. Farrell*, 23 Mo. App. 176; *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *People v. Bootman*, 180 N. Y. 1, 72 N. E. 505, 2 A. & E. Ann. Cas. 226; *People v. Gerger*, 92 Hun. 554, 36 N. Y. Supp. 720; *People v. Waldorf-Astoria Hotel Co.* 118 App. Div.

723, 103 N. Y. Supp. 434; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *State v. Schuman*, 36 Or. 16, 47 L.R.A. 154, 78 Am. St. Rep. 754, 58 Pac. 661; *Re Deininger*, 108 Fed. 623. *Contra*, *Re Davenport*, 102 Fed. 544.

Of course, no question under the commerce clause could arise under statutes of this character unless construed to apply to game brought in from outside. They are frequently so construed. *Javins v. United States*, 11 App. D. C. 345; *Com. v. Savage*, 155 Mass. 278, 29 N. E. 468; *People v. Dorbos and People v. Gerber*, supra; *Whitehead v. Smithers*, L. R. 2 C. P. Div. 553.

But some courts have adopted the opposite construction. *Dickhaut v. State*, 85 Md. 451, 36 L.R.A. 765, 60 Am. St. Rep. 332, 37 Atl. 21; *State v. Bucknam*, 88 Me. 385, 51 Am. St. Rep. 406, 34 Atl. 170; *Com. v. Hall*, 128 Mass. 410, 35 Am. Rep. 387; *People v. O'Neil*, 71 Mich. 325, 39 N. W. 1; *Com. v. Wilkinson*, 139 Pa. 298, 21 Atl. 14.

See also case note to *People ex rel. Hill v. Hesterberg*, 3 L.R.A. (N.S.) 163.

545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Rhodes v. Iowa, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; Vance v. W. A. Vandercook Co. 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674.

If a statute purporting to have been enacted to protect the public health, public morals, or the public safety has no real or substantial relation to those objects, it is the duty of the court to so adjudge and thereby give effect to the Constitution.

Mugler v. Kansas, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Dobbins v. Los Angeles; Lawton v. Steele; Holden v. Hardy; and Connolly v. Union Sewer Pipe Co.,—supra; Lochner v. New York, 198 U. S. 45, 53, 49 L. ed. 937, 940, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Tiedeman, Pol. Power, p. 4.

The so-called police power which attempts to penalize possession upon arrival of that which it is lawful to import from a foreign country, is, *per se*, a power of exclusion. Possession is a necessary incident to the right of importation and to the title of the property imported. Possession by the importer is the necessary and intended consequence of the right of importation. It would as effectually destroy the privilege of importation to make the intended consequence thereof unlawful as to prohibit the importation itself.

Brown v. Maryland, 12 Wheat. 419, 442, 6 L. ed. 678, 686.

Is it within the police power of the state to prohibit the introduction within the state of a wholesome article of food merely from the difficulty the state encounters in enforcing a law to prevent the taking of its game out of season?

Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757.

It is not within the police power of the state to pass a statute wholly excluding a pure, wholesome, and inherently harmless article of food merely from the danger of confusing such an article with an adulterated, harmful article, or from the difficulty of enforcing its inspection laws.

Minnesota v. Barber, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; Brimmer v. Rebman, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; Scott v. Donald, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 465, 24 L. ed. 527.

Mr. James A. Donnelly argued the cause, and, with Mr. William Schuyler Jackson, filed a brief for defendant in error:

From very early times the property which an individual might acquire in wild animals or game of any description has been quali-

fied by the superior right of the state to restrict its use and possession. The question of individual ownership has always been one of public policy, and not of private right. Thus, in the feudal as well as the ancient law of the continent of Europe, in all countries the right to acquire animals *feræ naturæ* by possession was recognized as being subject to the governmental authority and under its power, not only as a matter of regulation, but also by absolute control (Geer v. Connecticut, 161 U. S. 523, 40 L. ed. 794, 16 Sup. Ct. Rep. 600). In England the ownership of game is vested in the sovereign power, and the right to take certain game may not only be restricted to a particular class of animals or birds, but may be granted to particular persons only as a license (2 Bl. Com. 394, 410; Magner v. People, 97 Ill. 333). In the United States the ownership of game is in the people of the state,—the repository of sovereign authority,—and no person has any private right to be affected. To hunt and kill game is a privilege granted by the state. The ownership of game is held by the sovereign authority in trust for all the people in the state (Magner v. People, supra).

Each state has the right to enact such laws for the protection of its game as to it shall seem best for the accomplishment of that purpose, even though, in attempting to effect that result, the state prohibits its importation.

People v. Bootman, 180 N. Y. 1, 72 N. E. 505, 2 A. & E. Ann. Cas. 226; People v. O'Neil, 110 Mich. 324, 33 L.R.A. 696, 68 N. W. 227; State v. Randolph, 1 Mo. App. 15; State v. Judy, 7 Mo. App. 525; Stevens v. State, 89 Md. 669, 43 Atl. 929; State v. Schuman, 36 Or. 16, 47 L.R.A. 153, 78 Am. St. Rep. 754, 58 Pac. 661; Ex parte Maier, 103 Cal. 479, 42 Am. St. Rep. 129, 37 Pac. 402; Magner v. People, 97 Ill. 331; Merritt v. People, 169 Ill. 218, 48 N. E. 325; Geer v. Connecticut, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600.

The English law is based upon principles similar to those enunciated in the foregoing cases.

Whitehead v. Smithers, L. R. 2 C. P. Div. 553.

In the state of New York, legislation of a similar character was upheld years before the passage by Congress of the act known as the Lacey act.

Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140.

Mr. Justice Day delivered the opinion of the court:

This case comes to this court because of the alleged invalidity, under the Constitution of the United States, of certain sec-

tions of the game laws of the state of New York. *Section 106 of chapter 20 of the Laws of 1900 of the state of New York provides:

"Grouse and quail shall not be taken from January 1st to October 31st, both inclusive. Woodcock shall not be taken from January 1st to July 31st, both inclusive. Such birds shall not be possessed in their closed season except in the city of New York, where they may be possessed during the open season in the state at large."

Section 25 of the law provides:

"The close season for grouse shall be from December 1st to September 15th, both inclusive." As amended by § 2, chapter 317, Laws of 1902.

Section 140 of the law provides:

"1. 'Grouse' includes ruffed grouse, partridge, and every member of the grouse family."

Section 108 of the law provides:

"Plover, curlew, jacksnipe, Wilsons, commonly known as English snipe, yellow legs, killdeer, willett snipe, dowitcher, short-necks, rail, sandpiper, bay snipe, surf snipe, winter snipe, ringnecks, and oxeys shall not be taken or possessed from January 1st to July 15th, both inclusive." As amended by § 2, chapter 588, Laws 1904.

Section 141 of the law provides:

"Wherever in this act the possession of fish or game, or the flesh of any animal, bird, or fish is prohibited, reference is had equally to such fish, game, or flesh coming from without the state as to that taken within the state: Provided, nevertheless, That, if there be any open season therefor, any dealer therein, if he has given the bond herein provided for, may hold during the close season such part of his stock as he has on hand undisposed of at the opening of such close season. Said bond shall be to the people of the state, conditioned that such dealer will not, during the close season ensuing, sell, use, give away, or otherwise dispose of any fish, game, or the flesh of any animal, bird, or fish which he is permitted to possess during the close season by this 37]section; that he *will not, in any way, during the time said bond is in force, violate any provision of the forest, fish, and game law; the bond may also contain such other provisions as to the inspection of the fish and game possessed as the commission shall require, and shall be subject to the approval of the commission as to amount and form thereof, and the sufficiency of sureties. But no presumption that the possession of fish or game or the flesh of any animal, bird, or fish is lawfully possessed under the provisions of this section shall arise until it affirmatively ap-

pears that the provisions thereof have been complied with." Added by chapter 194, Laws of 1902.

Section 119 of the law makes a violation of its provisions a misdemeanor, and subjects the offending parties to a fine.

The relator, a dealer in imported game, was arrested for unlawfully having in his possession, on the 30th of March, 1905, being within the closed season, in the borough of Brooklyn, city of New York, one dead body of a bird known as the golden plover, and one dead body of an imported grouse, known in England as blackcock, and taken in Russia. The relator filed a petition for a writ of habeas corpus to be relieved from arrest, and, upon hearing before a justice of the supreme court of the state of New York, the writ was dismissed, and the relator remanded to the custody of the sheriff. Upon appeal to the appellate division of the supreme court of the state of New York this order was reversed and the relator discharged from custody. The judgment of the appellate division was reversed in the court of appeals of the state of New York. 184 N. Y. 126, 3 L.R.A.(N.S.) 163, 76 N. E. 1032. Upon remittitur to the supreme court of the state of New York from the court of appeals the final order and judgment of the court of appeals was made the final order and judgment of the supreme court, and a writ of error brings the case here for review.

The alleged errors relied upon by the plaintiff in error for reversal of the judgment below are: First, that the provisions of the game law in question are contrary to the 14th *Amendment of the Constitution[38 of the United States, in that they deprive the relator, and others similarly situated, of their liberty and property without due process of law. Second, that the provisions of the law contravene the Constitution of the United States, in that they are an unjustifiable interference with and regulation of interstate and foreign commerce, placed under the exclusive control of Congress by § 8, article 1, of the Federal Constitution. Third, that the court below erred in construing the act of Congress, commonly known as the Lacey act, which relates to the transportation in interstate commerce of game killed in violation of local laws. 31 Stat. at L. chap. 553, p. 187, U. S. Comp. Stat. 1901, p. 290.

The complaint discloses that the relator, August Silz, a dealer in imported game, had in his possession in the city of New York one imported golden plover, lawfully taken, killed, and captured in England during the open season for such game birds there, and thereafter sold and consigned to Silz in the

city of New York by a dealer in game in the city of London. He likewise had in his possession the body of one imported black-cock, a member of the grouse family, which was lawfully taken, killed, and captured in Russia during the open season for such game there, and thereafter sold and consigned to Silz in New York city by the same dealer in London. Such birds were imported by Silz, in accordance with the provisions of the tariff laws and regulations in force, during the open season for grouse and plover in New York. Such imported golden plover and imported blackcock are different varieties of game birds from birds known as plover and grouse in the state of New York; they are different in form, size, color, and markings from the game bird known as plover and grouse in the state of New York, and can be readily distinguished from the plover and grouse found in that state. And this is true when they are cooked and ready for the table. The birds were sound, wholesome, and valuable articles of food, and recognized as articles of commerce in 39]*different countries of Europe and in the United States. These statements of the complaint are the most favorable possible to the relator, and gave rise to the comment in the opinion of the court of appeals that the case was possibly collusive. That court, nevertheless, proceeded to consider the case on the facts submitted, and a similar course will be pursued here. While the birds mentioned, imported from abroad, may be distinguished from native birds, they are nevertheless of the families within the terms of the statute, and possession of which, during the closed season, is prohibited.

As to the first contention, that the laws in question are void within the meaning of the 14th Amendment because they do not constitute due process of law. The acts in question were passed in the exercise of the police power of the state, with a view to protect the game supply for the use of the inhabitants of the state. It is not disputed that this is a well-recognized and often-exerted power of the state, and necessary to the protection of the supply of game which would otherwise be rapidly depleted, and which, in spite of laws passed for its protection, is rapidly disappearing from many portions of the country.

But it is contended that while the protection of the game supply is within the well-settled boundaries of the police power of a state, that the law in question is an unreasonable and arbitrary exercise of that power. That the legislature of the state is not the final judge of the limitations of the police power, and that such enactments are subject to the scrutiny of the courts, and will be set aside when found to be unwarranted

and arbitrary interferences with rights protected by the Constitution in carrying on a lawful business or making contracts for the use and enjoyment of property, is well settled by former decisions of this court. *Lawton v. Steele*, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Dobbins v. Los Angeles*, 195 U. S. 236, 49 L. ed. 175, 25 Sup. Ct. Rep. 18.

It is contended, in this connection, that the protection of the game of the state does not require that a penalty be imposed *for[40 the possession out of season of imported game of the kind held by the relator. It is insisted that a method of inspection can be established which will distinguish the imported game from that of the domestic variety, and prevent confusion in its handling and selling. That such game can be distinguished from domestic game has been disclosed in the record in this case, and it may be that such inspection laws would be all that would be required for the protection of domestic game. But, subject to constitutional limitations, the legislature of the state is authorized to pass measures for the protection of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted. In order to protect local game during the closed season it has been found expedient to make possession of all such game during that time, whether taken within or without the state, a misdemeanor. In other states of the Union such laws have been deemed essential, and have been sustained by the courts. *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *Stevens v. State*, 89 Md. 669, 43 Atl. 929; *Magner v. People*, 97 Ill. 320. It has been provided that the possession of certain kinds of game during the closed season shall be prohibited, owing to the possibility that dealers in game may sell birds of the domestic kind, under the claim that they were taken in another state or country. The object of such laws is not to affect the legality of the taking of game in other states, but to protect the local game, in the interest of the food supply of the people of the state. We cannot say that such purpose, frequently recognized and acted upon, is an abuse of the police power of the state, and, as such, to be declared void because contrary to the 14th Amendment of the Constitution.

It is next contended that the law is an attempt to unlawfully regulate foreign commerce, which, by the Constitution of the United States, is placed wholly within the control of the Federal Congress. That a state may not pass laws directly regulating

41]*foreign, or interstate commerce has frequently been held in the decisions of this court. But, while this is true, it has also been held in repeated instances that laws passed by the states in the exertion of their police power, not in conflict with laws of Congress upon the same subject, and indirectly or remotely affecting interstate commerce, are nevertheless valid laws. *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485.

In the case of *Geer v. Connecticut*, 161 U. S. 519, 40 L. ed. 793, 16 Sup. Ct. Rep. 600, the plaintiff in error was convicted for having in his possession game birds killed within the state, with the intent to procure transportation of the same beyond the state limits. It was contended that this statute was a direct attempt by the state to regulate commerce between the states. It was held that the game of the state was peculiarly subject to the power of the state, which might control its ownership for the common benefit of the people, and that it was within the power of the state to prohibit the transportation of game killed within its limits beyond the state, such authority being embraced in the right of the state to confine the use of such game to the people of the state. After a discussion of the peculiar nature of such property, and the power of the state over it, Mr. Justice White, who delivered the opinion of the court in that case, said:

"Aside from the authority of the state, derived from the common ownership of game and the trust for the benefit of its people which the state exercises in relation thereto, there is another view of the power of the state in regard to the property in game, which is equally conclusive. The right to preserve game flows from the undoubted existence in the state of a police power to that end, which may be none the less efficiently called into play because by doing so interstate commerce may be remotely and indirectly affected. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Sherlock v. Alling*, 93 U. S. 99, 103, 23 L. ed. 819, 820; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23. Indeed, the source of the police power as to game birds *(like those covered by the statute here called in question) flows from the duty of the state to preserve for its people a valuable food supply. *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Ex parte Maier and Magner v. People*, ubi su-

pra, and the cases there cited. The exercise by the state of such power therefore comes directly within the principle of *Plumley v. Massachusetts*, 155 U. S. 461, 473, 39 L. ed. 223, 227, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154. The power of a state to protect, by adequate police regulation, its people against the adulteration of articles of food (which was, in that case, maintained), although, in doing so, commerce might be remotely affected, necessarily carries with it the existence of a like power to preserve a food supply which belongs in common to all the people of the state, which can only become the subject of ownership in a qualified way, and which can never be the object of commerce except with the consent of the state, and subject to the conditions which it may deem best to impose for the public good."

In the case of *Plumley v. Massachusetts*, referred to in the opinion just cited, it was held that a law of the state of Massachusetts which prevented the sale of oleomargarine colored in imitation of butter was a legal exertion of police power on the part of the state, although oleomargarine was a wholesome article of food, transported from another state; and this upon the principle that the Constitution did not intend, in conferring upon Congress an exclusive power to regulate interstate commerce, to take from the states the right to make reasonable laws concerning the health, life, and safety of their citizens, although such legislation might indirectly affect foreign or interstate commerce; and the general statement in *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819, was quoted with approval:

"And it may be said generally, that the legislation of a state, not directed against commerce or any of its regulations, but relating to the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, *or engaged in commerce, foreign[43 or interstate, or in any other pursuit."

It is true that in the case of *Schollenberger v. Pennsylvania*, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757, it was held that a state law directly prohibiting the introduction in interstate commerce of a healthful commodity for the purpose of thereby preventing the traffic in adulterated and injurious articles within the state was not a legitimate exercise of the police power. But, in that case, there was a direct, and, it was held, unlawful, interference with interstate commerce as such. In the case at bar the interference with foreign commerce is only incidental, and not the direct purpose of the enactment for the protection of

the food supply and the domestic game of the state.

It is provided in the New York statutes that game shall be taken only during certain seasons of the year; and to make this provision effectual it is further provided that the prohibited game shall not be possessed within the state during such times; and, owing to the likelihood of fraud and deceit in the handling of such game, the possession of game of the classes named is likewise prohibited, whether it is killed within or without the state. Such game may be legally imported during the open season, and held and possessed within the state of New York. It may be legally held in the closed season upon giving bond, as provided by the statute against its sale. Incidentally, these provisions may affect the right of one importing game to hold and dispose of it in the closed season, but the effect is only incidental. The purpose of the law is not to regulate interstate commerce, but, by laws alike applicable to foreign and domestic game, to protect the people of the state in the right to use and enjoy the game of the state.

The New York court of appeals further held that the so-called Lacey act (31 Stat. at L. 187, chap. 553, U. S. Comp. Stat. 1901, p. 290) relieved the regulation of the objection in question because of the consent 44] of Congress to *the passage of such laws concerning such commerce, interstate and foreign, within the principles upon which the Wilson act was sustained by this court. *Re Rahrer* (Wilkinson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865.

In the aspect in which the game law of New York is now before this court we think it was a valid exertion of the police power, independent of any authorization thereof by the Lacey act, and we shall therefore not stop to examine the provisions of that act. For the reasons stated, we think the legislature, in the particulars in which the statute is here complained of, did not exceed the police power of the state, nor run counter to the protection afforded the citizens of the state by the Constitution of the United States.

Judgment affirmed.

45] *BEREA COLLEGE, Plff. in Err.,
v.

COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 45-70.)

Statutes — invalid in part.

1. The validity of Kentucky Acts 1904, chap. 85, so far as it prohibits domestic corporations from teaching white and negro pupils in the same institution, cannot be
53 L. ed.

deemed affected by its possible invalidity under the Federal Constitution as to individuals, where the highest state court considers the act separable, and, while sustaining it as an entirety, gives an independent reason which applies only to corporations.

[For other cases, see Statutes, 61-88, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — separating white and negro pupils.

2. The prohibition against teaching white and negro pupils in the same institution, which is made by Kentucky Acts 1904, chap. 85, does not, when applied to a corporation as to which the state has reserved the power to alter, amend, or repeal its charter, deny due process of law, or otherwise violate the Federal Constitution.

[Exercise of reserved power to alter or repeal charter, see Constitutional Law, 1386-1412, in Digest Sup. Ct. 1908.]

[No. 12.]

Argued April 10, 13, 1908. Decided November 9, 1908.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a conviction of a corporation in the Circuit Court of Madison County, in that state, of the offense of teaching white and negro pupils in the same institution. Affirmed.

See same case below, 123 Ky. 209, 94 S. W. 623.

Statement by Mr. Justice Brewer:

On October 8, 1904, the grand jury of Madison county, Kentucky, presented in the circuit court of that county an indictment charging:

"The said Berea College, being a corporation duly incorporated under the laws of the state of Kentucky, and owning, maintaining, and operating a college, school, and institution of learning, known as 'Berea College,' located in the town of Berea, Madison county, Kentucky, did unlawfully and wilfully permit and receive both the white and negro races as pupils for instruction in said college, school, and institution of learning."

This indictment was found under an act of March 22, 1904 (Ky. Acts 1904, chap. 85, p. 181), whose 1st section reads:

"Sec. 1. That it shall be unlawful for any person, corporation, or association of persons to maintain or operate any college,

NOTE.—On statute part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L.R.A. 363, and *Fayette County v. People's & Drivers' Bank*, 10 L.R.A. 196.

On constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

As to constitutional equality of school privileges—see note to *Cumming v. County Board of Education*, 44 L. ed. U. S. 262.

school, or institution where persons of the white and negro races are both received as pupils for instruction, and any person or corporation who shall operate or maintain any such college, school, or institution shall be fined \$1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined \$100 for each day they may operate said school, college, or institution after such conviction."

On a trial the defendant was found guilty and sentenced to pay a fine of \$1,000. This judgment was, on June 12, 1906, affirmed by the court of appeals of the state (123 Ky. 209, 94 S. W. 623), and from that court brought here on writ of error.

Messrs. Guy Ward Mallon and John G. Carlisle argued the cause and filed a brief for plaintiff in error:

The constitutionality of each and every provision of the act, all being intended to accomplish one purpose, and all having a direct bearing on the rights and interests of the plaintiff in error, must be inquired into by the court; and, if any one of them is unconstitutional, the entire act is invalid.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912.

The right of the citizen to choose and follow an innocent occupation is both a personal and a property right.

Cummings v. Missouri, 4 Wall. 321, 18 L. ed. 362.

The right to follow any lawful pursuit is one of the inalienable rights of a citizen of the United States.

Allgeyer v. Louisiana, 165 U. S. 591, 41 L. ed. 836, 17 Sup. Ct. Rep. 427; *Schnaier v. Navarre Hotel & Importation Co.* 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Yick Wo. v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Colon v. Lisk*, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; *People v. Gillson*, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; *Re Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133.

The privileges and immunities of citizens of the United States include protection by the government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject, nevertheless, to such restraints as the gov-

ernment may prescribe for the general good of the whole.

Corfield v. Coryell, 4 Wash. C. C. 371, Fed. Cas. No. 3,230; *Maxwell v. Dow*, 176 U. S. 588, 589, 44 L. ed. 600, 20 Sup. Ct. Rep. 448, 494.

Speaking of the restraints which legislatures may constitutionally impose upon the people for the general good, the court said, in the case of *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go."

The subject to which the legislation relates may be clearly within the scope of the police power, and yet the enactment may be so unreasonable, unnecessary, or inappropriate for the accomplishment of the purpose ostensibly designed, that the courts, in the discharge of their duty to protect personal and property rights, will be bound to hold it null and void.

Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; *Eden v. People*, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108.

The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

When a health law is challenged in the courts as unconstitutional, on the ground that it arbitrarily interferes with personal liberty and private property without due process of law, the court must be able to see that it has at least in fact some relation to the public health, that the public health is the end actually aimed at, and that it is appropriate and adequate to that end.

Re Jacobs, 98 N. Y. 115, 50 Am. Rep. 636.

One may be deprived of his liberty in a constitutional sense without putting his person in confinement.

Bertholf v. O'Reilly, 74 N. Y. 515, 30 Am. Rep. 323.

The constitutional guaranty that no person shall be deprived of his property without due process of law may be violated without the physical taking of property for public or private use.

Re Jacobs, 98 N. Y. 99, 50 Am. Rep. 636; *Cooley, Const. Lim.* § 393.

The common business and dealings of life,

the ordinary trades and pursuits which are innocuous in themselves, and have been followed in all communities from time immemorial, must therefore be free in this country to all alike, upon the same conditions. The right to pursue them without let or hindrance, except that which is applied to all persons of the same age, sex, and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 756, 28 L. ed. 590, 4 Sup. Ct. Rep. 652; 1 Smith, *Wealth of Nations*, chap. 10.

In every case that comes before this court where legislation of this character is concerned and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family?

Lochner v. New York, supra.

While the 14th Amendment may not limit the subjects upon which the police power of a state may be exercised, so long as there is no discrimination on account of race or color, yet, in the exercise of that power, the state cannot disregard the limitations which the Amendment imposes.

Virginia v. Rives, 100 U. S. 339, 347, 25 L. ed. 676, 679; *Barbier v. Connolly*, 113 U. S. 27-31, 28 L. ed. 923-925, 5 Sup. Ct. Rep. 357.

There is no doubt that the 13th, 14th, and 15th Amendments to the Constitution of the United States were adopted for the protection of the colored race, or that their primary purpose was to establish absolute civil equality,—that is, to place the colored race, in respect to civil rights, upon the same basis as the white race.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Strauder v. West Virginia*, 100 U. S. 303, 25 L. ed. 664; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Bush v. Kentucky*, 107 U. S. 110, 27 L. ed. 354, 1 Sup. Ct. Rep. 625.

But the effect of the 14th Amendment, as has been repeatedly decided, is not only to secure equal civil rights to the colored race, but to protect the white race also in the unmolested enjoyment of all its rights of person and property.

Education in private schools is not a matter of public or state control.

State ex rel. Clark v. Maryland Institute, 87 Md. 643, 41 Atl. 126.

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The court below appeared to think the validity of this act might be sustained upon the ground that it was an amendment or repeal of the charter of the college, and referred to *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427. We do not see that the case cited has any bearing upon this question, as the trustees did not acquire the right to maintain the school by any grant from the state. That right constitutes no part of the franchise of this voluntary corporation. It is a right which belongs to every free citizen. The absolute repeal of the charter would not have prevented the trustees, as individuals, from continuing the school. The only franchise the association acquired by the charter was the right to be a corporate body and to conduct its business as such; and the only effect of a repeal would have been to dissolve the corporation, leaving the trustees and those associated with them entirely free to maintain and operate the school as it had been conducted for nearly half a century.

The right of a teacher to earn a livelihood by teaching, and the right of a person to attend school and to obtain an education, are fundamental rights of all citizens, whether citizens of the state in which the school is situated, or of other states.

Cooley, Const. Lim. p. 889; *Cooley*, Torts, p. 286.

The liberty mentioned in the 14th Amendment means not only the right of the citizen to be free from the mere physical restraint of his person as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and, for that purpose, to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.

Allgeyer v. Louisiana, 165 U. S. 578, 579, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746-762, 28 L. ed. 585-588, 4 Sup. Ct. Rep. 652; *Powell v. Pennsylvania*, 127 U. S. 678-684, 32 L. ed. 253-256, 8 Sup. Ct. Rep. 992, 1257.

A college founded by an individual or individuals is a private charity, subject to the government and visitation of the founder, and not to the unlimited control of the government.

Dartmouth College v. Woodward, 4 Wheat. 665, 4 L. ed. 666.

Mr. N. B. Hays argued the cause, and, with Messrs. James Breathitt, Thomas B.

McGregor, and Charles H. Morris, filed a brief for defendant in error:

The state has not surrendered its sovereign power of legislation for the general welfare by constitutional guaranties of individual liberty.

Cooley, *Const. Lim.* 6th ed. 704; *New Orleans Gaslight Co. v. Hart*, 40 La. 474, 8 Am. St. Rep. 544, 4 So. 215; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 192, 22 Am. Rep. 71; 1 *Hare*, *Am. Const. Law*, p. 766; *Tiedeman*, *Pol. Power*, p. 212; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Allgeyer v. Louisiana*, 165 U. S. 580, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *State v. Holden* (*Holden v. Hardy*) 14 Utah, 71, 37 L.R.A. 103, 46 Pac. 756; *Com. v. Alger*, 7 Cush. 85; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; 22 *Am. & Eng. Enc. Law*, 2d ed. p. 937.

Laws prohibiting intermarriage between the two races, in force not only in the commonwealth of Kentucky, but in many of the states, have been held to be a reasonable and valid exercise of the police power of the state, and do not abridge any right or privilege secured by the 14th Amendment to either of the races.

Re Hobbs, 1 *Woods*, 537, *Fed. Cas. No.* 6,550; *State v. Gibson*, 36 Ind. 402, 10 Am. Rep. 42; *State v. Jackson*, 80 Mo. 177, 50 Am. Rep. 499; *State v. Hairston*, 63 N. C. 453; *Green v. State*, 58 Ala. 190, 29 Am. Rep. 742; *Brook v. Brook*, 9 H. L. Cas. 193; *Fraser v. State*, 3 Tex. App. 263, 30 Am. Rep. 131; *Lonas v. State*, 3 Heisk. 302.

Laws of several states, as well as Kentucky, prohibit the two races from attending the same public school, and provide separate public schools for the two races. These laws have been held to be a reasonable and valid exercise of the police power of such states, and not to abridge any right or privilege granted by the 14th Amendment to either of the races.

Lehew v. Brummell, 103 Mo. 551, 11 L.R.A. 828, 23 Am. St. Rep. 895, 15 S. W. 765; *Cory v. Carter*, 48 Ind. 362, 17 Am. Rep. 738; *Martin v. Board of Education*, 42 W. Va. 515, 26 S. E. 348; *State ex rel. Ganes v. McCann*, 21 Ohio St. 210; *People ex rel. Ciseo v. School Board*, 161 N. Y. 598, 48 L.R.A. 113, 56 N. E. 81; *Bertonneau v. City Schools*, 3 *Woods*, 180, *Fed. Cas. No.* 1,361.

The laws of several states, including Kentucky, require common carriers to provide separate cars or coaches for the white and colored persons who travel over their lines. These laws have been upheld by the Supreme Court of the United States as a reasonable and valid exercise of the police power, and not to abridge any immunity or privilege

secured by the 14th Amendment to either of the races.

West Chester & P. R. Co. v. Miles, 55 Pa. 209, 93 Am. Dec. 747; *Smith v. State*, 100 Tenn. 494, 41 L.R.A. 432, 46 S. W. 566; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 *Inters. Com. Rep.* 801, 10 *Sup. Ct. Rep.* 348; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 *Sup. Ct. Rep.* 1138; *Chesapeake & O. R. Co. v. Kentucky*, 179 U. S. 392, 45 L. ed. 247, 21 *Sup. Ct. Rep.* 101.

The legislature of Kentucky is vested with a large discretion, and is at liberty to act for the preservation of the public peace and general welfare. The political rights of the two races may be equal without being identical. The conditions of this statute apply equally to both races.

Mugler v. Kansas, 123 U. S. 678, 31 L. ed. 216, 8 *Sup. Ct. Rep.* 273; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 *Sup. Ct. Rep.* 714.

The legislature of Kentucky was and is vested with the power and jurisdiction to say whether or not the association of the white and colored children of the state, and in one and the same school, at the same time, is detrimental to the peace, morals, and welfare of the state.

Neither the Federal Constitution nor the 14th Amendment thereto has taken this right away from the state of Kentucky.

Mugler v. Kansas, *supra*; *Plumley v. Massachusetts*, 155 U. S. 461-479, 39 L. ed. 223-230, 5 *Inters. Com. Rep.* 590, 15 *Sup. Ct. Rep.* 154.

Classification for the purpose of education is not special legislation.

Lehew v. Brummell; *Cory v. Carter*; *State ex rel. Ganes v. McCann*; *Re Hobbs*; and *Brook v. Brook*,—*supra*.

Such a classification was within the power of the state legislature unless it was unreasonably and arbitrarily made.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 290, 42 L. ed. 1042, 18 *Sup. Ct. Rep.* 594; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 *Sup. Ct. Rep.* 1161; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 *Sup. Ct. Rep.* 357.

The privileges and immunities belonging to the citizens of the states, as such, rest for their security and protection where they have heretofore rested, with the states themselves.

Cory v. Carter, *supra*.

Every regulation of a property right has been before the courts of the country in recent years for adjudication. All property in the commonwealth and every property right is held subject to those general regulations which are necessary to promote the common good and general welfare.

Cooley, *Const. Lim.* 7th ed. 830; *Powers*

v. Com. 110 Ky. 387, 53 L.R.A. 245, 61 S. W. 735; Dunn v. Com. 105 Ky. 834, 43 L.R.A. 701, 88 Am. St. Rep. 344, 49 S. W. 813; New York, N. H. & H. R. Co. v. New York, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; Gladson v. Minnesota, 166 U. S. 427, 41 L. ed. 1065, 17 Sup. Ct. Rep. 627; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; Otis v. Parker, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

Mr. Justice Brewer delivered the opinion of the court:

There is no dispute as to the facts. That the act does not violate the Constitution of Kentucky is settled by the decision of its highest court, and the single question for our consideration is whether it conflicts with the Federal Constitution. The court of appeals discussed at some length the general power of the state in respect to the separation of the two races. It also ruled that "the right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant, as a corporation created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether, or qualify it. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427."

Upon this we remark that when a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision. *Murdock v. Memphis*, 20 Wall. 590, 636, 22 L. ed. 429, 444; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Giles v. Teasley*, 193 U. S. 146-160, 48 L. ed. 655-658, 24 Sup. Ct. Rep. 359; *Allen v. Arguimbau*, 198 U. S. 149, 49 L. ed. 990, 25 Sup. Ct. Rep. 622.

[54] *Again, the decision by a state court of the extent and limitation of the powers conferred by the state upon one of its own corporations is of a purely local nature. In creating a corporation a state may withhold powers which may be exercised by and cannot be denied to an individual. It is under no obligation to treat both alike. In granting corporate powers the legislature may deem that the best interests of the state would be subserved by some restriction, and the corporation may not plead that, in spite of the restriction, it has more or greater powers because the citizen has. "The granting of such right or privilege [the right or privilege to be a corporation] rests en-

tirely in the discretion of the state, and, of course, when granted, may be accompanied with such conditions as its legislature may judge most befitting to its interests and policy." *Home Ins. Co. v. New York*, 134 U. S. 594-600, 33 L. ed. 1025-1029, 10 Sup. Ct. Rep. 593, 595; *Perrine v. Chesapeake & D. Canal Co.* 9 How. 172-184, 13 L. ed. 92-97; *Horn Silver Min. Co. v. New York*, 143 U. S. 305-312, 36 L. ed. 164-167, 4 Inters. Com. Rep. 57, 12 Sup. Ct. Rep. 403. The act of 1904 forbids "any person, corporation, or association of persons to maintain or operate any college," etc. Such a statute may conflict with the Federal Constitution in denying to individuals powers which they may rightfully exercise, and yet, at the same time, be valid as to a corporation created by the state.

It may be said that the court of appeals sustained the validity of this section of the statute, both against individuals and corporations. It ruled that the legislation was within the power of the state, and that the state might rightfully thus restrain all individuals, corporations, and associations. But it is unnecessary for us to consider anything more than the question of its validity as applied to corporations.

The statute is clearly separable, and may be valid as to one class while invalid as to another. Even if it were conceded that its assertion of power over individuals cannot be sustained, still it must be upheld so far as it restrains corporations.

There is no force in the suggestion that the statute, although *clearly sepa-[55] rable, must stand or fall as an entirety on the ground the legislature would not have enacted one part unless it could reach all. That the legislature of Kentucky desired to separate the teaching of white and colored children may be conceded; but it by no means follows that it would not have enforced the separation so far as it could do so, even though it could not make it effective under all circumstances. In other words, it is not at all unreasonable to believe that the legislature, although advised beforehand of the constitutional question, might have prohibited all organizations and corporations under its control from teaching white and colored children together, and thus made at least uniform official action. The rule of construction in questions of this nature is stated by Chief Justice Shaw in *Warren v. Charlestown*, 2 Gray, 84, quoted approvingly by this court in *Allen v. Louisiana*, 103 U. S. 80-84, 26 L. ed. 318, 319:

"But if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other as to warrant a belief that the

legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected, must fall with them."

See also *Loeb v. Columbia Twp.* 179 U. S. 472, 490, 45 L. ed. 280, 290, 21 Sup. Ct. Rep. 174, 181, in which this court said:

"As one section of a statute may be repugnant to the Constitution without rendering the whole act void, so one provision of a section may be invalid by reason of its not conforming to the Constitution, while all the other provisions may be subject to no constitutional infirmity. One part may stand, while another will fall, unless the two are so connected or dependent on each other in subject-matter, meaning, or purpose, that the good cannot remain without the bad. The point is not whether the parts are contained in the same section, for the distribution into sections is purely artificial; but 56] whether *they are essentially and inseparably connected in substance,—whether the provisions are so interdependent that one cannot operate without the other."

Further, inasmuch as the court of appeals considered the act separable, and, while sustaining it as an entirety, gave an independent reason which applies only to corporations, it is obvious that it recognized the force of the suggestions we have made. And when a state statute is so interpreted, this court should hesitate before it holds that the supreme court of the state did not know what was the thought of the legislature in its enactment. *Missouri K. & T. R. Co. v. McCann*, 174 U. S. 580, 586, 43 L. ed. 1093, 1096, 19 Sup. Ct. Rep. 755; *Tullis v. Lake Erie & W. R. Co.* 175 U. S. 348, 353, 44 L. ed. 192, 194, 20 Sup. Ct. Rep. 136.

While the terms of the present charter are not given in the record, yet it was admitted on the trial that the defendant was a corporation organized and incorporated under the general statutes of the state of Kentucky, and of course the state courts, as well as this court on appeal, take judicial notice of those statutes. Further, in the brief of counsel for the defendant is given a history of the incorporation proceedings, together with the charters. From that it appears that Berea College was organized under the authority of an act for the incorporation of voluntary associations, approved March 9, 1854 (2 Stanton, Rev. Stat. [Ky.] 553), which act was amended by an act of March 10, 1856 (2 Id. 555), and which in terms reserved to the general assembly "the right to alter or repeal the charter of any associations formed under the provisions of this act, and the act to which this act is an

amendment, at any time hereafter." After the Constitution of 1891 was adopted by the state of Kentucky, and on June 10, 1899, the college was reincorporated under the provisions of chap. 32, art. 8, Ky. Stat. (Carroll, Stat. [Ky.] 1903, p. 459), the charter defining its business in these words: "Its object is the education of all persons who may attend its institution of learning at Berea, and, in the language of the original articles, 'to promote the cause of Christ.'" The Constitution of 1891 *provided in § 3[57 of the Bill of Rights that "every grant of a franchise, privilege, or exemption shall remain, subject to revocation, alteration, or amendment." Carroll, Stat. (Ky.) 1903, p. 86. So that the full power of amendment was reserved to the legislature.

It is undoubtedly true that the reserved power to alter or amend is subject to some limitations, and that, under the guise of an amendment, a new contract may not always be enforceable upon the corporation or the stockholders; but it is settled "that a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right. *Inland Fisheries v. Holyoke Water Power Co.* 104 Mass. 446, 451, 6 Am. Rep. 247; *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 522, 21 L. ed. 133, 140;" *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. ed. 408, 412, 2 Sup. Ct. Rep. 267, 274.

Construing the statute, the court of appeals held that "if the same school taught the different races at different times, though at the same place, or at different times at the same place, it would not be unlawful." Now, an amendment to the original charter, which does not destroy the power of the college to furnish education to all persons, but which simply separates them by time or place of instruction, cannot be said to "defeat or substantially impair the object of the grant." The language of the statute is not in terms an amendment, yet its effect is an amendment, and it would be resting too much on mere form to hold that a statute which in effect works a change in the terms of the charter is not to be considered as an amendment, because not so designated. The act itself, being separable, is to be read as though it, in one section, prohibited any person, in another section any corporation, and, in a third, any association of persons to do the acts named. Reading the statute as containing a separate prohibition on all corporations, at least, all state corporations, *it substantially declares that any[58

authority given by previous charters to instruct the two races at the same time and in the same place is forbidden, and that prohibition, being a departure from the terms of the original charter in this case, may properly be adjudged an amendment.

Again, it is insisted that the court of appeals did not regard the legislation as making an amendment, because another prosecution instituted against the same corporation under the 4th section of the act, which makes it a misdemeanor to teach pupils of the two races in the same institution, even although one race is taught in one branch and another in another branch, provided the two branches are within 25 miles of each other, was held could not be sustained, the court saying: "This last section, we think, violates the limitations upon the police power: it is unreasonable and oppressive." But, while so ruling, it also held that this section could be ignored and that the remainder of the act was complete notwithstanding. Whether the reasoning of the court concerning the 4th section be satisfactory or not is immaterial, for no question of its validity is presented, and the court of appeals, while striking it down, sustained the balance of the act. We need concern ourselves only with the inquiry whether the 1st section can be upheld as coming within the power of a state over its own corporate creatures.

We are of opinion, for reasons stated, that it does come within that power, and, on this ground, the judgment of the Court of Appeals of Kentucky is affirmed.

Mr. Justice Holmes and Mr. Justice Moody concur in the judgment.

Mr. Justice Harlan, dissenting:

This prosecution arises under the 1st section of an act of the general assembly of Kentucky, approved March 22d, 1904. *The purpose and scope of the act is clearly indicated by its title. It is "An Act to Prohibit White and Colored Persons from Attending the Same School." Ky. Acts 1904, p. 181.

It is well to give here the entire statute, as follows:

"Sec. 1. That it shall be unlawful for any person, corporation, or association of persons to maintain or operate any college, school, or institution where persons of the white and negro races are both received as pupils for instruction; and any person or corporation who shall operate or maintain any such college, school, or institution shall be fined \$1,000, and any person or corporation who may be convicted of violating the provisions of this act shall be fined \$100 for each day they may operate said school,

college, or institution after such conviction.

"Sec. 2. That any instructor who shall teach in any school, college, or institution where members of said two races are received as pupils for instruction shall be guilty of operating and maintaining same and fined as provided in the 1st section hereof.

"Sec. 3. It shall be unlawful for any white person to attend any school or institution where negroes are received as pupils or receive instruction, and it shall be unlawful for any negro or colored person to attend any school or institution where white persons are received as pupils or receive instruction. Any person so offending shall be fined \$50 for each day he attends such institution or school: Provided, That the provisions of this law shall not apply to any penal institution or house of reform.

"Sec. 4. Nothing in this act shall be construed to prevent any private school, college, or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than 25 miles distant, for the education exclusively of one race or color.

"Sec. 5. This act shall not take effect, or be in operation, before the 15th day of July, 1904." Acts 1904, chap. 85, p. 181.

The plaintiff in error, Berea College, is an incorporation, organized under the General Laws of Kentucky in 1859. Its original articles of incorporation set forth that the object of *the founders was to establish and maintain an institution of learning, "in order to promote the cause of Christ." In 1899 new articles were adopted, which provided that the affairs of the corporation should be conducted by twenty-five persons.

In 1904 the college was charged in a Kentucky state court with having unlawfully and wilfully received both white and negro persons as pupils for instruction. A demurrer to the indictment was overruled, and a trial was had which resulted in a verdict of guilty and the imposition of a fine of \$1,000 on the college. The trial court refused an instruction asked by the defendant, to the effect that the statute was in violation of the 14th Amendment of the Constitution of the United States. A motion in arrest of judgment and for a new trial having been overruled, the case was taken to the highest court of Kentucky, where the judgment of conviction was affirmed, one of the members of the court dissenting.

The state court had before it and determined at the same time (delivering one opinion for both cases) another case against Berea College,—which was an indictment based on § 4 of the same statute,—under which the college was convicted of the offense of "maintaining and operating a col-

lege, school, and institution of learning where persons of the white and negro races are both received, and within a *distance of 25 miles of each other*, as pupils for instruction." After observing that there were fundamental limitations upon the police power of the several states which could not be disregarded, the state court held § 4 of the statute to be in violation of those limitations because "unreasonable and oppressive." Treating that particular section as null and void and regarding the other sections as complete in themselves and enforceable, the state court, in the first case (the present case) based on § 1, affirmed, and, in the second case, based on § 4 of the statute, reversed, the judgment. It held it to be entirely competent for the state to adopt the policy of the separation of the races, even in private schools, and concluded its opinion in these words: "The right to teach white and negro children in a private 61]*school at the same time and place is not a property right." The state court (but without any discussion whatever) added, as if merely incidental to or a makeweight in the decision of the pivotal question in this case, these words: "Besides, appellant, as a *corporation* created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether or qualify it. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427." [123 Ky. 228, 94 S. W. 623.] It concluded: "We do not think the act is in conflict with the Federal Constitution."

Upon a review of the judgment below this court says that the statute is "clearly separable, and may be valid as to one class, while invalid as to another;" that "even if it were conceded that its assertion of power over individuals cannot be sustained, still the statute must be upheld so far as it restrains corporations." "It is unnecessary," this court says, "for us to consider anything more than the question of its validity as applied to corporations. . . . We need concern ourselves only with the inquiry whether the 1st section can be upheld as coming within the power of a state over its own *oorporate* creatures." The judgment of the state court is now affirmed, and thereby left in full force, so far as Kentucky and its courts are concerned, although such judgment rests in part upon the ground that the statute is not, in any particular, in violation of any rights secured by the Federal Constitution. In so ruling, it must necessarily have been assumed by this court that the legislature may have regarded the teaching of white and colored pupils at the same time and in the same school or institution, when maintained by private indi-

viduals and associations, as wholly different in its results from such teaching when conducted by the same individuals acting under the authority of or representing a corporation. But, looking at the nature or subject of the legislation, it is inconceivable that the legislature consciously regarded the subject in that light. It is absolutely certain that the legislature had in mind to prohibit the teaching of the two races in the same private institution, *at the same time, by [62 whomsoever that institution was conducted. It is a reflection upon the common sense of legislators to suppose that they might have prohibited a private *corporation* from teaching by its agents, and yet left individuals and unincorporated associations entirely at liberty, by the same instructors, to teach the two races in the same institution at the same time. It was the teaching of pupils of the two races *together*, or in the same school, no matter by whom or under whose authority, which the legislature sought to prevent. The manifest purpose was to prevent the association of white and colored persons in the same school. That such was its intention is evident from the title of the act, which, as we have seen, was "to prohibit white and colored persons from attending the same school." Even if the words in the body of the act were doubtful or obscure, the title may be looked to in aid of construction. *Smythe v. Fiske*, 23 Wall. 374, 23 L. ed. 47.

Undoubtedly, the general rule is that one part of a statute may be stricken down as unconstitutional and another part, distinctly separable and valid, left in force. But that general rule cannot control the decision of this case.

Referring to that rule, this court in *Huntington v. Worthen*, 120 U. S. 97, 102, 30 L. ed. 588, 590, 7 Sup. Ct. Rep. 469, said that, if one provision of a statute be invalid, the whole act will fall, where "*it is evident the legislature would not have enacted one of them without the other.*"

In *Sprague v. Thompson*, 118 U. S. 90, 94, 95, 30 L. ed. 115-117, 6 Sup. Ct. Rep. 988, 990, the question arose as to the validity of a particular section of the Georgia Code. The supreme court of that state held that so much of a section of that Code as made certain illegal exceptions could be disregarded, leaving the rest of the section to stand; this upon the principle that a distinct, separable, and unconstitutional part of a statute may be rejected and the remainder preserved and enforced. "But," the court took care to say, "the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the legislature of Georgia, the statute is made to

enact *what confessedly the legislature never meant.*"

63] *In *Marshall Field & Co. v. Clark*, 143 U. S. 649, 696, 36 L. ed. 294, 311, 12 Sup. Ct. Rep. 495, it was held that certain specified parts of the tariff act of 1890 [26 Stat. at L. 567, chap. 1244] could be adjudged invalid without affecting the validity of another and distinct part, covering a different subject. But that, as the court held, was because "they are entirely separate *in their nature*, and, in law, are wholly independent of each other."

A case very much in point here is that of *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 565, 46 L. ed. 679, 692, 22 Sup. Ct. Rep. 431, 441. Those were actions upon promissory notes and an open account. The defense was that the notes and the account arose out of business transactions with the Union Sewer Pipe Company, an Ohio corporation doing business in Illinois, and which corporation, it was alleged, was a trust and combination of a class or kind described in the Illinois anti-trust statute. That statute made certain combinations of capital, skill, or acts by two or more persons for certain defined purposes illegal in Illinois. The defense was based in part on that statute, and the question was whether the statute was repugnant to the Constitution of the United States, in that, after prescribing penalties for its violation, it provided by a distinct section (§ 9) that its provisions "shall not apply to agricultural products or live stock while in the hands of the producer or raiser." The transactions out of which the notes and account in suit arose had no connection whatever with agriculture or with the business of raising live stock, and yet the question considered and determined—and which the court did not feel at liberty to pass by—was whether the entire statute was not unconstitutional by reason of the fact that the 9th section excepted from its operation agricultural products and live stock while in the hands of the producer or raiser. This court held that section to be repugnant to the Constitution of the United States, in that it made such a discrimination in favor of agriculturists or live-stock dealers as to be a denial to all others of the equal protection of the laws. The question then arose, whether the other provisions of the statute could not be upheld and enforced by eliminating the 9th section. This court held in the negative, 64] saying: "The *principles applicable to such a question are well settled by the adjudications of this court. If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But, if an obnoxious

section is of such import that the other sections, without it, would cause results *not contemplated or desired by the legislature*, then the *entire statute must be held inoperative*. . . . Looking, then, at all the sections together, we must hold that the legislature would not have entered upon or continued the policy indicated by the statute unless agriculturalists and live-stock dealers were excluded from its operation and thereby protected from prosecution. The result is that the statute must be regarded as an entirety, and, in that view, it must be adjudged to be unconstitutional as denying the equal protection of the laws to those within its jurisdiction who are not embraced by the 9th section."

The general principle was well stated by Chief Justice Shaw, who, after observing that, if certain parts of a statute are wholly independent of each other, one part may be held void and the other enforced, said, in *Warren v. Charlestown*, 2 Gray, 84: "But, if they are so mutually connected with and dependent on each other, as conditions, *considerations*, or compensations for each other, as to warrant a belief that the *legislature intended them as a whole*, and that, if all could not be carried into effect, the legislature would not pass the residue independently, and some parts are unconstitutional, all the provisions which are thus dependent, conditional, or *connected*, must fall with them." This statement of the principle was affirmed in *Allen v. Louisiana*, 103 U. S. 80, 84, 26 L. ed. 318, 319, and again in *Loeb v. Columbia Twp.* 179 U. S. 472, 490, 45 L. ed. 280, 290, 21 Sup. Ct. Rep. 174, 181, cited by the court. In the latter case the court said: "One part [of a statute] may stand, while another will fall, unless the two are so connected or dependent on each other in subject-matter, meaning, or purpose that the good cannot remain without the bad. The point is not whether the parts are contained in the same section, for, the distribution into sections *is purely artificial; 65 but whether they are essentially and inseparably *connected in substance*,—whether the provisions are so interdependent that one cannot operate *without the other*." All the cases are, without exception, in the same direction.

Now, can it for a moment be doubted that the legislature intended all the sections of the statute in question to be looked at, and that the purpose was to forbid the teaching of pupils of the two races together in the same institution, at the same time, *whether the teachers represented natural persons or corporations?* Can it be said that the legislature would have prohibited such teaching by corporations, and yet consciously permitted the teaching by private individuals or

unincorporated associations? Are we to attribute such folly to legislators? Who can say that the legislature would have enacted one provision without the other? If not, then, in determining the intent of the legislature, the provisions of the statute relating to the teaching of the two races together by corporations cannot be separated in its operation from those in the same section that forbid such teaching by individuals and unincorporated associations. Therefore the court cannot, as I think, properly forbear to consider the validity of the provisions that refer to teachers who do not represent corporations. If those provisions constitute, as, in my judgment, they do, an essential part of the legislative scheme or policy, and are invalid, then, under the authorities cited, the whole act must fall. The provision as to corporations may be valid, and yet the other clauses may be so inseparably connected with that provision and the policy underlying it, that the validity of all the clauses necessary to effectuate the legislative intent must be considered. There is no magic in the fact of incorporation which will so transform the act of teaching the two races in the same school at the same time that such teaching can be deemed lawful when conducted by private individuals, but unlawful when conducted by the representatives of corporations.

There is another line of thought. The state court evidently regarded it as necessary to consider the entire act; for it adjudged [66]*it to be competent for the state to forbid *all* teaching of the two races together, in the same institution, at the same time, no matter by whom the teaching was done. The reference at the close of its opinion, in the words above quoted, to the fact that the defendant was a corporation, which could be controlled as the state saw fit, was, as already suggested, only incidental to the main question determined by the court as to the extent to which the state could control the teaching of the two races in the same institution. The state court upheld the authority of the state, under its general police power, to forbid the association of the two races in the same institution of learning, although it adjudged that there were limitations upon the exercise of that power, and that, under those limitations, § 4 was invalid, because unreasonable and oppressive. If it had regarded the authority of the state over its own corporations as being, in itself, and without reference to any other view, sufficient to sustain the statute, so far as the defendant corporation is concerned, it need only have said that much, and omitted all consideration of the general power of the state to forbid the

teaching of the two races together, by anybody, in the same institution at the same time. It need not, in that view, have made any reference whatever to the 25-mile provision in the 4th section as being "unreasonable and oppressive," whether applied to teaching by individuals or by corporations, or held such provision to be void on that special ground.

Some stress is laid upon the fact that when Berea College was incorporated the state reserved the power to alter, amend, or repeal its charter. If the state had, in terms, and in virtue of the power reserved, repealed outright the charter of the college, the case might present a different question. But the charter was not repealed. The corporation was left in existence. The statute here in question does not purport to amend the charter of any particular corporation, but assumes to establish a certain rule applicable alike to all individuals, associations, or corporations that assume to teach the white and black races *together in [67] the same institution. Besides, it should not be assumed that the state intended, under the guise of impliedly amending the charter of a private corporation, to destroy, or that it could destroy, the substantial, essential purposes for which the corporation was created, and yet leave the corporation in existence. The authorities cited by this court, in its opinion, establish the proposition that, under the reserved power to amend or alter a charter, no amendment or alteration can be made which will "defeat or substantially impair the object of the grant." *Holyoke Water Power Co. v. Lyman*, 15 Wall. 500, 21 L. ed. 133; *Close v. Glenwood Cemetery*, 107 U. S. 466, 476, 27 L. ed. 408, 412, 2 Sup. Ct. Rep. 267.

In my judgment the court should directly meet and decide the broad question presented by the statute. It should adjudge whether the statute, as a whole, is or is not unconstitutional, in that it makes it a crime against the state to maintain or operate a private institution of learning where white and black pupils are received, at the same time, for instruction. In the view which I have as to my duty I feel obliged to express my opinion as to the validity of the act as a whole. I am of opinion that, in its essential parts, the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the 14th Amendment against hostile state action, and is, therefore, void.

The capacity to impart instruction to others is given by the Almighty for beneficent purposes; and its use may not be forbidden or interfered with by government,—certainly not, unless such instruction is, in its nature, harmful to the public morals or

imperils the public safety. The right to impart instruction, harmless in itself or beneficial to those who receive it, is a substantial right of property,—especially, where the services are rendered for compensation. But even if such right be not strictly a property right, it is, beyond question, part of one's liberty as guaranteed against hostile state action by the Constitution of the United States. This court has more than once said that the liberty guaranteed by the 14th Amendment embraces "the right of the citizen to be free in the enjoyment *of all his faculties," and "to be free to use them in all lawful ways." *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Adair v. United States*, 208 U. S. 161, 173, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277. If pupils, of whatever race,—certainly, if they be citizens,—choose, with the consent of their parents, or voluntarily, to sit together in a private institution of learning while receiving instruction which is not in its nature harmful or dangerous to the public, no government, whether Federal or state, can legally forbid their coming together, or being together temporarily, for such an innocent purpose. If the commonwealth of Kentucky can make it a crime to teach white and colored children together at the same time, in a private institution of learning, it is difficult to perceive why it may not forbid the assembling of white and colored children in the same Sabbath school, for the purpose of being instructed in the Word of God, although such teaching may be done under the authority of the church to which the school is attached as well as with the consent of the parents of the children. So, if the state court be right, white and colored children may even be forbidden to sit together in a house of worship or at a communion table in the same Christian church. In the cases supposed there would be the same association of white and colored persons as would occur when pupils of the two races sit together in a private institution of learning for the purpose of receiving instruction in purely secular matters. Will it be said that the cases supposed and the case here in hand are different, in that no government, in this country, can lay unholy hands on the religious faith of the people? The answer to this suggestion is that, in the eye of the law, the right to enjoy one's religious belief, unmolested by any human power, is no more sacred nor more fully or distinctly recognized than is the right to impart and receive instruction not harmful to the public. The denial of either right would be an infringement of the

liberty inherent in the freedom secured by the fundamental law. Again, if the views of the highest court of Kentucky be sound, that commonwealth may, without infringing the Constitution of the United States, forbid the *association in the same private school of [69 pupils of the Anglo-Saxon and Latin races respectively, or pupils of the Christian and Jewish faiths, respectively. Have we become so inoculated with prejudice of race than an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes, simply because of their respective races? Further, if the lower court be right, then a state may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature, in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question, and how inconsistent such legislation is with the great principle of the equality of citizens before the law.

Of course, what I have said has no reference to regulations prescribed for public schools, established at the pleasure of the state and maintained at the public expense. No such question is here presented and it need not be now discussed. My observations have reference to the case before the court, and only to the provision of the statute making it a crime for any person to impart harmless instruction to white and colored pupils together, at the same time, in the same private institution of learning. That provision is, in my opinion, made an essential element in the policy of the statute, and, if regard be had to the object and purpose of this legislation, it cannot be treated as separable nor intended to be separated from the provisions relating to corporations. The whole statute should therefore be held void; otherwise, it will be taken as the law of Kentucky, to be enforced by its courts, that the teaching of white and black pupils, at the same time, even in a *private* institution, is a crime against that commonwealth, punishable by fine and imprisonment.

*In my opinion the judgment should [70 be reversed upon the ground that the statute is in violation of the Constitution of the United States.

Mr. Justice Day also dissents.

STATE OF LOUISIANA, Complainant,

v.

JAMES RUDOLPH GARFIELD, Secretary of the Interior of the United States, and Fred Dennett, Commissioner of the General Land Office.

(See S. C. Reporter's ed. 70-78.)

Statutes — repeal by implication — general and special provisions.

1. The Federal Supreme Court will follow the continuous construction of the Land Department that the special provision for Louisiana in the swamp land grant act of March 2, 1849 (9 Stat. at L. 352, chap. 87), that title shall vest in the state on approval of a list of lands by the Secretary of the Interior, was not affected by the general clause of the act of September 28, 1850 (9 Stat. at L. 519, chap. 84), granting swamp lands to Arkansas, to vest only upon the issuance of a patent, that the provisions of this act be extended to and their benefits be conferred upon each of the other states in which such swamp and overflowed lands may be situated.

[For other cases, see Statutes, 607, 608, in Digest Sup. Ct. 1908.]

United States — immunity from suit — suit against officers.

2. The Supreme Court of the United

States has no jurisdiction of a bill in equity filed by the state of Louisiana against the Secretary of the Interior and the Commissioner of the General Land Office to establish its title under the swamp land grant act of March 2, 1849, to certain lands which were approved to the state by the Secretary of the Interior upon the manifest mistake of law, that, upon the abandonment of the military reservation of which they formed a part, the lands fell within the terms of the grant, since such suit raises questions of law and fact upon which the United States would have to be heard.

[For other cases, see United States, IV. b, in Digest Sup. Ct. 1908.]

[No. 7, Original.]

Argued October 27, 28, 1908. Decided November 9, 1908.

ORIGINAL BILL in equity, filed by the State of Louisiana against the Secretary of the Interior and the Commissioner of the General Land Office, to establish the title of the state to certain swamp lands, and to enjoin the defendants from disposing of such lands. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

NOTE.—On repeal of statutes by implication—see notes to *State v. Massey*, 4 L.R.A. 309; *First Nat. Bank v. Weidenbeck*, 38 C. C. A. 136; and *United States v. Henderson*, 20 L. ed. U. S. 235.

Suit against Federal officers or agents as suit against United States.

The immunity of the United States from suit prevents a state from maintaining, in the Supreme Court of the United States, a suit against the Secretary of the Interior and the Commissioner of the General Land Office, to restrain them from allotting and patenting in severalty swamp lands within the limits of an Indian reservation. *Oregon v. Hitchcock*, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568.

A suit to restrain the Secretary of the Interior from carrying out the provisions of the act of June 27, 1902 (32 Stat. at L. 400, chap. 1157), controlling the disposition of the pine lands ceded by the Indians of the state of Minnesota under the act of January 14, 1889 (25 Stat. at L. 642, chap. 24), to the United States, to be administered for their benefit, and to require him to execute the trust and account.—is in effect a suit against the United States, which the courts have no jurisdiction to entertain. *Naganab v. Hitchcock*, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667.

A suit by a state to enjoin the Secretary of the Interior and the Commissioner of the Land Office from selling school lands in an Indian reservation is a suit against the United States. *Minnesota v. Hitchcock*, 185 U. S. 373, 46 L. ed. 954, 22 Sup. Ct. Rep. 650. Jurisdiction was sustained in this

case, however, on the ground that the United States had expressly consented to be sued, and assumed the responsibility for the outcome of the litigation.

An injunction against the infringement of a patent by the use of a caisson gate which is part of a dry dock in a navy yard, put in place by, and the property of, the United States, and used for the public benefit, cannot be granted in an action against officers and agents of the government, as they have no individual interest in the controversy, but the relief is in fact asked against the United States. *Belknap v. Schild*, 161 U. S. 10, 40 L. ed. 599, 16 Sup. Ct. Rep. 443.

The inability to make the United States a party defeats the right of a patentee for improvements in stamp canceling and post-marking machines, to enjoin the use by a postmaster in a United States postoffice of infringing machines of which the United States is a lessee in possession, for a term which has not expired. *International Postal Supply Co. v. Bruce*, 194 U. S. 601, 48 L. ed. 1134, 24 Sup. Ct. Rep. 820.

But there is a class of cases which hold that the immunity of the United States from suit cannot successfully be pleaded in favor of officers and agents of the United States when sued by private persons, for property in their possession as such agents.

The leading case on this question is *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240, in which it was held by a vote of five to four that ejectment could be maintained against officers occupying, on behalf of the United States, land used for a military station and for a national cemetery. The majority relied largely on *Meigs v. McClung*, 9 Cranch, 11,

Messrs. Harvey M. Friend and George H. Lamar argued the cause and filed a brief for complainant:

Executive officers of a state or of the United States may be proceeded against by mandamus when they refuse to execute a ministerial duty imposed upon them by law, wherein no political rights are involved, and wherein they are not vested with any further discretion in the matter at hand; and such officers may be proceeded against by writ of injunction when they are assuming to act under an unconstitutional statute, or are assuming to act without authority of law and in violation of the law, where there is no adequate remedy at law, and where the complainant will suffer irreparable injury thereby, or where an injunction is the only remedy that can be invoked to avoid a multiplicity of suits.

Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Noble v. Union River Logging Co. 147 U. S. 165, 171, 37 L. ed. 123, 125, 13 Sup. Ct. Rep. 271.

The majority of the cases in this court in which an executive officer has been enjoined from executing an unconstitutional statute, or where such officer has been proceeded

against on the ground that he is acting or assuming to act beyond the scope of his authority, in derogation of the rights of complainants, guaranteed to them by the law, have been cases against state officials.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; Davis v. Gray, 16 Wall. 220, 21 L. ed. 453; Board of Liquidation v. McComb, 92 U. S. 531, 23 L. ed. 623; Poin-dexter v. Greenhow, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; Allen v. Baltimore & O. R. Co. 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962 (these last two being known as the Virginia Coupon Cases); Pennoyer v. McConnaughy, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; Stanley v. Schwalby, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; Tindal v. Wesley, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; Scott v. Donald, 165 U. S. 58, 107, 41 L. ed. 632, 648, 17 Sup. Ct. Rep. 262, 265; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Prout v. Starr, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

This case is on all fours with that of

3 L. ed. 639, where an action in ejectment had successfully been maintained against Federal officers to recover land unlawfully occupied and improved for military purposes. Other cases are to the same effect.

Ejectment will lie against a Federal officer who claims possession of the disputed premises on behalf of the United States. Scranton v. Wheeler, 113 Mich. 565, 67 Am. St. Rep. 484, 71 N. W. 1091, affirmed in 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

Ejectment may be maintained against an Army officer in the occupancy of lands as such officer for a military post. McConnell v. Wilcox, 2 Ill. 344, reversed on other grounds in 13 Pet. 498, 10 L. ed. 264.

Ejectment may be maintained against an Army officer occupying the demanded premises for the purpose of a military camp or fortification, under the direction of the Secretary of War and the President of the United States. Polack v. Mansfield, 44 Cal. 40, 13 Am. Rep. 151.

Ejectment, or its equivalent, lies against officers employed by the United States to carry on the operations of a branch mint, who are in possession of the disputed premises on behalf of the Federal government. King v. La Grange, 61 Cal. 221; Dreux v. Kennedy, 12 Rob. (La.) 489.

The principle extends to other suits for alleged unlawful invasions of property rights by officers of the United States, acting on behalf of the government.

A person claiming to be the owner of timber seized by timber agents as belonging to the United States may bring suit against such agents to obtain an injunction to prevent them from selling the property, 53 L. ed.

and for a determination of his right to it. Wells v. Nickles, 104 U. S. 444, 26 L. ed. 825.

A suit to enjoin an Indian agent from unlawfully obstructing and attempting to eject a complainant when prospecting on lands of an Indian reservation, with a view to making a mineral location thereon, as he was authorized to do by an act of Congress, is not one against the United States, although such agent claims to be acting in his official capacity. Wadsworth v. Boysen, 78 C. C. A. 437, 148 Fed. 771.

A suit by a riparian owner to prevent interference with his rights in a submerged water front by an officer of the United States, in possession of a pier built by the government, is not to be deemed a suit against the United States, of which a state court cannot take jurisdiction without the consent of the United States, although, in determining the question the court may have to consider whether the defendant could constitutionally acquire from the United States authority to obstruct the plaintiff's access to navigable water in front of his land without making or securing compensation to him. Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48.

There are *dicta* to the contrary.

Thus, in Carr v. United States, 98 U. S. 433, 25 L. ed. 209, Mr. Justice Bradley said that when the pleadings or the proofs in an action against the officers or agents of the government disclose that its possession is assailed, the jurisdiction of the court ought to cease.

And in People v. Ambrecht, 11 Abb. Pr. 97, the court thought that the United States could not be indirectly sued in the persons

United States v. Lee, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

It is difficult to perceive the slightest objection to the jurisdiction of this court in the present case.

United States v. Texas, 143 U. S. 621, 644, 36 L. ed. 285, 292, 12 Sup. Ct. Rep. 488; Wisconsin v. Pelican Ins. Co. 127 U. S. 265, 287, 32 L. ed. 239, 242, 8 Sup. Ct. Rep. 1370; Minnesota v. Hitchcock, 185 U. S. 373, 388, 46 L. ed. 954, 963, 22 Sup. Ct. Rep. 650; Pennsylvania v. Wheeling & B. Bridge Co. 13 How. 518, 560, 14 L. ed. 249, 266; Mississippi v. Johnson, 4 Wall. 475, 501, 18 L. ed. 437, 441; Texas v. White, 7 Wall. 700, 719, 19 L. ed. 227, 235; Pennsylvania v. Quicksilver Min. Co. 10 Wall. 553, 556, 19 L. ed. 998, 999; Florida v. Anderson, 91 U. S. 667, 23 L. ed. 290.

The legal title passes as completely by certification if patent is not expressly required by law, as though patent actually issued.

Garriques v. Atchison, T. & S. F. R. Co. 6 Land Dec. 543; Roberts v. Oregon Cent. Milita v Road Co. 19 Land Dec. 591; Wright v. California, 8 Land Dec. 24; Re Louisiana, 1 Lester. 554; Re Daly, 8 Land Dec. 471; California v. Boddy, 9 Land Dec. 636; Smith v. Portage Lake & L. S. Ship Canal Co. 11 Land Dec. 475.

Patent is the favored and more usual form of conveyance, especially as between the government and individuals, but sometimes an act of Congress will pass the fee.

Strother v. Lucas, 12 Pet. 410, 454, 9 L. ed. 1137, 1154; Ryan v. Carter, 93 U. S. 78, 23 L. ed. 807.

The law sometimes makes a certified list of lands operative to transfer title to the grantee.

Frasher v. O'Connor, 115 U. S. 102, 29 L. ed. 311, 5 Sup. Ct. Rep. 1141.

The acts of March 2, 1849, and September 28, 1850, have been, from the beginning to the present, separately administered in accordance with the provisions of the respective acts.

1 Lester, Land Laws, Regulations, &

of its officers or agents by the owner of an estate, for its recovery.

The United States will, of course, not be concluded by the judgment. United States v. Lee, supra.

And a judgment for plaintiffs for an undivided third part of land, and for the possession of the whole jointly with the defendants, who claimed no title therein, but claimed possession as officers and agents of the United States, under its title, is a judgment directly against the United States and against its property, and not merely against its officers, and is beyond the power of a state court to render, where the United

Decisions, pp. 549, 554; Re Louisiana, 32 Land. Dec. 270.

Where two acts of grant, one of an earlier and another of later date, are each broad enough in their terms to embrace the same property, under the well-known rule of law, title must be regarded and held to have passed by the first grant, under the principle, *prior est tempore, potior est in jure*.

9 Ops. Atty. Gen. 254; Wright v. Roseberry, 121 U. S. 488-502, 30 L. ed. 1039-1042, 7 Sup. Ct. Rep. 985; Rodgers v. United States, 185 U. S. 83, 46 L. ed. 816, 22 Sup. Ct. Rep. 582.

The language used in the certificate approved by Secretary Smith embraced everything requisite to an approval under the act of March 2, 1849. Such additional expressions, not required by that statute to be used, however, may be treated in law as mere surplusage, and may be wholly disregarded in determining the legal effect of the approval under the act of 1849.

Kountze v. Omaha Hotel Co. 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Rep. 911.

Attorney General Bonaparte and Solicitor General Hoyt argued the cause, and, with Mr. Glenn E. Husted, filed a brief for defendants:

The United States, the real party in interest as defendant, has not consented to be sued, and cannot be sued without its consent.

Minnesota v. Hitchcock, 185 U. S. 373, 387, 46 L. ed. 954, 962, 22 Sup. Ct. Rep. 650; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568; Naganab v. Hitchcock, 202 U. S. 473, 50 L. ed. 1113, 26 Sup. Ct. Rep. 667; Kansas v. United States, 204 U. S. 331, 51 L. ed. 510, 27 Sup. Ct. Rep. 388.

Swamp-land grants, like other grants from the United States to states or corporations, to aid in the construction of public works, are to be interpreted most strongly against the grantee, and in favor of the government; and nothing passes but what is clearly and explicitly included within the terms of the grant.

States has not voluntarily submitted to the jurisdiction. Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754.

In United States ex rel. Levey v. Stockslager, 129 U. S. 470, 32 L. ed. 785, 9 Sup. Ct. Rep. 382, it was held that a suit against the United States or public officer for the specific performance of a contract made by the United States could not be maintained in the supreme court of the District of Columbia.

On the immunity of the United States from suit, generally, see note to Beers v. Arkansas, 15 L. ed. U. S. 991.

Rice v. Minnesota & N. W. R. Co. 1 Black, 358, 380, 7 L. ed. 147, 153; United States v. Michigan, 190 U. S. 379, 401, 47 L. ed. 1103, 1111, 23 Sup. Ct. Rep. 742.

These military reservation lands were not intended to be, and were not, covered by the swamp-land grant.

Wilcox v. Jackson, 13 Pet. 498, 10 L. ed. 264; Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 741, 747, 23 L. ed. 634, 637, 640; Newhall v. Sanger, 92 U. S. 761, 23 L. ed. 769; Northern P. R. Co. v. Musser-Sauntry Land, Logging, & Mfg. Co. 168 U. S. 604, 609, 42 L. ed. 596, 598, 18 Sup. Ct. Rep. 205; Scott v. Carew, 196 U. S. 100, 49 L. ed. 403, 25 Sup. Ct. Rep. 193; Northern Lumber Co. v. O'Brien, 204 U. S. 190, 51 L. ed. 438, 27 Sup. Ct. Rep. 249.

The swamp-land grant is similar to the railroad grants, and there is no distinction in principle between them upon this point.

Wright v. Roseberry, 121 U. S. 488, 499, 30 L. ed. 1039, 1041, 7 Sup. Ct. Rep. 985.

Like the railroad grants, the swamp-land grant takes effect *in presenti*, the title to lands covered by the grant passing as of the date of the act.

Ibid; Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 42 L. ed. 591, 18 Sup. Ct. Rep. 208.

The words used in both railroad and swamp-land grants—"shall be and are hereby granted"—create an immediate interest, and do not indicate a purpose to give in the future.

Wright v. Roseberry, 121 U. S. 496, 30 L. ed. 1040, 7 Sup. Ct. Rep. 985.

This court has held that they have no other meaning; and the Land Department, on this interpretation of them, has uniformly administered every previous similar grant.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 741, 23 L. ed. 637.

Congress obviously could not have intended to grant to the state any interest as of the date of this swamp-land act in lands then reserved and occupied for military purposes, and the act by which such a grant is made being a law as well as a conveyance, effect must be given to the intent of Congress.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. 97 U. S. 491, 497, 24 L. ed. 1095, 1097.

Being thus reserved and excepted from such a grant at the date thereof, it is immaterial whether they subsequently become public lands.

Newhall v. Singer, *supra*; United States v. Southern P. R. Co. 146 U. S. 570, 606, 36 L. ed. 1091, 1101, 13 Sup. Ct. Rep. 152.

In construing a congressional grant, the act by which it is made is a law as well as a conveyance, and such effect must be given 53 L. ed.

to it as will carry out the intent of Congress.

Missouri, K. & T. R. Co. v. Kansas P. R. Co. *supra*.

When there are two acts of Congress on the same subject, the later act embracing the provisions of the former and also new provisions, the later act, without any repealing clause, operates as a repeal of the former.

Norris v. Crocker, 13 How. 429, 14 L. ed. 210; United States v. Tynen, 11 Wall. 88, 20 L. ed. 153; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429.

This is not a case for the application of the rule that a posterior general act does not repeal a prior special provision unless the legislative intent to repeal be apparent, because it does not fall within the reason of the rule.

People v. Jaehne, 103 N. Y. 182, 8 N. E. 374.

If there is a positive and irreconcilable repugnancy between the old law and the new, the new must stand and the old fall, even though the result is reached by implication alone.

Barney v. Dolph, 97 U. S. 652, 24 L. ed. 1063.

The state of Louisiana has several times treated the act of 1850 as applicable to lands within its borders.

United States v. Louisiana, 123 U. S. 32, 31 L. ed. 69, 8 Sup. Ct. Rep. 17; United States v. Louisiana, 127 U. S. 182, 32 L. ed. 66, 8 Sup. Ct. Rep. 1047.

That the court will not interfere with the Land Department of the government in the determination of questions concerning the public lands so long as the legal title remains in the United States is too well settled to require comment.

Kirwan v. Murphy, 189 U. S. 35, 47 L. ed. 698, 23 Sup. Ct. Rep. 599; Bockfinger v. Foster, 190 U. S. 116, 47 L. ed. 975, 23 Sup. Ct. Rep. 836; Humbird v. Avery, 195 U. S. 480, 49 L. ed. 286, 25 Sup. Ct. Rep. 123; Oregon v. Hitchcock, 202 U. S. 60, 50 L. ed. 935, 26 Sup. Ct. Rep. 568.

The principle that a public officer will not be restrained in the performance of his public trusts, even though the rights of a state may be violated by acts of Congress, should be applied.

Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. ed. 25; Mississippi v. Johnson, 4 Wall. 475, 18 L. ed. 437; Georgia v. Stanton, 6 Wall. 50, 18 L. ed. 721; Grant v. Cooke, 7 D. C. 165.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought in this court to establish the title of the state of Louisiana to

certain swamp lands which it claims under the statutes of the United States, and to enjoin the defendants against carrying out an order making a different disposition of the lands. The defendants demur on the grounds that this really is a suit against the United States, which has not consented to be sued, that the title never has passed from the United States, and that the remedy, if any, would be at law.

The act of March 2, 1849, chap. 87, 9 Stat. at L. 352, purported to grant to the state of Louisiana the whole of the swamp and overflowed lands therein, and provided that, on approval of a list of such lands by the Secretary of the Treasury (afterwards succeeded by the Secretary of the Interior), the fee simple to the same should vest in the [75]state. Certain lands were excluded, *but those in dispute were not by any express words. They belonged, however, to the Fort Sabine Military Reservation, established by the President on December 20, 1838, and although included in a list submitted under the statute, approval of the inclusion was suspended or denied. On March 25, 1871, the Fort Sabine Military Reservation was abandoned by Executive order, in pursuance of the act of February 24, 1871, chap. 68, 16 Stat. at L. 430, which authorized the Secretary of War to transfer it to the control of the Secretary of the Interior, to be sold for cash. On October 31, 1895, the Secretary of the Interior decided that the land was included in the grant of the act of 1849, subject to the right of the United States to use it for military purposes until abandoned. On December 10, 1895, pursuant to his decision, the Secretary indorsed upon a list of these lands that it was "approved to the state of Louisiana under the act of Congress of March 2, 1849, as supplemented and enlarged by the act of Congress of September 28, 1850 (9 Stat. at L. 519, chap. 84), subject to any valid adverse rights that may exist." The plaintiff says that thereupon the title passed.

On June 6, 1904, the Secretary of the Interior ordered that his predecessor's approval of the list be vacated, and that the lands should be held for disposition as provided by law, on the ground that they were not within the grant of the act of 1849, because at that time embraced in a military reservation. This decision has been upheld and finally affirmed by the present Secretary, the defendant in this case, and the result is the bringing of this bill.

We will assume, for purposes of decision, that, if the United States clearly had no title to the land in controversy, we should have jurisdiction to entertain this suit, for

we are of opinion that, even on that assumption, the bill must be dismissed. But before giving the reasons for our opinion, the course taken by the argument for the United States makes it proper to state a portion of that argument that does not command our assent.

The next year after the act of 1849, another act was passed, *which granted [76] swamp lands to the state of Arkansas. It provided for a list, required the Secretary of the Interior to issue a patent for the lands at the request of the governor, and then enacted that, "on that patent," the fee simple to the lands should vest in the state. The 4th section was more general: "That the provisions of this act be extended to, and their benefits be conferred upon, each of the other states of the Union in which such swamp and overflowed lands, known as designated as aforesaid, may be situated." Act of September 28, 1850, chap. 84, 9 Stat. at L. 519. It is argued that this so far repealed the special act of 1849 that thereafter the title would not pass on simple approval, as provided therein, but a patent was necessary. As we understand, the continuous construction of the Department has been to the contrary, and a great number of titles to a very large amount of land would be disturbed if we should accede to this argument. We see no reason for overthrowing the long-continued understanding that the special provisions for Louisiana were not affected by a general clause, evidently intended to extend benefits to states that did not enjoy them at the time, not to change the mode of conveyance previously established in a case where the benefit already had been conferred. We may add that we assume that, if approval was sufficient to pass the title, the form of words used by the Secretary of the Interior on December 10, 1895, had that effect, notwithstanding the reference to the act of 1850, whatever may have been his understanding or intent.

A further argument was presented that, if a patent was not necessary under the act of 1850, then a certificate by the Land Commissioner was made so by the act of August 3, 1854 (10 Stat. at L. 346, chap. 201, Rev. Stat. § 2449, U. S. Comp. Stat. 1901, p. 1516). But that law does not require so extended an application. We shall assume, for purposes of decision, that it is satisfied if confined according to its words to lands to which the act of 1849 did not purport "to convey the fee-simple title."

Leaving the foregoing arguments on one side, we nevertheless *are of opinion that [77] the bill must fail. The land in controversy

had been withdrawn from the public domain by reservation at the time when the act of 1849 was passed, and the general words of that act must be read as subject to an implied exception, under the rule laid down in *Scott v. Carew*, 196 U. S. 100, 109, 49 L. ed. 403, 405, 25 Sup. Ct. Rep. 193, and the earlier cases there cited. The case is not one where the approval proceeded upon a mistake of fact with regard to a matter on which it was necessary that the Secretary should pass. See *Noble v. Union River Logging R. Co.* 147 U. S. 165, 173, 174, 37 L. ed. 123, 126, 127, 13 Sup. Ct. Rep. 271. The approval proceeded upon a manifest mistake of law; that upon the abandonment of the military reservation the land fell within the terms of the grant of 1849. Therefore it was void upon its face. The only doubt is raised by the statute limiting suits by the United States to vacate patents to five years. Act of March 3, 1891, chap. 561, § 8, 26 Stat. at L. 1099. It may be that this act applies to approvals when they are given the effect of patents as well as to patents, which alone are named. In *United States v. Chandler-Dunbar Water Power Co.* 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579, it was decided that this act applied to patents even if void because of a previous reservation of the land, and it was said that the statute not merely took away the remedy, but validated the patent. The doubt is whether Louisiana has not now a good title by the lapse of five years since the approval and by the operation of that act.

But that doubt cannot be resolved in this case. It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that the statute of limitations was confined to patents, or was excluded by the act of 1871. If it yielded those points it still reasonably might maintain that a title could not be acquired under the statute by a mere void approval on paper, if the United States ever since had been in possession, claiming title, as it claimed it earlier by the act of 1871. It might argue that, for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, 78] it would be necessary at least to allege that the state took and has held possession under the void grant. The United States might, and undoubtedly would, deny the fact of such possession, and that fact cannot be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

Bill dismissed.

ALBERT C. TWINING and David C. Cornell, Pliffs. in Err.,

v.

STATE OF NEW JERSEY.

(See S. C. Reporter's ed. 78-127.)

Constitutional law — privileges and immunities—self-incrimination.

1. Exemption from self-incrimination, though secured as against Federal action by U. S. Const., 5th Amend., is not one of the fundamental rights of national citizenship, so as to be included among the privileges and immunities of citizens of the United States which the states are forbidden by the 14th Amendment to abridge.

[For other cases, see Constitutional Law, 180a-196, 380-401, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — self-incrimination.

2. Exemption from self-incrimination is not safeguarded as against state action by the provision of U. S. Const. 14th Amend., that no state shall deprive any person of life, liberty, or property without due process of law.

[Due process of law in criminal matters, see Constitutional Law, 779-830, in Digest Sup. Ct. 1908.]

[No. 10.]

Argued March 19, 20, 1908. Decided November 9, 1908.

IN ERROR to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the Supreme Court of that state, affirming a conviction in the Court of Quarter Sessions of the County of Monmouth of having knowingly exhibited a false paper to a bank examiner, with intent to deceive. Affirmed.

See same case below, 73 N. J. L. 683, 64 Atl. 1073, 1135.

Statement by Mr. Justice Moody:

Albert C. Twining and David C. Cornell, the plaintiffs in error, hereafter called the defendants, were indicted by the grand jury of Monmouth county, in the state of New Jersey. The indictment charged that the defendants, being directors of the Monmouth Trust & Safe Deposit Company, knowingly exhibited a false paper to Larue Vreedenberg, an examiner of the state banking department, with intent to deceive him as to the condition of the company. Such an act is made a misdemeanor by a statute of the state (P. L. 1899, p. 450, at 461), which is as follows:

"Every director, officer, agent, or clerk of any trust company who wilfully and knowingly subscribes or makes any false statement of facts or false entries in the books of such trust company, or knowingly subscribes or exhibits any false paper, with intent to deceive any person authorized to examine as to the condition of such trust

company, or wilfully or knowingly subscribes to or makes any false report, shall be guilty of a high misdemeanor and punished accordingly."

The defendants were found guilty on March 1, 1904, by the verdict of a jury, and judgment upon the verdict, that the defendants be imprisoned for six and four years, respectively, was affirmed successively by the 80]supreme court and the court *of errors and appeals. There needs to be stated here only such part of what occurred at the trial as will describe the questions on which this court is authorized to pass. It appeared that in February, 1903, the company closed its doors. The bank examiner came at once to the place of business for the purpose of examining the affairs of the company, and found there Twining and Cornell, who were respectively president and treasurer as well as directors. Having soon discovered that, according to a book entry, there had been a recent payment of \$44,875, for 381 shares of stock, the examiner inquired of the defendant by what authority this had been done, and was informed that it was done by authority of the board of directors, and the following paper was produced to him as a record of the transaction:

Monmouth Trust & Safe Deposit Company,
Asbury Park, N. J.

A special meeting of the board of directors of this company was held at the office of the company on Monday, Feb. 9th, 1903.

There were present the following directors: George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell.

The minutes of the regular meeting held Jan. 15th, 1903, were read, and on motion duly approved.

All loans taken since the last meeting were gone over carefully, and, upon motion duly seconded, were unanimously approved.

A resolution that this company buy 381 shares of the stock of the First National Bank at \$44,875 was adopted.

On motion the meeting adjourned.

This was the paper referred to in the indictment, and it was incumbent on the prosecution to prove that it was false and that it was "knowingly" exhibited by the defendants to the examiner. There was evidence on the part of the prosecution tending to prove both these propositions. The defendants called no witnesses and did not testify themselves, although the law of New Jersey gave them the right to do so if they chose. In his charge to the jury the presiding judge said:

"Now, gentlemen, was this paper false? 81]In the first place, *the paper charged in

the indictment, certifies in effect that a special meeting of the board of directors of this company was held at the office of the company on Monday, February 9, 1903. There were present the following directors: George F. Kroehl, S. A. Patterson, G. B. M. Harvey, A. C. Twining, D. C. Cornell.

"Among other things appears a resolution of this company to buy 381 shares of the stock of the First National Bank at \$44,875, which was adopted.

"Now, was that meeting held or not?

"That paper says that at this meeting were present, among others, Patterson, Twining, and Cornell.

"Mr. Patterson has gone upon the stand and has testified that there was no such meeting to his knowledge; that he was not present at any such meeting; that he had no notice of any such meeting; and that he never acquiesced, as I understand, in any way, in the passage of a resolution for the purchase of this stock.

"Now, Twining and Cornell, this paper says, were present. They are here in court and have seen this paper offered in evidence, and they know that this paper says that they were the two men, or two of the men, who were present. Neither of them has gone upon the stand to deny that they were present or to show that the meeting was held.

"Now, it is not necessary for these men to prove their innocence. It is not necessary for them to prove that this meeting was held. But the fact that they stay off the stand, having heard testimony which might be prejudicial to them, without availing themselves of the right to go upon the stand and contradict it, is sometimes a matter of significance.

"Now, of course, in this action, I do not see how that can have much weight, because these men deny that they exhibited the paper, and if one of these men exhibited the paper and the other did not, I do not see how you could say that the person who claims he did not exhibit the paper would be under any obligation at all to go upon the stand. Neither is under any *obligation. [82 It is simply a right they have to go upon the stand, and, consequently the fact that they do not go upon the stand to contradict this statement in the minutes, they both denying, through their counsel and through their plea, that they exhibited the paper, I do not see that that can be taken as at all prejudicial to either of them. They simply have the right to go upon the stand, and they have not availed themselves of it, and it may be that there is no necessity for them to go there. I leave that entirely to you."

Further, in that part of the charge relat-

ing to the exhibition of the paper to the examiner, the judge said:

"Now, gentlemen, if you believe that that is so; if you believe this testimony, that Cornell did direct this man's attention to it,—Cornell has sat here and heard that testimony and not denied it,—nobody could misunderstand the import of that testimony, it was a direct accusation made against him of his guilt,—if you believe that testimony beyond a reasonable doubt, Cornell is guilty. And yet he has sat here and not gone upon the stand to deny it. He was not called upon to go upon the stand and deny it, but he did not go upon the stand and deny it, and it is for you to take that into consideration.

"Now Twining has also sat here and heard this testimony, but you will observe there is this distinction as to the conduct of these two men in this respect: the accusation against Cornell was specific by Vreedenberg. It is rather inferential, if at all, against Twining, and he might say,—it is for you to say whether he might say,—'Well, I don't think the accusation against me is made with such a degree of certainty as to require me to deny it, and I shall not; nobody will think it strange if I do not go upon the stand to deny it, because Vreedenberg is uncertain as to whether I was there; he won't swear that I was there.' So consequently the fact that Twining did not go upon the stand can have no significance at all.

"You may say that the fact that Cornell did not go upon the stand has no significance. You may say so, because the circumstances may be such that there should be 83]no inference *drawn of guilt or anything of that kind from the fact that he did not go upon the stand. Because a man does not go upon the stand you are not necessarily justified in drawing an inference of guilt. But you have a right to consider the fact that he does not go upon the stand where a direct accusation is made against him."

The question duly brought here by writ of error is whether the parts of the charge set forth, affirmed, as they were, by the court of last resort of the state, are in violation of the 14th Amendment of the Constitution of the United States.

Mr. John G. Johnson argued the cause, and, with Messrs. William W. Gooch, Herbert C. Smyth, and Frederic C. Scofield, filed a brief for plaintiff in error Albert C. Twining:

In each case the primary inquiry must be as to what is the system of law of the particular state, and whether, according to that law, as adjudged by its courts, the procedure in question is "due process;" and the 53 L. ed.

secondary inquiry must be whether, in that process of law, if followed, there is any violation of the fundamental rights secured by the Federal Constitution.

Guthrie, 14th Amend. p. 72; Kennard v. Louisiana, 92 U. S. 480, 481, 23 L. ed. 478, 479; Caldwell v. Texas, 137 U. S. 692, 698, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; Leeper v. Texas, 139 U. S. 462, 469, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579; McNulty v. California, 149 U. S. 645, 647, 37 L. ed. 882, 883, 13 Sup. Ct. Rep. 959.

When a statute, harmless on its face, is systematically enforced in violation of fundamental rights, the procedure is not due process of law, and may be declared void and set aside by the courts under the jurisdiction conferred by the 14th Amendment.

Guthrie, 14th Amend. p. 73.

In New Jersey no person can be compelled to be a witness against himself.

State v. Zdanowicz, 69 N. J. L. 619, 55 Atl. 744.

The state of New Jersey stands out alone, among all the states and territories of the Union, in permitting comment upon the failure of the accused to testify, and bases its action solely upon the absence of any restriction in the qualifying statute, holding that the accused is thus placed in the same position as any party to a civil suit.

Parker v. State, 61 N. J. L. 308, 39 Atl. 651; State v. Wines, 65 N. J. L. 31, 46 Atl. 702; State v. Banusik (N. J.) 64 Atl. 994.

Comment upon the failure of the accused to testify is a violation of his fundamental right to remain silent.

People v. Tyler, 36 Cal. 522; Price v. Com. 77 Va. 393; State v. Howard, 35 S. C. 202, 14 S. E. 481; Bird v. Georgia, 50 Ga. 585; 1 Wigmore, Ev. § 488; 3 Wigmore, Ev. § 2272, note 2; Wilson v. United States, 149 U. S. 60, 37 L. ed. 650, 13 Sup. Ct. Rep. 765; McKnight v. United States, 54 C. C. A. 358, 115 Fed. 982; Cooper v. State, 86 Ala. 610, 4 L.R.A. 766, 11 Am. St. Rep. 84, 6 So. 110; People v. Cuff, 122 Cal. 589, 55 Pac. 407; Petite v. People, 8 Colo. 518, 9 Pac. 622; Wharton, Crim. Ev. 9th ed. § 435; Quinn v. People, 123 Ill. 345, 15 N. E. 46; Baker v. People, 105 Ill. 452; Austin v. People, 102 Ill. 261; Angelo v. People, 96 Ill. 209, 36 Am. Rep. 132; Miller v. People, 216 Ill. 309, 74 N. E. 743; State v. Banks, 78 Me. 492, 7 Atl. 269; Wynehamer v. People, 13 N. Y. 444; Ruloff v. People, 45 N. Y. 213; People v. Courtney, 94 N. Y. 492; State v. Hull, 18 R. I. 211, 20 L.R.A. 609, 26 Atl. 191; State v. Beswick, 13 R. I. 211, 43 Am. Rep. 26; State v. Williams, 11 S. D. 64, 75 N. W. 815; State v. Cameron, 40 Vt. 555; Guthrie, 14th Amend. p. 67.

Where a fundamental right guaranteed by the earlier amendments is involved, then

this court has jurisdiction because of the guaranty in the 14th Amendment that no state shall abridge those privileges or immunities, or deny due process of law.

Davidson v. New Orleans, 96 U. S. 104, 24 L. ed. 619; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394; *Barrington v. Missouri*, 205 U. S. 486, 51 L. ed. 894, 27 Sup. Ct. Rep. 582.

This question has been twice brought to the attention of this court, and is still open and undecided.

Consolidated Rendering Co. v. Vermont, 207 U. S. 553, 52 L. ed. 335, 28 Sup. Ct. Rep. 178; *Adams v. New York*, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372.

The power of the states to abridge these great rights of citizens can never be conceded until the court shall expressly so decide in a case involving the exact question and adequately argued.

Guthrie, 14th Amend. p. 62.

In determining whether or not this privilege is a fundamental right, the history of the provision is significant.

Bram v. United States, 168 U. S. 543, 42 L. ed. 573, 18 Sup. Ct. Rep. 183; 1 Stephen, *History of Crim. Law*, Eng. p. 440; *Story*, *Const.* 5th ed. pp. 1782, 1788.

In all the states the accused is entitled to a speedy and public trial by an impartial tribunal; to have the presence, advice, and assistance of counsel in his defense; to be confronted with the witnesses against him; and is not to be compelled to give evidence against himself. However much the forms of proceeding or the nature of the tribunal may be changed, due process of law must necessarily include each and all of these requisites.

2 *Story*, *Const.* 5th ed. p. 697.

It is an ancient principle of the law of evidence that a witness shall not be compelled in any proceeding to make disclosures or to give testimony which will tend to criminate him or subject him to fines, penalties, or forfeitures.

Counselman v. Hitchcock, 142 U. S. 563, 35 L. ed. 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

Any compulsory discovery is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.

Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524.

The common-law rule upon this subject was established in England, and thus it existed and was the law of that realm when the American colonies were organized and

when this government was formed. Under the shelter of judicial decision the subject became secure and could not be compelled to accuse himself; and, with the adoption of the 4th and 5th Amendments, principles established at common law became reaffirmed in the Constitution.

United States v. 3 Tons of Coal, 6 Biss. 386, Fed. Cas. No. 16,515.

The principle is well established that this constitutional provision, which has long been regarded as one of the safeguards of civil liberty, should be applied in a broad spirit, to secure to the citizen immunity from every kind of self-accusation.

Re Nachman, 114 Fed. 996.

By analogy the case at bar is in the same class with *Boyd v. United States*, supra, where a statute making the failure of a witness to attend and produce evidence against himself a confession of guilt was held unconstitutional.

The laws of a state come under the prohibition of the 14th Amendment when they infringe fundamental rights.

Ballard v. Hunter, 204 U. S. 262, 51 L. ed. 474, 27 Sup. Ct. Rep. 261.

The state has full control over the procedure in its courts both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.

Brown v. New Jersey, 175 U. S. 175, 44 L. ed. 120, 20 Sup. Ct. Rep. 77; *West v. Louisiana*, 194 U. S. 263, 48 L. ed. 970, 24 Sup. Ct. Rep. 650.

Where fundamental rights specially secured by the Federal Constitution are invaded, the Federal courts will interfere with a state in the administration of its law for the prosecution of crime.

Rogers v. Peck, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904.

Due process implies, at least, conformity to natural and inherent principles of justice.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383.

In the 14th Amendment, by parity of reasoning, it refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exercised within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

The purpose of the 14th Amendment is to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is afforded by the 5th Amendment against similar legislation by Congress.

Tonawanda v. Lyon, 181 U. S. 392, 45 L. ed. 911, 21 Sup. Ct. Rep. 609; *Guthrie*, 14th Amend. pp. 2, 3.

There are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard, and these principles recognize the inherent rights of the individual, and are embodied and intended to be protected and secured by the fundamental law, and the 14th Amendment imposes upon the courts the duty to protect every individual or corporation from arbitrary denial or abridgment of those rights by the states.

Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383.

Since the adoption of the 14th Amendment no one of the fundamental rights of life, liberty, or property, recognized and guaranteed by the Constitution of the United States, can be denied or abridged by a state in respect to any person within its jurisdiction.

These rights are principally enumerated in the earlier amendments of the Constitution. They were deemed so vital to the safety and security of the people that the absence from the Constitution adopted by the Convention of 1787 of express guaranties of them came very near defeating the acceptance of that instrument by the requisite number of states.

O'Neil v. Vermont, 144 U. S. 323, 370, 36 L. ed. 450, 469, 12 Sup. Ct. Rep. 693.

Mr. Marshall Van Winkle argued the cause and filed a brief for plaintiff in error David C. Cornell:

The plaintiff in error, Cornell, was denied a fundamental right guaranteed by the common law.

Bird v. Georgia, 50 Ga. 585; 3 *Wigmore*, Ev. § 2250, pp. 3069, 3103, 3105, 3122; *State v. Zdanowicz*, 69 N. J. L. 619, 55 Atl. 744; *United States v. 3 Tons of Coal*, 6 Biss. 379, Fed. Cas. No. 16,515.

A constitutional right and immunity of plaintiffs in error were violated.

Guthrie, 14th Amend. (1898) § 1.

The cases which hold that the 14th Amendment has not extended the provisions of the 5th Amendment to the states do not apply to *all* the provisions of the 5th Amendment.

Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Maxwell v.* 53 L. ed.

Dow, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

In the construction of the language of the Constitution here relied upon, as, indeed, in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument.

Ex parte Bain, 121 U. S. 1, 12, 30 L. ed. 849, 853, 7 Sup. Ct. Rep. 781.

The intention of the framers of the Amendment, and the design of the Amendment itself, was to change the existing condition, and to thus forever disable the states from passing laws trenching upon those fundamental rights and privileges which pertain to citizens of the United States.

Congressional Globe, p. 2764, May 23, 1866, 1st Session 39th Congress, pt. 3.

The genesis of the first section of the 14th Amendment is instructive as showing that it was constructed out of a demand for protection to all "citizens" of a state as well as of the United States, and to all "persons."

House Res. 1, 39th Congress, 1st Session; Congressional Globe, pp. 14, 18, 566, 645, 39th Congress, 1st Session; House Journal, pp. 267, 333, 796.

The effect of the 14th Amendment was that "the position of the United States is changed from that of a passive noninfringer of individual liberty to that of an active defender of the same against the states."

1 Burgess, Political Science & Comparative Const. Law, p. 185.

While it is true that a state has full control over the procedure in its courts, both in civil and criminal cases, that is so subject to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.

Brown v. New Jersey, 175 U. S. 175, 44 L. ed. 119, 20 Sup. Ct. Rep. 77.

Messrs. Robert H. McCarter and H. M. Nevius argued the cause and filed a brief for defendant in error:

The rights of a citizen of the United States may be those of a citizen of any of the states, by virtue of the two citizenships existing conjointly in any one person, but they are not necessarily coincident; and the rights of a citizen of the United States are not necessarily those of a citizen of any of the individual states.

Story, Const. 5th ed. ¶ 1936; *Re Kemmler*, 136 U. S. 448, 34 L. ed. 524, 10 Sup. Ct. Rep. 930; *Duncan v. Missouri*, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570; *Wadleigh v. Newhall*, 136 Fed. 946.

The 5th Amendment of the Federal Constitution is binding only on the Federal

government and its agencies, and is not a limitation upon any of the states composing the Federal Union. The rights or immunities which it creates, therefore, are rights and immunities against Federal, but not against state, interference or abridgment.

Barron v. Baltimore, 7 Pet. 243, 8 L. ed. 672; *Twitchell v. Pennsylvania*, 7 Wall. 321, 19 L. ed. 223; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675; *Scott v. Toledo*, 1 L.R.A. 688, 36 Fed. 385; *Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.

The 14th Amendment created no new civil rights. It merely extended the operation of existing rights, and furnished additional protection to such rights.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *United States v. Sanges*, 48 Fed. 78; *Minor v. Happersett*, 21 Wall. 171, 22 L. ed. 629; *United States v. Cruikshank*, 92 U. S. 542, 23 L. ed. 588.

The 14th Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceedings.

Hallinger v. Davis, 146 U. S. 321, 36 L. ed. 990, 13 Sup. Ct. Rep. 105; *Missouri v. Lewis* (*Bowman v. Lewis*) 10 L. U. S. 31, 32, 25 L. ed. 992, 993.

Due process of law (referring to the 5th Amendment) refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law. In the 14th Amendment, by parity of reason, it refers to the law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure.

Ibid. To the same effect are *Holden v.*
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Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 17 Sup. Ct. Rep. 383; *Hurtado v. California*, 110 U. S. 535, 28 L. ed. 238, 4 Sup. Ct. Rep. 111, 292; *Walker v. Sauvinet*, 92 U. S. 92, 23 L. ed. 679.

The 14th Amendment legitimately operates to extend to the citizens and residents of the states the same protection against arbitrary state legislation affecting life, liberty, and property as is offered by the 5th Amendment against similar legislation by Congress. But the Federal courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a state, applicable to all persons in like circumstances and conditions; and the Federal courts should not interfere unless there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

1 Fed. Stat. Anno: p. 427.

Messrs. Nelson B. Gaskill and Robert H. McCarter also filed a brief for defendant in error.

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court:

In the view we take of the case we do not deem it necessary to consider whether, with respect to the Federal question, there is any difference in the situation of the two defendants. It is assumed, in respect of each, that the jury were instructed that they might draw an unfavorable inference against him from his failure to testify, where it was within his power, in denial of the evidence which tended to incriminate him. The law of the state, as declared in the case at bar, which accords with other decisions (*Parker v. State*, 61 N. J. L. 308, 39 Atl. 651; *State v. Wines*, 65 N. J. L. 31, 46 Atl. 702; *State v. Zdanowicz*, 69 N. J. L. 619, 55 Atl. 743; *State v. Banusik* (N. J.) 64 Atl. 994), permitted such an inference to be drawn. The judicial act of the highest court of the *state, in authoritatively con- [91] struing and enforcing its laws, is the act of the state. *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. The general question, therefore, is, whether such a law violates the 14th Amendment, either by abridging the privileges or immunities of citizens of the United States, or by depriving persons of their life, liberty, or property without due process of law. In order to bring themselves within the protection of the Constitution it is incumbent on the defendants to prove two propositions: First, that the

exemption from compulsory self-incrimination is guaranteed by the Federal Constitution against impairment by the states; and, second, if it be so guaranteed, that the exemption was in fact impaired in the case at bar. The first proposition naturally presents itself for earlier consideration. If the right here asserted is not a Federal right, that is the end of the case. We have no authority to go further and determine whether the state court has erred in the interpretation and enforcement of its own laws.

The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced by any form of legal process, is universal in American law, though there may be differences as to its exact scope and limits. At the time of the formation of the Union the principle that no person could be compelled to be a witness against himself had become embodied in the common law and distinguished it from all other systems of jurisprudence. It was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions. Five of the original thirteen states (North Carolina, 1776; Pennsylvania, 1776; Virginia, 1776; Massachusetts, 1780; New Hampshire, 1784) had then guarded the principle from legislative or judicial change by including it in Constitutions or Bills of Right; Maryland had provided in her Constitution (1776) that "no man ought to be compelled to 92] give evidence against *himself, in a common court of law, or in any other court, but in such cases as have been usually practised in this state or may hereafter be directed by the legislature;" and in the remainder of those states there seems to be no doubt that it was recognized by the courts. The privilege was not included in the Federal Constitution as originally adopted, but was placed in one of the ten amendments which were recommended to the states by the first Congress, and by them adopted. Since then all the states of the Union have, from time to time, with varying form, but uniform meaning, included the privilege in their Constitutions, except the states of New Jersey and Iowa, and in those states it is held to be part of the existing law. *State v. Zdanowicz*, supra; *State v. Height*, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935. It is obvious from this short statement that it has been supposed by the states that, so far as the state courts are concerned, the privilege had its origin in the Constitutions and laws of the states, and that persons appealing to it must look to the state for their protection. Indeed, since, by the unvarying de-

cisions of this court, the first ten Amendments of the Federal Constitution are restrictive only of national action, there was nowhere else to look up to the time of the adoption of the 14th Amendment, and the state, at least until then, might give, modify, or withhold the privilege at its will. The 14th Amendment withdrew from the states powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations and restraints whenever they exist, and there has been no hesitation in the performance of the duty. But, whenever a new limitation or restriction is declared, it is a matter of grave import, since, to that extent, it diminishes the authority of the state, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union. The question in the case at bar has been twice before us, and been left undecided, as the cases were disposed of on other grounds. *Adams v. New York*, [93 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178. The defendants contend, in the first place, that the exemption from self-incrimination is one of the privileges and immunities of citizens of the United States which the 14th Amendment forbids the states to abridge. It is not argued that the defendants are protected by that part of the 5th Amendment which provides that "no person . . . shall be compelled in any criminal case to be a witness against himself," for it is recognized by counsel that, by a long line of decisions, the first ten Amendments are not operative on the states. *Barron v. Baltimore*, 7 Pet. 243, 8 L. ed. 672; *Spies v. Illinois*, 123 U. S. 131, 31 L. ed. 80, 8 Sup. Ct. Rep. 21, 22; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; *Barrington v. Missouri*, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582. But it is argued that this privilege is one of the fundamental rights of national citizenship, placed under national protection by the 14th Amendment, and it is specifically argued that the "privileges and immunities of citizens of the United States," protected against state action by that Amendment, include those fundamental personal rights which were protected against national action by the first eight Amendments; that this was the intention of the framers of the 14th Amendment, and that this part of it would otherwise have little or no meaning and effect. These arguments are not new to this court and the answer to them is found in its decisions. The meaning of the

phrase "privileges and immunities of citizens of the United States," as used in the 14th Amendment, came under early consideration in the Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394. A statute of Louisiana created a corporation and conferred upon it the exclusive privilege, for a term of years, of establishing and maintaining within a fixed division of the city of New Orleans stock yards and slaughterhouses. The act provided that others might use these facilities for a prescribed price, forbade the landing for slaughter or the slaughtering of animals elsewhere or otherwise, and established a system of inspection. Those persons who were driven out of independent business by this law denied its validity in suits which [94] came to this *court by writs of error to the supreme court of the state, which had sustained the act. It was argued, *inter alia*, that the statute abridged the privileges and immunities of the plaintiffs in error as citizens of the United States, and the particular privilege which was alleged to be violated was that of pursuing freely their chosen trade, business, or calling. The majority of the court were not content with expressing the opinion that the act did not in fact deprive the plaintiffs in error of their right to exercise their trade (a proposition vigorously disputed by four dissenting justices), which would have disposed of the case, but preferred to rest the decision upon the broad ground that the right asserted in the case was not a privilege or immunity belonging to persons by virtue of their national citizenship, but, if existing at all, belonging to them only by virtue of their state citizenship. The 14th Amendment, it is observed by Mr. Justice Miller, delivering the opinion of the court, removed the doubt whether there could be a citizenship of the United States independent of citizenship of the state, by recognizing or creating and defining the former. "It is quite clear, then," he proceeds to say (p. 74), "that there is a citizenship of the United States and a citizenship of a state, which are distinct from each other and which depend upon different characteristics or circumstances in the individual." The description of the privileges and immunities of state citizenship, given by Mr. Justice Washington in *Corfield v. Coryell*, 4 Wash. C. C. 371, Fed. Cas. No. 3,230, is then quoted, approved, and said to include "those rights which are fundamental," to embrace "nearly every civil right for the establishment and protection of which organized government is instituted," and "to be the class of rights which the state governments were created to establish and secure." This part of the opinion then concludes with the holding that the rights relied upon in the case are those which belong to the

citizens of states, as such, and are under the sole care and protection of the state governments. The conclusion is preceded by the important declaration that the civil rights theretofore appertaining to citizenship of the states *and under the protection of the states were not given the security of national protection by this clause of the 14th Amendment. The exact scope and the momentous consequence of this decision are brought into clear light by the dissenting opinions. The view of Mr. Justice Field, concurred in by Chief Justice Chase and Justices Swayne and Bradley, was that the fundamental rights of citizenship, which, by the opinion of the court, were held to be rights of state citizenship, protected only by the state government, became, as the result of the 14th Amendment, rights of national citizenship, protected by the national Constitution. Said Mr. Justice Field (p. 95):

"The fundamental rights, privileges, and immunities which belong to him as a free man and a free citizen, now belong to him as a citizen of the United States, and are not dependent upon his citizenship of any state. . . . The Amendment does not attempt to confer any new privileges or immunities upon citizens, or to enumerate or define those already existing. It assumes that there are such privileges and immunities, which belong of right to citizens as such, and ordains that they shall not be abridged by state legislation. If this inhibition has no reference to privileges and immunities of this character, but only refers, as held by the majority of the court in their opinion, to such privileges and immunities as were, before its adoption, specially designated in the Constitution, or necessarily implied as belonging to citizens of the United States, it was a vain and idle enactment, which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied no state could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character. But, if the Amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."

*In accordance with these principles it [96] is said by the learned justice that the privileges and immunities of state citizenship, described by Mr. Justice Washington, and held by the majority of the court still to pertain exclusively to state citizenship, and to be protected solely by the state government, have been guaranteed by the 14th

Amendment as privileges and immunities of citizens of the United States. And see the concurring opinions of Mr. Justice Field and Mr. Justice Bradley in *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; and in *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652. There can be no doubt, so far as the decision in the *Slaughter-House Cases* has determined the question, that the civil rights sometimes described as fundamental and inalienable, which, before the War Amendments, were enjoyed by state citizenship and protected by state government, were left untouched by this clause of the 14th Amendment. Criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this court. Undoubtedly, it gave much less effect to the 14th Amendment than some of the public men active in framing it intended, and disappointed many others. On the other hand, if the views of the minority had prevailed, it is easy to see how far the authority and independence of the states would have been diminished, by subjecting all their legislative and judicial acts to correction by the legislative and review by the judicial branch of the national government. But we need not now inquire into the merits of the original dispute. This part, at least, of the *Slaughter-House Cases*, has been steadily adhered to by this court, so that it was said of it, in a case where the same clause of the Amendment was under consideration (*Maxwell v. Dow*, 176 U. S. 581, 591, 44 L. ed. 597, 601, 20 Sup. Ct. Rep. 448, 494): "The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court." The distinction between national and state citizenship and their respective privileges there drawn has come to be firmly established. And so it was held that the right of 97] peaceable assembly *for a lawful purpose (it not appearing that the purpose had any reference to the national government) was not a right secured by the Constitution of the United States, although it was said that the right existed before the adoption of the Constitution of the United States, and that "it is and always has been one of the attributes of citizenship under a free government." *United States v. Cruikshank*, 92 U. S. 542, 551, 23 L. ed. 588, 591. And see *Hodges v. United States*, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6. In each case the *Slaughter-House Cases* were cited by the court, and in the latter case the rights described by Mr. Justice Washington were again treated as rights of state citizenship under state protection. If, then, it be assumed, without deciding the point, that

an exemption from compulsory self-incrimination is what is described as a fundamental right belonging to all who live under a free government, and incapable of impairment by legislation or judicial decision, it is, so far as the states are concerned, a fundamental right inherent in state citizenship, and is a privilege or immunity of that citizenship only. Privileges and immunities of citizens of the United States, on the other hand, are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States. *Slaughter-House Cases*, supra, p. 79; *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570.

Thus, among the rights and privileges of national citizenship recognized by this court are the right to pass freely from state to state (*Crandall v. Nevada*, 6 Wall. 35, 18 L. ed. 745); the right to petition Congress for a redress of grievances (*United States v. Cruikshank*, supra); the right to vote for national officers (*Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Wiley v. Sinkler*, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17); the right to enter the public lands (*United States v. Waddell*, 112 U. S. 76, 28 L. ed. 673, 5 Sup. Ct. Rep. 35); the right to be protected against violence while in the lawful custody of a United States marshal (*Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617); and the right to inform the United States authorities of violation of its laws (*Re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. Rep. 959). *Most of these cases were indictments[98 against individuals for conspiracies to deprive persons of rights secured by the Constitution of the United States, and met with a different fate in this court from the indictments in *United States v. Cruikshank* and *Hodges v. United States*, because the rights in the latter cases were rights of state, and not of national, citizenship. But assuming it to be true that the exemption from self-incrimination is not, as a fundamental right of national citizenship, included in the privileges and immunities of citizens of the United States, counsel insist that, as a right specifically granted or secured by the Federal Constitution, it is included in them. This view is based upon the contention which must now be examined, that the safeguards of personal rights which are enumerated in the first eight articles of amendment to the Federal Constitution, sometimes called the Federal Bill of Rights, though they were by those Amendments originally secured only

against national action, are among the privileges and immunities of citizens of the United States, which this clause of the 14th Amendment protects against state action. This view has been, at different times, expressed by justices of this court (Mr. Justice Field in *O'Neil v. Vermont*, 144 U. S. 323, 361, 36 L. ed. 450, 466, 12 Sup. Ct. Rep. 693; Mr. Justice Harlan in the same case, 370, and in *Maxwell v. Dow*, supra, 606, 617), and was undoubtedly that entertained by some of those who framed the Amendment. It is, however, not profitable to examine the weighty arguments in its favor, for the question is no longer open in this court. The right of trial by jury in civil cases, guaranteed by the 7th Amendment (*Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678), and the right to bear arms, guaranteed by the 2d Amendment (*Presser v. Illinois*, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580), have been distinctly held not to be privileges and immunities of citizens of the United States, guaranteed by the 14th Amendment against abridgment by the states, and in effect the same decision was made in respect of the guaranty against prosecution, except by indictment of a grand jury, contained in the 5th Amendment (*Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292), *and in respect of the right to be confronted with witnesses, contained in the 6th Amendment (*West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650). In *Maxwell v. Dow*, supra, where the plaintiff in error had been convicted in a state court of a felony upon an information, and by a jury of eight persons, it was held that the indictment, made indispensable by the 5th Amendment, and the trial by jury, guaranteed by the 6th Amendment, were not privileges and immunities of citizens of the United States, as those words were used in the 14th Amendment. The discussion in that case ought not to be repeated. All the arguments for the other view were considered and answered, the authorities were examined and analyzed, and the decision rested upon the ground that this clause of the 14th Amendment did not forbid the states to abridge the personal rights enumerated in the first eight Amendments, because those rights were not within the meaning of the clause "privileges and immunities of citizens of the United States." If it be possible to render the principle which governed the decision more clear, it is done so by the dissent of Mr. Justice Harlan. We conclude, therefore, that the exemption from compulsory self-incrimination is not a privilege or immunity of national citizenship guaranteed by this clause of the 14th Amendment against abridgment by the states.

The defendants, however, do not stop here. They appeal to another clause of the 14th Amendment, and insist that the self-incrimination which they allege the instruction to the jury compelled was a denial of due process of law. This contention requires separate consideration, for it is possible that some of the personal rights safeguarded by the first eight Amendments against national action may also be safeguarded against state action, because a denial of them would be a denial of due process of law. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581. If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law. Few *phrases of the law are so[100] elusive of exact apprehension as this. Doubtless the difficulties of ascertaining its connotation have been increased in American jurisprudence, where it has been embodied in constitutions and put to new uses as a limit on legislative power. This court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise. There are certain general principles, well settled, however, which narrow the field of discussion, and may serve as helps to correct conclusions. These principles grow out of the proposition universally accepted by American courts on the authority of Coke, that the words "due process of law" are equivalent in meaning to the words "law of the land," contained in that chapter of Magna Charta which provides that "no freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall we go upon him, nor send upon him, but by the lawful judgment of his peers or by the law of the land." *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616; *Jones v. Robbins*, 8 Gray, 329; *Cooley, Const. Lim.* 7th ed. 500; *McGehee, Due Process of Law*, 16. From the consideration of the meaning of the words in the light of their historical origin this court has drawn the following conclusions:

First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was

adopted by the court, speaking through Mr. Justice Curtis, in *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 280, 15 L. ed. 372, 376 (approved in *Hallinger v. Davis*, 146 U. S. 314, 320, 36 L. ed. 986, 989, 13 Sup. Ct. Rep. 105; *Holden v. Hardy*, 169 U. S. 366, 390, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; but see *Lowe v. Kansas*, 163 U. S. 81, 85, 41 L. ed. 78, 79, 16 Sup. Ct. Rep. 1031). Of course, the part of **101]**the Constitution then *before the court was the 5th Amendment. If any different meaning of the same words, as they are used in the 14th Amendment, can be conceived, none has yet appeared in judicial decision. "A process of law," said Mr. Justice Matthews, commenting on this statement of Mr. Justice Curtis, "which is not otherwise forbidden, must be taken to be due process of law, if it can show the sanction of settled usage both in England and in this country." *Hurtado v. California*, 110 U. S. 516, 528, 28 L. ed. 232, 236, 4 Sup. Ct. Rep. 111, 117, 292.

Second. It does not follow, however, that a procedure, settled in English law at the time of the emigration, and brought to this country and practised by our ancestors, is an essential element of due process of law. If that were so, the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight jacket, only to be unloosed by constitutional amendment. That, said Mr. Justice Matthews, in the same case, p. 529, "would be to deny every quality of the law but its age, and to render it incapable of progress or improvement." *Holden v. Hardy*, 169 U. S. 366, 388, 42 L. ed. 780, 789, 18 Sup. Ct. Rep. 383; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77.

Third. But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law, and protect the citizen in his private right, and guard him against the arbitrary action of government. This idea has been many times expressed in differing words by this court, and it seems well to cite some expressions of it. The words "due process of law" "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." *Bank of Columbia v. Okely*, 4 Wheat. 235, 244, 4 L. ed. 559, 561 (approved in *Hurtado v. California*, 110 U. S. 516, 527, 28 L. ed. 232, 235, 4 Sup. Ct. Rep. 111, 292; *Leeper v. Texas*, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. **53 L. ed.**

577; *Scott v. McNeal*, 154 U. S. 34, 45, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108). "This court has never attempted to define *with precision the words 'due process[**102** of law.' . . . It is sufficient to say that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard." *Holden v. Hardy*, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383, 387. "The same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, 934. "The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *West v. Louisiana*, 194 U. S. 258, 263, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650, 652.

The question under consideration may first be tested by the application of these settled doctrines of this court. If the statement of Mr. Justice Curtis, as elucidated in *Hurtado v. California*, is to be taken literally, that alone might almost be decisive. For nothing is more certain, in point of historical fact, than that the practice of compulsory self-incrimination in the courts and elsewhere existed for four hundred years after the granting of Magna Charta, continued throughout the reign of Charles I. (though then beginning to be seriously questioned), gained at least some foothold among the early colonists of this country, and was not entirely omitted at trials in England until the eighteenth century. *Wigmore, Ev.* § 2250 (see for the Colonies, note 108); *Hallam's Constitutional History of England*, chapter 8. *Widdleton's American ed.* vol. 2, p. 37 (describing the criminal jurisdiction of the court of star chamber); *Bentham's Rationale of Judicial Evidence*, book 9, chap. 3, § 4.

Sir James Fitzjames Stephen, in his studies of the reports of English trials for crime, has thrown much light on the existence of the practice of questioning persons accused of *crime, and its gradual decay. He[**103** considers, first, a group of trials which occurred between 1554 and 1637. Speaking of the trial before the jury, he says:

"The prisoner, in nearly every instance, asked, as a favor, that he might not be overpowered by the eloquence of counsel denouncing him in a set speech, but, in consid-

eration of the weakness of his memory, might be allowed to answer separately to the different matters which might be alleged against him. This was usually granted, and the result was that the trial became a series of excited altercations between the prisoner and the different counsel opposed to him. Every statement of counsel operated as a question to the prisoner, and indeed they were constantly thrown into the form of questions, the prisoner either admitting or denying or explaining what was alleged against him. The result was that, during the period in question, the examination of the prisoner, which is at present scrupulously and I think even pedantically avoided, was the very essence of the trial, and his answers regulated the production of the evidence; the whole trial, in fact, was a long argument between the prisoner and counsel for the Crown, in which they questioned each other and grappled with each other's arguments with the utmost eagerness and closeness of reasoning." Stephen, *History of the Crim. Law*, 325.

This description of the questioning of the accused and the meeting of contending arguments finds curious confirmation in the report of the trial, in 1637, of Ann Hutchinson (which resulted in banishment) for holding and encouraging certain theological views which were not approved by the majority of the early Massachusetts rulers. 1 *Hart's American History Told by Contemporaries*, 382. The trial was presided over and the examination very largely conducted by Governor Winthrop, who had been, for some years before his emigration, an active lawyer and admitted to the Inner Temple. An examination of the report of this trial will show that he was not aware of any privilege against self-incrimination or [104] conscious of *any duty to respect it. Stephen says of the trials between 1640 and 1660 (*Id.* 358): "In some cases the prisoner was questioned, but never to any greater extent than that which it is practically impossible to avoid when a man has to defend himself without counsel. When so questioned the prisoners usually refused to answer." He further says (*Id.* 440): "Soon after the Revolution of 1688 the practice of questioning the prisoner died out." But committing magistrates were authorized to take the examination of persons suspected, which, if not under oath, was admissible against him on his trial, until by the 11 & 12 Viet. chap. 2, the prisoner was given the option whether he would speak, and warned that what he said might be used against him. But even now there seems to be a very well-recognized and important exception in English law to the rule that no person can be compelled to furnish evidence against himself.

A practice in bankruptcy has existed from ancient times, and still exists, which would not be constitutionally possible under our national bankruptcy law or under the insolvency law of any state whose Constitution contains the customary prohibition of compulsory self-incrimination. The bankruptcy act of 1 James I., chap. 15, § 7 (1603), authorized the commissioners of bankruptcy to compel, by commitment, if necessary, the bankrupt to submit to an examination touching his estate and dealings. The provision was continued in the subsequent acts, and in 1820, in *Ex parte Cossens*, Buck, Bankr. Cas. 531, 540, Lord Eldon, in the course of a discussion of the right to examine a bankrupt, held that he could be compelled to disclose his violations of law in respect of his trade and estate, and, while recognizing the general principle of English law, that no one could be compelled to incriminate himself, said: "I have always understood the proposition to admit of a qualification with respect to the jurisdiction in bankruptcy." The act of 6 Geo. IV., chap. 16, § 36 (1825), authorized the compulsory examination of the bankrupt "touching all matters relating either to his trade, dealings, or estate, or which may tend to disclose any *secret [105 grant, conveyance, or concealment of his lands." The act of 12 & 13 Viet. chap. 106, § 117 (1849), contained the same provision. Construing these acts, it was held that the bankrupt must answer, though his answer might furnish evidence of his crime, and even if an indictment were pending against him; and that the evidence thus compelled was admissible on his trial for crime. *Re Heath*, 2 Deacon & C. 214; *Re Smith*, 2 Deacon & C. 230, 235; *Reg. v. Scott*, Dears. & B. C. C. 47; *Reg. v. Cross*, 7 Cox, C. C. 226; *Queen v. Widdop*, L. R. 2 C. C. 3. The act of 46 & 47 Viet. chap. 52, § 17 (1883), which we understand to be (with some amendment, not material here) the present law, passed after the decisions cited, expressly provided that the examination shall be taken in writing and signed by the debtor, "and may thereafter be used in evidence against him." It has since been held that other evidence of his testimony than that written and signed by him may be used. *Queen v. Erdheim* [1896] 2 Q. B. 260, and see *King v. Pike* [1902] 1 K. B. 552.† It is to be observed that not until 1883 did Parliament, which has an unlimited legislative power, expressly provide that the evidence compelled from the bankrupt could be used in proof of an indictment against

†In certain offenses, which may be generally described as embezzlements, the evidence compelled from a bankrupt cannot be used against him. 24 & 25 Viet. chap. 96, § 85; 53 & 54 Viet. chap. 71, § 27.

him. The rule had been previously firmly established by judicial decisions upon statutes simply authorizing a compulsory examination. If the rule had been thought to be in conflict with "the law of the land" of Magna Charta, "a sacred text, the nearest approach to an irrevocable 'fundamental statute' that England has ever had" (1 Pollock & M. History of English Law, 152), it is inconceivable that such a consideration would not have received some attention from counsel and judges. We think it is manifest, from this review of the origin, growth, extent, and limits of the exemption from compulsory self-incrimination in the English law, that it is not regarded as a part of the law of the land of Magna Charta or the due process of law, which *has been deemed an equivalent expression, but, on the contrary, is regarded as separate from and independent of due process. It came into existence not as an essential part of due process, but as a wise and beneficent rule of evidence developed in the course of judicial decision. This is a potent argument when it is remembered that the phrase was borrowed from English law, and that to that law we must look at least for its primary meaning.

But, without repudiating or questioning the test proposed by Mr. Justice Curtis for the court, or rejecting the inference drawn from English law, we prefer to rest our decision on broader grounds, and inquire whether the exemption from self-incrimination is of such a nature that it must be included in the conception of due process. Is it a fundamental principle of liberty and justice which inheres in the very idea of free government and is the inalienable right of a citizen of such a government? If it is, and if it is of a nature that pertains to process of law, this court has declared it to be essential to due process of law. In approaching such a question it must not be forgotten that in a free representative government nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the state to order its own affairs and govern its own people, except so far as the Federal Constitution, expressly or by fair implication, has withdrawn that power. The power of the people of the states to make and alter their laws at pleasure is the greatest security for liberty and justice, this court has said in *Hurtado v. California*, 110 U. S. 516, 527, 28 L. ed. 232, 235, 4 Sup. Ct. Rep. 111, 292. We are not invested with the jurisdiction to pass

upon the expediency, wisdom, or justice of the laws of the states as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution we must *take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules of government to be adopted by a free people, and confound them with constitutional limitations. The question before us is the meaning of a constitutional provision which forbids the states to deny to any person due process of law. In the decision of this question we have the authority to take into account only those fundamental rights which are expressed in that provision; not the rights fundamental in citizenship, state or national, for they are secured otherwise; but the rights fundamental in due process, and therefore an essential part of it. We have to consider whether the right is so fundamental in due process that a refusal of the right is a denial of due process. One aid to the solution of the question is to inquire how the right was rated during the time when the meaning of due process was in a formative state, and before it was incorporated in American constitutional law. Did those who then were formulating and insisting upon the rights of the people entertain the view that the right was so fundamental that there could be no due process without it? It has already appeared that, prior to the formation of the American Constitutions, in which the exemption from compulsory self-incrimination was specifically secured, separately, independently, and side by side with the requirement of due process, the doctrine was formed, as other doctrines of the law of evidence have been formed, by the course of decision in the courts, covering a long period of time. Searching further, we find nothing to show that it was then thought to be other than a just and useful principle of law. None of the great instruments in which we are accustomed to look for the declaration of the fundamental rights made reference to it. The privilege was not dreamed of for hundreds of years after Magna Charta (1215), and could not have been implied in the "law of the land" there secured. The Petition of Right (1629), though it insists upon the right secured by Magna Charta to be condemned only by the law of the land, and sets forth, by way of grievance, divers violations of *it, is silent upon the practice of compulsory self-incrimination, though it was then a matter of common occurrence in all the courts of the realm. The Bill of Rights of the first year of the reign of William and Mary (1689) is likewise

silent, though the practice of questioning the prisoner at his trial had not then ceased. The negative argument which arises out of the omission of all reference to any exemption from compulsory self-incrimination in these three great declarations of English liberty (though it is not supposed to amount to a demonstration) is supported by the positive argument that the English courts and Parliaments, as we have seen, have dealt with the exemption as they would have dealt with any other rule of evidence, apparently without a thought that the question was affected by the law of the land of Magna Charta, or the due process of law which is its equivalent.

We pass by the meager records of the early colonial time, so far as they have come to our attention, as affording light too uncertain for guidance. See Wigmore; Ev. § 2250, note 108; 2 Hening's Stat. at L. 422 (1676) Va.; 1 Winthrop's History of New England, 47, provincial act, 4 Wm. & Mary, Ancient Charters, Massachusetts, 214. Though it is worthy of note that neither the declaration of rights of the Stamp Act Congress (1765) nor the declaration of rights of the Continental Congress (1774) nor the ordinance for the government of the Northwestern territory included the privilege in their enumeration of fundamental rights.

But the history of the incorporation of the privilege in an amendment to the national Constitution is full of significance in this connection. Five states—Delaware, Pennsylvania, New Jersey, Georgia, and Connecticut—ratified the Constitution without proposing amendments. Massachusetts then followed with a ratification, accompanied by a recommendation of nine amendments, none of which referred to the privilege; Maryland with a ratification without proposing amendments; South Carolina with a ratification accompanied by a recommendation of four amendments, none of which [109]referred to the privilege, *and New Hampshire with a ratification accompanied by a recommendation of twelve amendments, none of which referred to the privilege. The nine states requisite to put the Constitution in operation ratified it without a suggestion of incorporating this privilege. Virginia was the tenth state to ratify, proposing, by separate resolution, an elaborate bill of rights under twenty heads, and, in addition, twenty amendments to the body of the Constitution. Among the rights enumerated as "essential and inalienable" is that no man "can be compelled to give evidence against himself," and "no freeman ought to be deprived of his life, liberty, or property but by the law of the land." New York ratified with a proposal of numer-

ous amendments and a declaration of rights which the convention declared could not be violated and were consistent with the Constitution. One of these rights was that "no person ought to be taken, imprisoned or deprived of his freehold, or be exiled or deprived of his privileges, franchises, life, liberty, or property but by due process of law;" and another was that, "in all criminal prosecutions, the accused . . . should not be compelled to give evidence against himself." North Carolina and Rhode Island were the last to ratify, each proposing a large number of amendments, including the provision that no man "can be compelled to give evidence against himself;" and North Carolina, that "no freeman ought to be . . . deprived of his life, liberty, or property but by the law of the land;" and Rhode Island, that "no freeman ought to be . . . deprived of his life, liberty, or property but by the trial by jury, or by the law of the land."

Thus it appears that four only of the thirteen original states insisted upon incorporating the privilege in the Constitution, and they separately and simultaneously with the requirement of due process of law, and that three states proposing amendments were silent upon this subject. It is worthy of note that two of these four states did not incorporate the privilege in their own Constitutions, where it would have had a much wider field of usefulness, until many years after. New York *in [110 1821 and Rhode Island in 1842 (its first Constitution). This survey does not tend to show that it was then in this country the universal or even general belief that the privilege ranked among the fundamental and inalienable rights of mankind; and what is more important here, it affirmatively shows that the privilege was not conceived to be inherent in due process of law, but, on the other hand, a right separate, independent, and outside of due process. Congress, in submitting the Amendments to the several states, treated the two rights as exclusive of each other. Such also has been the view of the states in framing their own Constitutions, for in every case, except in New Jersey and Iowa, where the due process clause or its equivalent is included, it has been thought necessary to include separately the privilege clause. Nor have we been referred to any decision of a state court save one (*State v. Height*, 117 Iowa, 650, 59 L.R.A. 437, 94 Am. St. Rep. 323, 91 N. W. 935), where the exemption has been held to be required by due process of law. The inference is irresistible that it has been the opinion of constitution makers that the privilege, if fundamental in any sense, is not fundamental in due process of

law, nor an essential part of it. We believe that this opinion is proved to have been correct by every historical test by which the meaning of the phrase can be tried.

The decisions of this court, though they are silent on the precise question before us, ought to be searched to discover if they present any analogies which are helpful in its decision. The essential elements of due process of law, already established by them, are singularly few, though of wide application and deep significance. We are not here concerned with the effect of due process in restraining substantive laws, as, for example, that which forbids the taking of private property for public use without compensation. We need notice now only those cases which deal with the principles which must be observed in the trial of criminal and civil causes. Due process requires that the court which assumes to determine the rights of parties shall have jurisdiction (*Pennoyer v. Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Scott v. McNeal*, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; *Old Wayne Mut. 111*] *Life Asso. v. McDonough*, 204 U. S. 8, 51 L. ed. 345, 27 Sup. Ct. Rep. 236), and that there shall be notice and opportunity for hearing given the parties. (*Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841; *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; and see *Londoner v. Denver*, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708). Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence, and methods of trial, and held them to be consistent with due process of law. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; *Caldwell v. Texas*, 137 U. S. 692, 34 L. ed. 816, 11 Sup. Ct. Rep. 224; *Leeper v. Texas*, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Hallinger v. Davis*, 146 U. S. 314, 36 L. ed. 986, 13 Sup. Ct. Rep. 105; *McNulty v. California*, 149 U. S. 645, 37 L. ed. 882, 13 Sup. Ct. Rep. 959; *McKane v. Durston*, 153 U. S. 684, 38 L. ed. 867, 14 Sup. Ct. Rep. 913; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Lowe v. Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Allen v. Georgia*, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; *Hodgson v. Vermont*, 168 U. S. 262, 42 L. ed. 461, 18 Sup. Ct. Rep. 80; *Brown v. New Jersey*, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; 53 L. ed.

Bolln v. Nebraska, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *West v. Louisiana*, 194 U. S. 258, 48 L. ed. 965, 24 Sup. Ct. Rep. 650; *Marvin v. Trout*, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; *Rogers v. Peck*, 199 U. S. 425, 50 L. ed. 256, 26 Sup. Ct. Rep. 87; *Howard v. Kentucky*, 200 U. S. 164, 50 L. ed. 421, 26 Sup. Ct. Rep. 189; *Rawlins v. Georgia*, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560; *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366.

Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indictments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process, so far as it relates to procedure in court and methods of trial and character and effect of evidence, are complied with. Thus it was said in *Iowa C. R. Co. v. Iowa*, supra, p. 393: "But it is clear that the 14th Amendment in no way undertakes to control the *power of a[112] state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice and accords fair opportunity to be heard before the issues are decided;" and in *Louisville & N. R. Co. v. Schmidt*, 177 U. S. 236, 44 L. ed. 750, 20 Sup. Ct. Rep. 622: "It is no longer open to contention that the due process clause of the 14th Amendment to the Constitution of the United States does not control mere forms of procedure in state courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice, and adequate opportunity has been afforded him to defend;" and in *Hooker v. Los Angeles*, 188 U. S. 314, 318, 47 L. ed. 487, 491, 63 L.R.A. 471, 479, 23 Sup. Ct. Rep. 395, 397: "The 14th Amendment does not control the power of a state to determine the form of procedure by which legal rights may be ascertained, if the method adopted gives reasonable notice and affords a fair opportunity to be

heard;" and in *Rogers v. Peck*, supra, p. 435: "Due process of law guaranteed by the 14th Amendment does not require the state to adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution." It is impossible to reconcile the reasoning of these cases and the rule which governed their decision with the theory that an exemption from compulsory self-incrimination is included in the conception of due process of law. Indeed, the reasoning for including indictment by a grand jury and trial by a petit jury in that conception, which has been rejected by this court in *Hurtado v. California* and *Maxwell v. Dow*, was historically and in principle much stronger. Clearly appreciating this, Mr. Justice Harlan, in his dissent in each of these cases, pointed out that the inexorable logic of the reasoning of the court was to allow the states, so far as the Federal Constitution was concerned, to compel any person to be a witness against himself. In *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 25 L. ed. 113 [1898], Mr. Justice Bradley, speaking for the whole court, said, in effect, that the 14th Amendment would not prevent a state from adopting or continuing the Civil Law instead of the common law. This *dictum* has been approved and made an essential part of the reasoning of the decision in *Holden v. Hardy*, 169 U. S. 387, 389, 42 L. ed. 789, 790, 18 Sup. Ct. Rep. 383, and *Maxwell v. Dow*, supra, 598. The statement excludes the possibility that the privilege is essential to due process, for it hardly need be said that the interrogation of the accused at his trial is the practice in the Civil Law.

Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutory as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham, many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice, but as a law proved by experience to be expedient. See Wigmore, Ev. § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our

own people in the search for truth outside the administration of the law. It should, must, and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of national citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The states had guarded the privilege to the satisfaction of their own people up to the adoption of the 14th Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened, by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands. They may, if they choose, alter it by legislation, as the people of Maine did when the courts of that state made the same ruling. *State v. Bartlett*, 55 Me. 200; *State v. Lawrence*, 57 Me. 574; *State v. Cleaves*, 59 Me. 298, 8 Am. Rep. 422; *State v. Banks*, 78 Me. 492, 7 Atl. 269; Rev. Stat. chap. 135, § 19.

We have assumed only for the purpose of discussion that what was done in the case at bar was an infringement of the privilege against self-incrimination. We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself, and not a denial of it. The reasoning by which this view is supported will be found in the cases cited from New Jersey and Maine, and see *Queen v. Rhodes* [1899] 1 Q. B. 77; *Ex parte Kops* [1894] A. C. 650. The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, we think that the exemption from compulsory self-incrimination in the courts of the states is not secured by any part of the Federal Constitution.

Judgment affirmed.

Mr. Justice Harlan, dissenting:

I feel constrained by a sense of duty to express my nonconcurrence in the action of the court in this case.

Twining and Cornell were indicted for a criminal offense in a New Jersey court, and, having been found guilty by a jury, were sentenced, respectively, to imprisonment for 115]six and *four years. The judgment of conviction was affirmed, first in the supreme court of the state, afterwards in the court of errors and appeals. The case was brought here for review, and the accused assigned for error that the mode of proceeding during the trial was such as to deny them a right secured by the Constitution of the United States,—namely, the right of an accused not to be compelled to testify against himself.

Upon this point the court, in the opinion just delivered, says: "We have assumed, only for the purpose of discussion, that what was done in the case at bar was an infringement of the privilege against self-incrimination." But the court takes care to add immediately: "We do not intend, however, to lend any countenance to the truth of that assumption. The courts of New Jersey, in adopting the rule of law which is complained of here, have deemed it consistent with the privilege itself."

It seems to me that the first inquiry on this writ of error should have been whether, upon the record before us, that which was actually done in the trial court amounted, in law, to a violation of that privilege. If the court was not prepared to hold, upon the record before it, that the privilege of immunity from self-incrimination had been actually violated, then, I submit, it ought not to have gone further and held it to be competent for a state, despite the granting of immunity from self-incrimination by the Federal Constitution, to compel one accused of crime to be a witness against himself. Whether a state is forbidden by the Constitution of the United States to violate the principle of immunity from self-incrimination is a question which it is clearly unnecessary to decide now, unless what was, in fact, done at the trial, was inconsistent with that immunity. But, although expressly declaring that it will not lend any countenance to the truth of the assumption that the proceedings below were in disregard of the maxim, *Nemo tenetur seipsum accusare*, and without saying whether there was, in fact, any substantial violation of the 116]privilege *of immunity from self-incrimination, the court, for the purpose only of discussion, has entered upon the academic inquiry whether a state may, without violating the Constitution of the United States, compel one accused of crime to be a witness against himself,—a question of vast moment, one of such transcendent importance that a court ought not to decide it unless the record before it requires that course to

be adopted. It is entirely consistent with the opinion just delivered that the court thinks that what is complained of as having been done at the trial of the accused was not, in law, an infringement of the privilege of immunity from self-incrimination. Yet, as stated, the court, in its wisdom, has forborne to say whether, in its judgment, that privilege was, in fact, violated in the state court, but simply, for the purpose of discussion, has proceeded on the assumption that the privilege was disregarded at the trial.

As a reason why it takes up first the question of the power of a state, so far as the Federal Constitution is concerned, to compel self-incrimination, the court says that if the right here asserted is not a Federal right that is an end of the case, and it must not go further. It would, I submit, have been more appropriate to say that, if no ground whatever existed, under the facts disclosed by the record, to contend that a Federal right had been violated, this court would be without authority to go further and express its opinion on an abstract question relating to the powers of the states under the Constitution.

What I have suggested as to the proper course of procedure in this court is supported by our action in *Shoener v. Pennsylvania*, 207 U. S. 188, 195, 52 L. ed. 163, 166, 28 Sup. Ct. Rep. 110. That was a criminal case, brought here from the supreme court of Pennsylvania,—the accused, who was convicted, insisting that the proceeding against him in the state court was in violation of the clause of the Federal Constitution declaring that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. Upon looking into the record of that case we found that the accused had not been, previously, put in legal jeopardy for *the same offense. We went no further, [117 but dismissed the writ of error, declining to consider the grave constitutional question pressed upon our attention, namely, whether the jeopardy clause of the Federal Constitution operated as a restraint upon the states in the execution of their criminal laws. But as a different course has been pursued in this case, I must of necessity consider the sufficiency of the grounds upon which the court bases its present judgment of affirmance.

The court, in its consideration of the relative rights of the United States and of the several states, holds, in this case, that, *without violating the Constitution of the United States*, a state can *compel* a person accused of crime to testify against himself. In my judgment, immunity from self-incrimination is protected against hostile state action, not only by that clause in the 14th

Amendment declaring that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," but by the clause, in the same Amendment, "nor shall any state deprive any person of life, liberty, or property, without due process of law." No argument is needed to support the proposition that, whether manifested by statute or by the final judgment of a court, state action, if liable to the objection that it abridges the privileges or immunities of national citizenship, must also be regarded as wanting in the due process of law enjoined by the 14th Amendment, when such state action substantially affects life, liberty, or property.

At the time of the adoption of the 14th Amendment immunity from self-incrimination was one of the privileges or immunities belonging to citizens, for the reason that the 5th Amendment, speaking in the name of the people of the United States, had declared, in terms, that no person "shall be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law." That Amendment, it was long ago decided, operated as a restriction on the exercise of powers by the United States or by Federal tribunals and agencies, but ¹¹⁸*did not impose any restraint upon a state or upon a state tribunal or agency. The original Amendments of the Constitution had their origin, as all know, in the belief of many patriotic statesmen in the states then composing the Union, that, under the Constitution, as originally submitted to the people for adoption or rejection, the national government might disregard the fundamental principles of Anglo-American liberty, for the maintenance of which our fathers took up arms against the mother country.

What, let me inquire, must then have been regarded as principles that were fundamental in the liberty of the citizen? Every student of English history will agree that, long before the adoption of the Constitution of the United States, certain principles affecting the life and liberty of the subject had become firmly established in the jurisprudence of England, and were deemed vital to the safety of freemen, and that among those principles was the one that no person accused of crime could be compelled to be a witness against himself. It is true that at one time in England the practice of "questioning the prisoner" was enforced in star chamber proceedings. But we have the authority of Sir James Fitzjames Stephen, in his History of the Criminal Law of England, for saying that, soon after the Revolution of 1688, the practice of questioning the prison-

er died out. Vol. 1, p. 440. The liberties of the English people had then been placed on a firmer foundation. Personal liberty was thenceforward jealously guarded. Certain it is, that when the present government of the United States was established it was the belief of all liberty-loving men in America that real, genuine freedom could not exist in any country that recognized the power of government to *compel* persons accused of crime to be witnesses against themselves. And it is not too much to say that the wise men who laid the foundations of our constitutional government would have stood aghast at the suggestion that immunity from self-incrimination was not among the essential, fundamental principles of English law. An able writer on English and American Constitutional ¹¹⁹*law has recently well said: "When [the first Continental Congress of 1774 claimed to be entitled to the benefit, not only of the common law of England, but of such of the English statutes as existed at the time of the colonization, and which they had by experience found to be applicable to their several local and other circumstances, they simply declared the basic principle of English law that English subjects, going to a new and uninhabited country, carry with them, as their birthright, the laws of England existing when the colonization takes place. . . . English law, public and private, continued in force in all the states that became sovereign in 1776, each state declaring for itself the date from which it would recognize it." Taylor, Science of Jurisprudence, 436, 437. It is indisputably established that, despite differences in forms of government, the people in the colonies were a unit as to certain leading principles, among which was the principle that the people were entitled to "enjoy the rights and privileges of British-born subjects and the benefit of the common laws of England" (1 Story, Const. § 163), and that (to use the words of the Continental Congress of 1774) "by immigration to the colonies, the people by no means forfeited, surrendered, or lost any of those rights, but that they were then, and their descendants are now, entitled to the exercise and enjoyment of them as their local and other circumstances enable them to exercise and enjoy."

Can there be any doubt that, at the opening of the War of Independence, the people of the colonies claimed as one of their birthrights the privilege of immunity from self-incrimination? This question can be answered in but one way. If, at the beginning of the Revolutionary War, any lawyer had claimed that one accused of crime could lawfully be compelled to testify against himself, he would have been laughed at by his

brethren of the bar, both in England and America. In accordance with this universal view as to the rights of freemen, Virginia, in its convention of May, 1776,—in advance, be it observed, of the Declaration of Independence,—made a *declaration (drawn entirely by the celebrated George Mason) which set forth certain rights as pertaining to the people of that state and to their posterity “as the basis and foundation of government.” Among those rights (that famous declaration distinctly announced) was the right of a person not to be compelled to give evidence against himself. Precisely the same declaration was made in Pennsylvania by its convention assembled at Philadelphia on the 15th of July, 1776. Vermont, by its convention of 1777, said “Nor can he [a man accused of crime] be compelled to give evidence against himself.” Maryland, in 1776, declared that “no man ought to be compelled to give evidence against himself, in a court of criminal law.” Massachusetts, in its Constitution of 1780, provided that “no subject shall be . . . compelled to accuse, or to furnish evidence against, himself.” The same provision was made by New Hampshire in its Constitution of 1784. And North Carolina as early as 1776 recognized the privilege of immunity from self-incrimination by declaring, in its Constitution, that a man “shall not be compelled to give evidence against himself.” These explicit declarations in the Constitutions of leading colonies, before the submission of the national Constitution to the people for adoption or rejection, caused patriotic men, whose fidelity to American liberty no one doubted, to protest that that instrument was defective, in that it furnished no express guaranty against the violation by the national government of the personal rights that inhered in liberty. Nothing is made clearer by the history of our country than that the Constitution would not have been accepted by the requisite number of states, but for the understanding, on all sides, that it should be promptly amended so as to meet this objection. So, when the first Congress met, there was entire unanimity among statesmen of that day as to the necessity and wisdom of having a national Bill of Rights which would, beyond all question, secure against Federal encroachment all the rights, privileges, and immunities which, everywhere and by everybody in America, [121] were then recognized as *fundamental in Anglo-American liberty. Hence the prompt incorporation into the supreme law of the land of the original Amendments. By the 5th Amendment, as already stated, it was expressly declared that no one should be compelled, in a criminal case, to be a

witness against himself. Those Amendments being adopted by the nation, the people no longer feared that the United States or any Federal agency could exert power that was inconsistent with the fundamental rights recognized in those Amendments. It is to be observed that the Amendments introduced no principle not already familiar to liberty-loving people. They only put in the form of constitutional sanction, as barriers against oppression, the principles which the people of the colonies, with entire unanimity, deemed vital to their safety and freedom.

Still more. At the close of the late Civil War, which had seriously disturbed the foundations of our governmental system, the question arose whether provision should not be made by constitutional Amendments to secure against attack by the *states* the rights, privileges, and immunities which, by the original Amendments, had been placed beyond the power of the United States or any Federal agency to impair or destroy. Those rights, privileges, and immunities had not then, in terms, been guarded by the national Constitution against impairment or destruction by the states, although, before the adoption of the 14th Amendment, every state, without, perhaps, an exception, had, in some form, recognized, as part of its fundamental law, most, if not all, the rights and immunities mentioned in the original Amendments, among them immunity from self-incrimination. This is made clear by the opinion of the court in the present case. The court says: “The exemption from testimonial compulsion, that is, from disclosure as a *witness of evidence against one's self, forced by any form of legal process, is universal in American law*, though there may be a difference as to its exact scope and limits. At the time of the formation of the Union, the principle that no person could be compelled to be a witness against himself *had become embodied in the common [122] law and distinguished it from all other systems of jurisprudence. *It was generally regarded then, as now, as a privilege of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions.*” Such was the situation, the court concedes, at the time the 14th Amendment was prepared and adopted. That Amendment declared that all persons born or naturalized in the United States and subject to its jurisdiction are citizens of the United States, “and of the state wherein they reside.” Momentous as this declaration was, in its political consequences, it was not deemed sufficient for the complete protection of the essential rights of national citizenship and personal liberty. Al-

though the nation was restrained by existing constitutional provisions from encroaching upon those rights, yet, so far as the Federal Constitution was concerned, the states could, at that time, have dealt with those rights upon the basis entirely of their own Constitution and laws. It was therefore deemed necessary that the 14th Amendment should, in the name of the United States, forbid, as it expressly does, any *state* from making or enforcing a law that will abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty, or property without due process of law. The privileges and immunities mentioned in the original Amendments, and universally regarded as our heritage of liberty from the common law, were thus secured to every citizen of the United States, and placed beyond assault by any government, Federal or state; and due process of law, in all public proceedings affecting life, liberty, or property, was enjoined equally upon the nation and the states.

What, then, were the privileges and immunities of citizens of the United States which the 14th Amendment guarded against encroachment by the states? Whatever they were, that Amendment placed them beyond the power of any state to abridge. And what were the rights of life and liberty which the Amendment protected? Whatever they were, that Amendment **123*** guarded them against any hostile state action that was wanting in due process of law.

I will not attempt to enumerate all the privileges and immunities which *at that time* belonged to citizens of the United States. But I confidently assert that among such privileges was the privilege of immunity from self-incrimination which the people of the United States, by adopting the 5th Amendment, had placed beyond Federal encroachment. Can such a view be deemed unreasonable in the face of the fact, frankly conceded in the opinion of the court, that, at common law, as well at the time of the formation of the Union and when the 14th Amendment was adopted, immunity from self-incrimination was a privilege "universal in American law," was everywhere deemed "of great value, a protection to the innocent, though a shelter to the guilty, and a safeguard against heedless, unfounded, or tyrannical prosecutions?" Is it conceivable that a privilege or immunity of such a priceless character, one expressly recognized in the supreme law of the land, one thoroughly interwoven with the history of Anglo-American liberty, was not in the mind of the country when it declared, in the 14th Amendment, that no state shall abridge the privileges or immunities of citi-

zens of the United States? The 14th Amendment would have been disapproved by every state in the Union if it had saved or recognized the right of a state to compel one accused of crime, in its courts, to be a witness against himself. We state the matter in this way because it is common knowledge that the compelling of a person to criminate himself shocks or ought to shock the sense of right and justice to everyone who loves liberty. Indeed, this court has not hesitated thus to characterize the star chamber method of compelling an accused to be a witness against himself. In *Boyd v. United States*, 116 U. S. 616, 631, 633, 29 L. ed. 746, 751, 752, 6 Sup. Ct. Rep. 524, 533, 534, will be found some weighty observations by Mr. Justice Bradley, delivering the judgment of the court, as to the scope and meaning of the 4th and 5th Amendments. The court, speaking by that eminent jurist, said: *"**124** it is elementary knowledge, that one cardinal rule of the court of chancery is never to decree a discovery which might *tend to convict the party of a crime*, or to forfeit his property. And any compulsory discovery *by extorting the party's oath*, or compelling the production of his private books and papers, *to convict him of crime*, or to forfeit his property, *is contrary to the principles of a free government. It is abhorrent to the instincts of an Englishman; it is abhorrent to the instincts of an American. It may suit the purposes of despotic power, but it cannot abide the pure atmosphere of political liberty and personal freedom.*" Again: "We have already noticed the intimate relation between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the 4th Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which, in criminal cases, is condemned in the 5th Amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the 5th Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the 4th Amendment. And we have been unable to perceive that the seizure of a man's private books and papers, to be used in evidence against him,' is substantially different from compelling him to be a witness against himself." These observations were referred to approvingly in *Counselman v. Hitchcock*, 142 U. S. 547, 580, 581, 35 L. ed. 1110, 1120, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195.

I am of opinion that, as immunity from self-incrimination was recognized in the 5th Amendment of the Constitution, and placed beyond violation by any Federal agency, it

should be deemed one of the immunities of citizens of the United States which the 14th Amendment, in express terms, forbids any state from abridging,—as much so, for instance, as the right of free speech (1st Amend.) or the exemption from cruel or unusual punishments (8th Amend.), or the exemption from being put twice in jeopardy of life or limb for the same offense (5th Amend.), or the exemption from 125]unreasonable searches *and seizures of one's person, house, papers, or effects (4th Amend.). Even if I were anxious or willing to cripple the operation of the 14th Amendment by strained or narrow interpretations, I should feel obliged to hold that, when that Amendment was adopted, all these last-mentioned exemptions were among the immunities belonging to citizens of the United States, which, after the adoption of the 14th Amendment, no state could impair or destroy. But, as I read the opinion of the court, it will follow from the general principles underlying it, or from the reasoning pursued therein, that the 14th Amendment would be no obstacle whatever in the way of a state law or practice under which, for instance, cruel or unusual punishments (such as the thumbscrew, or the rack, or burning at the stake) might be inflicted. So of a state law which infringed the right of free speech, or authorized unreasonable searches or seizures of persons, their houses, papers, or effects, or a state law under which one accused of crime could be put in jeopardy twice or oftener, at the pleasure of the prosecution, for the same offense.

It is my opinion, also, that the right to immunity from self-incrimination cannot be taken away by any state consistently with the clause of the 14th Amendment that relates to the deprivation by the state of life or liberty without due process of law. This view is supported by what Mr. Justice Miller said for the court in *Davidson v. New Orleans*, 96 U. S. 97, 101, 102, 24 L. ed. 616, 618, 619. That great judge, delivering the opinion in that case said: "The prohibition against depriving the citizen or subject of his life, liberty, or property without due process of law, is not new in the constitutional history of the English race. It is not new in the constitutional history of this country, and it was not new in the Constitution of the United States when it became a part of the 14th Amendment, in the year 1866." After observing that the equivalent of the phrase "due process of law," according to Lord Coke, is found in the words, "law of the land," in the Great Charter, in connection with the guaranties of the 126]rights of the subject *against the oppression of the Crown, the court said: "In the series of amendments to the Constitution

of the United States, proposed and adopted immediately after the organization of the government, which were dictated by the jealousy of the states as further limitations upon the power of the Federal government, it is found in the fifth, in connection with other guaranties of personal rights of the same character." Among these guaranties this court distinctly said was protection against being twice tried for the same offense, and protection "against the accused being compelled, in a criminal case, to testify against himself." Again, said the court: "It is easy to see that when the great barons of England wrung from King John, at the point of the sword, the concession that neither their lives nor their property should be disposed of by the Crown, except as provided by the law of the land, they meant by 'law of the land' the ancient and customary laws of the English people, or laws enacted by the Parliament, of which those barons were a controlling element. It was not in their minds, therefore, to protect themselves against the enactment of laws by the Parliament of England. But when, in the year of grace 1866, there is placed in the Constitution of the United States a declaration that 'no state shall deprive any person of life, liberty, or property without due process of law,' can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail or has no application where the invasion of private rights is affected under the forms of state legislation."

I cannot support any judgment declaring that immunity from self-incrimination is not one of the privileges or immunities of national citizenship, nor a part of the liberty guaranteed by the 14th Amendment against hostile state action. The declaration of the court, in the opinion just delivered that immunity from self-incrimination is of great value, a protection to the innocent, and a safeguard against unfounded and tyrannical prosecutions, meets my cordial *ap-[127

proval. And the court having heretofore, upon the fullest consideration, declared that the compelling of a citizen of the United States, charged with crime, to be a witness against himself, was a rule abhorrent to the instincts of Americans, was in violation of universal American law, was contrary to the principles of free government, and a weapon of despotic power which could not abide the pure atmosphere of political liberty and personal freedom, I cannot agree that a state may make that rule a part of its law and binding on citizens, despite the Constitution of the United States. No former decision of this court requires that we should now

so interpret the Constitution.

STATE OF WASHINGTON, Complainant,
v.

STATE OF OREGON.

(See S. C. Reporter's ed. 127-136.)

Boundary — between states.

The middle of the north ship channel of the Columbia river, described as the boundary between Oregon and Washington in the act of February 14, 1859 (11 Stat. at L. 383, chap. 33), admitting Oregon into the Union, remains the boundary, subject to the changes in it which come by accretion and is not moved to the other channel because the latter, in the course of years, becomes the more important and is properly called the main channel of the river.

[For other cases, see *Boundaries*, III. b, in *Digest Sup. Ct.* 1908.]

[No. 3, Original.]

Argued January 8, 9, 1908. Decided November 16, 1908.

ORIGINAL BILL in equity filed by the State of Washington against the State of Oregon to determine the boundary line between those states. Boundary adjudged to be the center of the north channel of the Columbia river, changed only as it may be from time to time by accretions.

Statement by Mr. Justice Brewer:

This is an original suit, commenced in [128] this court on February 26, 1906, *by the state of Washington against the state of Oregon, to determine their boundary line. Pleadings were filed, testimony taken before a commissioner by consent of the parties, and on these pleadings and proofs the case has been argued and submitted. The maps or charts accompanying this opinion have been prepared from exhibits filed by the parties, and will aid to an understanding of the case.

A brief chronological statement is that on August 14, 1848, the territory of Oregon was established (9 Stat. at L. 323, chap. 177), and on March 2, 1853, the territory of Washington, including all that portion of Oregon territory lying north of the middle of the main channel of the Columbia river (10 Stat. at L. 172, chap. 90). On February 14, 1859, Oregon was admitted into the Union. The boundary, so far as is important in this controversy, is as follows (11 Stat. at L. 383, chap. 33):

"Beginning one marine league at sea due west from the point where the forty-second parallel of north latitude intersects the

same; thence northerly, at the same distance from the line of the coast, lying west and opposite the state, including all islands within the jurisdiction of the United States, to a point due west and opposite the middle of the north ship channel of the Columbia river; thence easterly, to and up the middle channel of said river, and where it is divided by islands, up the middle of the widest channel thereof, to a point near Fort Walla-Walla."

On February 22, 1889, an act was passed providing for the admission of Washington. 25 Stat. at L. 676, chap. 180. On November 11, 1889, the President, as authorized by § 8 of the statute last referred to, issued his proclamation, declaring Washington duly admitted into the Union. 26 Stat. at L. 1552. The material part of the boundary described in the Constitution of that state is—

"Beginning at a point in the Pacific ocean one marine league due west of and opposite the middle of the mouth of the north ship channel of the Columbia river, thence running easterly to and up the middle channel of said river, and where *it is divided [129 by islands up the middle of the widest channel thereof to where the forty-sixth parallel of north latitude crosses said river, near the mouth of the Walla Walla river." Art. 24, § 1; 2 Hill's *Anno. Statutes & Codes* (Wash.) p. 851.

Mr. E. C. Macdonald argued the cause, and, with Messrs. John D. Atkinson, Samuel H. Piles, A. J. Falknor, and J. B. Alexander, filed a brief for complainant.

Mr. A. M. Crawford argued the cause, and, with Messrs. I. H. Van Winkle, Harrison Allen, C. W. Fulton, and A. M. Smith, filed a brief for defendant.

Mr. Justice Brewer delivered the opinion of the court:

The northern boundary of the state of Oregon was established *prior to that [131 of the state of Washington, and it is not within the power of the national government to change that boundary without the consent of Oregon. Nor, indeed, was there any attempt to change it. The same description is found in both the act admitting Oregon and in the Constitution of Washington, under which that state was admitted. It will be perceived that the starting point in the line running up the Columbia river is a point "due west and opposite the middle of the north ship channel of the Columbia river." This language implies that there was more than one channel, and the middle of the north channel was named. There were at that time two channels, and the northerly one ran to the north of what is

NOTE.—On rivers and lakes as state boundaries—see note to *Buck v. Ellenbolt*, 15 L.R.A. 187.

On judicial settlement of state boundary—see note to *Nebraska v. Iowa*, 36 L. ed. U. S. 798.

called "Sand island." This is shown by abundant testimony, and is admitted by counsel for complainant. At that time the north channel was perhaps the better one,—at least, one quite generally used by vessels passing in and out of the river, although the quantity and direction of the wind was an important factor. It is true there has been no little variation in the channels at and near the entrance, as might be expected considering the great width of the mouth and the sandy character of the soil underneath a large part of the river. The earliest known chart is a sketch made in 1792 by Admiral Vancouver, which does not show Sand island, but discloses two inside channels uniting and crossing the bar into the ocean with a depth of 27 feet. Chart "A," made by the United States authorities in 1851, shows the condition of the mouth of the river as it then existed. The two channels are plainly disclosed. The brown color indicates land above low-water mark; the yellow, water of 18 feet in depth or less, and the white, water over 18 feet in depth. See notation at the upper left-hand corner. The existence of the two channels clearly opened the way for a selection of one as the boundary, and the north one was adopted. Sand island appears as a small body of land surrounded by shoal water. Another chart was prepared in 1854, which of all the charts and maps is the nearest in point of time to 132]the admission of *Oregon. On this, as in Chart "A," Sand island is shown, and the two channels, one north and the other south of the island. It is called an island, but it was little more than a sand bar. By the action of the waters it had been gradually moving northward, but the general configuration of the mouth of the river was unchanged. Since then the movement of Sand 133]*island has continued, the north channel has been growing more shallow, and the southern channel has become the one most used. The movements of Sand island and the changes in the entrance are shown in chart "B."

Looking only at the description of the boundary in the act, one might think that there were three channels, north, south, and middle; but it is quite apparent from the testimony that there were but the two. The meaning would be more clear if the language was "easterly to and up the middle of said channel," and that that was the intent of Congress is, we think, obvious; first, because there were only two channels; second, to locate a starting point on the west line in the ocean, opposite the middle of one channel, and thence run the boundary up the middle of another channel, would hardly be expected. If the middle of the northern channel was intended to be the dividing line

between Oregon and the territory north, it would be natural to fix the point of starting in the ocean west of the center of that channel. Further, that the channel north of Sand island was the one intended as the boundary between Oregon and the territory north of it is made more clear by this fact:

On October 21, 1864, Oregon passed an act granting to the United States—

"all right and interest of the state of Oregon, in and to the land in front of Fort Stevens and Point Adams, situate in this state, and subject to overflow between high and low tide, and also to Sand island, situate at the mouth of the Columbia river in this state; the said island being subject to overflow between high and low tide.

"Sec. 2. The governor of this state shall cause two copies of this act to be prepared and certified under the seal of this state, and forward one of such copies to the Secretary of War of the United States, and the other of such copies to the commanding officer of this district of the military department of the Pacific coast." Special Laws of Oregon, 1864, p. 72.

Now this act was passed shortly after the admission of Oregon, and indicates the understanding both of the state of Oregon and the United States, that the bound-134]ary was through the channel north of Sand island. It is a recognition of Oregon's title to that island and an acceptance by the United States of a grant from that state.

While all this is not in terms admitted by counsel for complainant, yet the burden of their principal contention impliedly does so, for they say:

"The proof will disclose the fact that there have been various channels in the Columbia river which have gradually, imperceptibly, and continuously changed and shifted. There has been at no time such a change as to come within the definition of avulsion. The contention of the complainant is that the true boundary line is the varying center or middle of that channel of the river which is best constituted and ordinarily used for the purposes of navigation. . . . The line claimed by the defendant commences at a point which is alleged to have been the middle of the north ship channel of the river as it existed in 1859 (the year in which Oregon was admitted into the Union), and follows certain channels supposed to exist in that year throughout the portion of the river in controversy."

In support of their contention counsel refer to: *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Iowa v. Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239; *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571. To these may be added *Missouri*

v. Nebraska, 196 U. S. 23, 35, 49 L. ed. 372, 374, 25 Sup. Ct. Rep. 155.

But in these cases the boundary named was "the middle of the main channel of the river," or "the middle of the river," and it was upon such a description that it was held that, in the absence of avulsion, the boundary was the varying center of the channel. But there is no fixed rule making that the boundary between states bordering on a river. Thus, the grant of Virginia, all right, title, and claim which the said commonwealth had to the territory northwest of the river Ohio, was held to place the boundary on the north bank of the river. *Handly v. Anthony*, 5 Wheat. 374, 5 L. ed. 113, in which the subject is discussed by Mr. Chief Justice Marshall. See also *Howard v. Ingersoll*, 13 How. 381, 14 L. ed. 189. Now, if Congress, in establishing [135] the boundary *between Washington and Oregon, had simply named the middle of the river, or the center of the channel, doubtless it would be ruled that the center of the main channel, varying, as it might, from year to year through the processes of accretion, was the boundary between the two states. That Congress had the propriety of such a boundary in mind is suggested by the terms of the act establishing the territorial government of Washington, passed March 2, 1853 (10 Stat. at L. 172, 90), in which "the middle of the main channel of the Columbia river" was named as the boundary. However, as we have seen, when Congress came to provide for the admission of Oregon (doubtless from being more accurately advised as to the condition of the channels of the Columbia river), it provided that the boundary should be the middle of the north channel. The courts have no power to change the boundary thus prescribed and establish it at the middle of some other channel. That remains the boundary, although some other channel may, in the course of time, become so far superior as to be practically the only channel for vessels going in and out of the river. It is true the middle of the north ship channel may vary through the processes of accretion. It may narrow in width, may become more shallow, and yet the middle of that channel will remain the boundary. This is but enforcing the idea which controlled the decisions in the prior cases referred to, the difference springing out of the fact that here there were two instead of but one substantial channel. Aside from the fact that any other rule would be ignoring the action of the government in prescribing the boundary,—the

intention in respect to which was in effect confirmed by the conveyance from Oregon to the United States of Sand island and adjoining lands,—there would be this practical difficulty: At the time of the admission of Oregon both the north and south channels were freely used. The depth of water in each was nearly the same, and the use of either channel depended largely upon the prevailing wind, so that it would be hard to say which was the most important, so surpassing in importance the other as to be properly called the main channel. *Con-[136] cede that to-day, owing to the gradual changes through accretion, the north channel has become much less important, and seldom, if ever, used by vessels of the largest size, yet, when did the condition of the two channels change so far as to justify transferring the boundary to the south channel? When and upon what conditions could it be said that grants of land or of fishery rights made by the one state ceased to be valid because they had passed within the jurisdiction of the other? Has the United States lost title to Sand island by reason of the change in the main channel? And if by accretion the north should again become the main channel, would the boundary revert to the center of that channel? In other words, does the boundary move from one channel to the other, according to which is, for the time being, the most important, the one most generally used?

These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states bordering on that river, the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river.

The testimony fails to show anything calling for consideration in respect to the last clause in the quotation from the boundary of Oregon. The channel is not divided by islands.

Our conclusion, therefore, is in favor of the state of Oregon, and that the boundary between the two states is the center of the north channel, changed only as it may be from time to time through the processes of accretion.

This is one of those cases in which the parties to the suit are alike interested, and, according to the usual rule, the costs will be divided equally between them.

137]*HONOLULU RAPID TRANSIT & LAND COMPANY Appt.,

v.

CHARLES T. WILDER, Assessor.†

(See S. C. Reporter's ed. 137-144.)

Taxes — Federal agencies.

1. Franchises granted by the Hawaiian government between July 7, 1898, and September 28, 1899, were not made acts of Congress by adoption, so as to be exempt from territorial taxation, by the provision of the organic act of April 30, 1900 (31 Stat. at L. 141, 154, chap. 339), § 73, ratifying and affirming such franchises.

[Taxation of Federal agencies, see Taxes, I. c. 2, in Digest Sup. Ct. 1908.]

Taxes — exemption.

2. An intention to exempt from a franchise tax cannot be gathered from the provisions of a railway charter that its income is lawfully chargeable with certain specified expenses and with "every other cost and charge properly or necessarily connected with the maintenance and operation of said railway," with dividends and with a sinking fund, and that the excess of income shall be divided equally between the government and the stockholders, where a subsequent provision exempts the property from taxation while under construction, "provided that, as fast as completed and equipped, the completed and equipped portion shall become liable to such taxation," although, when the charter was granted, real and personal property were, under Haw. Rev. Laws 1905, § 1216, assessed for taxation "separately as to each item thereof for its full value."

[For other cases, see Taxes, 419-435, in Digest Sup. Ct. 1908.]

[No. 23.]

Argued October 28, 29, 1908. Decided November 16, 1908.

A PPEAL from the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a decision of the Tax Appeal Court of the First Judicial Circuit of that territory, imposing a franchise tax. Affirmed.

See same case below, 18 Haw. 15.

The facts are stated in the opinion.

Messrs. David L. Withington and Aldis B. Browne argued the cause, and, with Messrs. Alexander Britton and William R. Castle, filed a brief for appellant:

Although the word "franchise" is to be found in Hawaii Rev. Laws 1905, § 1215, which describes the character of personal property to be taxed, it had long been held

†Substituted as a party in place of James L. Holt.

NOTE.—On taxation of corporate franchises—see note to Louisville Tobacco Warehouse Co. v. Com. 57 L.R.A. 34.

That exemption from taxation, whether a contract or not, is not implied—see note to Tucker v. Ferguson, 22 L. ed. U. S. 805.

53 L. ed.

to be the policy of Hawaii to tax only tangible property.

McBryde v. Kala, 6 Haw. 529; Brewer v. Luce, 6 Haw. 554.

Where the property itself is taxed which comprises the enterprise, to tax the right to share is double taxation.

Kekaha Sugar Co. v. Hawaiian Government, 8 Haw. 293; Alexander v. Fornander, 6 Haw. 322; Haiku Sugar Co. v. Fornander, 6 How. 532; Castle v. Luce, 4 Haw. 63.

Where a price has been paid or agreed to be paid for a franchise, this becomes a fixed consideration for the granting of the franchise, which cannot be changed by the legislature alone.

Gordon v. Appeal Tax Court, 3 How. 133, 145, 11 L. ed. 529, 535.

And where this language is said to have been qualified and limited in subsequent decisions, it stands unreversed and approved on the proposition that, while the exemption from taxation must be plainly and unmistakably granted, since in grants from the public nothing passes by implication, the exemption need not be in any particular words, is not implied, but is expressed, if, from all the language of the grant, there is no doubt of the contract.

New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381; Piqua Branch of State Bank v. Knoop, 16 How. 369, 14 L. ed. 977; New York v. Tax & A. Comrs. 4 Wall. 244, 18 L. ed. 344; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; Farrington v. Tennessee, 95 U. S. 679, 24 L. ed. 558; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Memphis Gaslight Co. v. Taxing District, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; New Orleans City & Lake R. Co. v. New Orleans, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406.

In cases where it was sought to tax one party to the contract, who was a nonresident, by providing that the other party, who was a resident, should retain something on account of the contract to pay taxes, this was beyond the power of the taxing authority,—a law which interfered with the contract between the parties.

New York, L. E. & W. R. Co. v. Pennsylvania, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

The line of distinction between those cases in this court which have sustained the tax and those denying the right is to be found by determining the question whether there is a contract between the parties, fixing their pecuniary rights, which the imposition of the tax would alter. In every

such case it is necessary that the reservation of the power to alter by taxation should be expressed; for that surrender is expressed by a contract, with the terms of which the particular form of taxation is inconsistent.

New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. *supra*; New York ex rel. Brooklyn City R. Co. v. New York State Tax Comrs. 199 U. S. 48, 50 L. ed. 79, 25 Sup. Ct. Rep. 713; *Citizens' Bank v. Parker*, 192 U. S. 73, 48 L. ed. 346, 24 Sup. Ct. Rep. 181.

It has been said by this court more than once that the power of amendment of charters may be exercised where it will not defeat or substantially impair the object of the grant or any rights which have vested under it.

Holyoke Water-Power Co. v. Lyman, 15 Wall. 500, 21 L. ed. 133; *Fair Haven & W. R. Co. v. New Haven*, 203 U. S. 379, 51 L. ed. 237, 27 Sup. Ct. Rep. 74.

But, as was said in the latter case, quoting from *Shields v. Ohio*, 95 U. S. 319, 24 L. ed. 357, the "alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation."

Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Los Angeles v. Los Angeles City Water Co.* 124 Cal. 368, 57 Pac. 210, 571; *Los Angeles v. Los Angeles City Water Co.* 61 Cal. 65; *Stein v. Mobile*, 49 Ala. 362, 20 Am. Rep. 283.

The franchise of the company, granted by the republic of Hawaii July 7, 1898, ratified by Congress and approved by the President, is not assessable.

California v. Central P. R. Co. 127 U. S. 1, 32 L. ed. 150, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Thomson v. Union P. R. Co.* 9 Wall. 579, 19 L. ed. 792; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *Central P. R. Co. v. California*, 162 U. S. 91, 40 L. ed. 903, 16 Sup. Ct. Rep. 766; *Southern P. R. Co. v. California*, 162 U. S. 167, 40 L. ed. 929, 16 Sup. Ct. Rep. 794; *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Atty. Gen. v. Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; *Western U. Teleg. Co. v. Missouri*, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *San Francisco v. Western U. Teleg. Co.* 96 Cal. 140, 17 L.R.A. 301, 31 Pac. 10.

Mr. Charles R. Hemenway argued the cause, and, with Mr. Mason F. Prosser, filed a brief for appellee:

The supreme court of Hawaii did not err in holding the franchise of appellant subject to taxation as a part of the combined property of appellant.

(a) It is not a Federal franchise, and, even if it were, it would be subject to local taxation.

Miners' Bank v. Iowa, 12 How. 1, 13 L. ed. 867; *Lyons v. Woods*, 153 U. S. 661, 38 L. ed. 858, 14 Sup. Ct. Rep. 959; *United States v. Church of Jesus Christ of L. D. S.* 5 Utah, 373, 15 Pac. 479; *Atlantic & P. R. Co. v. Lesueur*, 2 Ariz. 428, 1 L.R.A. 244, 2 Inters. Com. Rep. 189, 19 Pac. 157.

(b) The terms of the franchise itself grant no immunity from taxation, nor is it exempt under the general laws of Hawaii.

Chicago Theological Seminary v. Illinois, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386; *New Orleans City & Lake R. Co. v. New Orleans*, 143 U. S. 192, 36 L. ed. 121, 12 Sup. Ct. Rep. 406; *Memphis Gaslight Co. v. Taxing District*, 109 U. S. 398, 27 L. ed. 976, 3 Sup. Ct. Rep. 205; *Chicago, B. & K. C. R. Co. v. Guffey* (*Chicago, B. & K. C. R. Co. v. Missouri*) 120 U. S. 569, 30 L. ed. 732, 7 Sup. Ct. Rep. 693; *Atlantic & P. R. Co. v. Lesueur*, *supra*; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665-668, 29 L. ed. 770, 771, 6 Sup. Ct. Rep. 625; *Bank of Commerce v. Tennessee*, 161 U. S. 134-146, 40 L. ed. 645-649, 16 Sup. Ct. Rep. 456; *Ford v. Delta & P. Land Co.* 164 U. S. 662-666, 41 L. ed. 590-592, 17 Sup. Ct. Rep. 230; *Hoge v. Richmond & D. R. Co.* 99 U. S. 348-355, 25 L. ed. 303-305.

As a general rule, the franchise, capital stock, business, and profits of all corporations are liable to taxation in the place where they do business and by the state which creates them, and any exemption from such taxation must be given in clear terms.

Central P. R. Co. v. California, 162 U. S. 91-126, 40 L. ed. 903-915, 16 Sup. Ct. Rep. 766; *State Railroad Tax Cases*, 92 U. S. 575-603, 23 L. ed. 663-670; *State Freight Tax Case*, 15 Wall. 232, 21 L. ed. 146; *Society for Savings v. Coite*, 6 Wall. 607, 18 L. ed. 902; *Thomson v. Union P. R. Co.* 9 Wall. 579-590, 19 L. ed. 792-798; *Henderson Bridge Co. v. Kentucky*, 166 U. S. 150, 41 L. ed. 953, 17 Sup. Ct. Rep. 532; *Atlantic & P. R. Co. v. Lesueur*, *supra*.

Under the provisions of the act to provide a government for the territory of Hawaii (31 Stat. at L. 141, chap. 339), as is also the case under the other organic acts of the other territories, the power of taxation is general and restricted only by the Constitution and laws of the United States.

Peacock v. Pratt, 58 C. C. A. 48, 121 Fed. 776; Talbott v. Silver Bow County, 139 U. S. 438, 35 L. ed. 210, 11 Sup. Ct. Rep. 594; Atlantic & P. R. Co. v. Lesueur, supra; Silver Bow County v. Davis, 6 Mont. 306, 12 Pac. 688.

(c) The tax assessed and in controversy here is not upon the franchise of appellant as such, but upon the combined property of appellant as an enterprise for profit.

Mr. Justice Holmes delivered the opinion of the court:

This is an appeal from a judgment affirming a decision of the tax appeal court and sustaining a tax upon the appellant. The appellant objected to the tax on the grounds that its franchise was derived from an act of Congress, and therefore was exempt from taxation, and that its charter also exempted it in terms. These objections, taken below, were argued at length before us.

The charter was granted by the Republic of Hawaii on July 7, 1898, the day on which Congress passed the resolution of annexation [30 Stat. at L. 750], and doubts having been felt as to the right of the Hawaiian legislature to grant a charter at that time (see 22 Ops. Atty. Gen. 574; Id. 627), the organic act declared that "subject to the approval of the President . . . all franchises granted by the Hawaiian government in conformity with the laws of Hawaii, between 142] the seventh day of July, *eighteen hundred and ninety-eight, and the twenty-eighth day of September, eighteen hundred and ninety-nine, are hereby ratified and confirmed." Act of April 30, 1900, chap. 339, § 73, 31 Stat. at L. 141, 154. It is contended that the effect of this section was to make the charter an act of Congress by adoption. In our opinion this is a mistake. There is no doubt that local legislation under the authority of Congress previously granted is treated as emanating from its immediate, not from its remote, source, in determining rights and liabilities. *Kawanakoa v. Polyblank*, 205 U. S. 349, 353, 354, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526. See *Re Moran*, 203 U. S. 96, 104, 51 L. ed. 105, 108, 27 Sup. Ct. Rep. 25. A general ratification like that of existing laws in § 6 would have no greater effect. We discover nothing in the words just quoted from § 73 to indicate that Congress had this particular franchise in view, or meant to adopt it and give it a superior source, or to do anything more than to supply the power that by accident might have been wanting. See *Miners' Bank v. Iowa*, 12 How. 1, 8, 13 L. ed. 867, 870; *Murphy v. Utter*, 186 U. S. 95, 106, 46 L. ed. 1070, 1077, 22 Sup. Ct. Rep. 776. We need not pursue further 53 L. ed.

this part of the objection to the tax, except to remark that, in view of obvious purpose, it properly was admitted that July 7 was not excluded from the ratification by the word "between." See *Taylor v. Brown*, 147 U. S. 640, 37 L. ed. 313, 13 Sup. Ct. Rep. 549. For it also was admitted at the argument before us that, if there was no exemption in the charter, the appellant had no case, and we are of opinion that there was none.

The tax in question is a property tax, and the effect of the decision is to uphold a valuation of the whole property as a going concern, and as more than a mere congeries of items; or, in other words, an addition of half a million dollars to the appellant's valuation, for the franchise of the company. The appellant says that this was contrary to § 17 of its charter, construed in the light of the scheme disclosed. That section provides that "the following charges shall be lawful upon the income of said railway: 1st. The expense of operating, repairs, renewals, extensions, interest, and every other cost and charge properly or necessarily connected with the maintenance and *operation [143 of said railway. 2d. Dividends may be paid to the stockholders not to exceed 8 per cent on the par value of the stock issued. 3d. A sinking fund may be created for the redemption of any bond which may be issued, or other record debt, and the capital upon the expiration of the franchise. Provided [that the amount is limited as set forth]. 4th. The excess of income shall be divided equally between the government of the Republic of Hawaii and the stockholders of said corporation." It is said that here is a complete plan for the division of the income, declaring what charges shall be lawful, and that only such taxes are allowed as fall under the words, "other charge properly connected with the maintenance and operation of the road."

The taxes authorized as such charges are thought to be limited to a license tax not to exceed \$10 on each passenger car used, imposed by § 31, and to the provisions of § 30. The latter section exempts from duty material produced in and imported from the United States, and goes on to say that "the property of said association and others shall not be liable to internal taxation while said railway is under construction, provided that, as fast as completed and equipped, the completed and equipped portion shall become liable to such taxation." It is said that, when the charter was granted, real and personal property were assessed for taxation "separately as to each item thereof for its full cash value," with provisos deemed not to be material (Rev. Laws,

Hawaii, 1905, § 1216); that § 30 contemplates a taxation of this kind, and that a taxation of the franchise would be double taxation, and was excluded. It is true that one of the provisos in § 1216 taxes going concerns as wholes, but § 30 is thought to show a choice of the other method. It is contended that the charter, by fair implication, contracts against any other charges, especially in view of the ultimate division of the excess of income, after the payment of 8 per cent dividend. If the dividends do not exceed 8 per cent, the tax will fall wholly on the stockholders, contrary to the fair understanding of what the charter holds out. 144] *The argument, of which we have given a summary outline, is far from establishing such a clear renunciation of the right to tax as the cases require. *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705. It appears to us very questionable whether the phrase, "charges properly or necessarily connected with the maintenance and operation of the road," has any reference to taxes. It points in an other direction. Taxes are left unmentioned in § 17, and the liability to them is assumed. The language of § 30 does not import the imposition of a tax that otherwise would be excluded. It takes the liability for granted, and relieves the company from the burden for a certain time. The drift of the section cannot be made clearer by lengthy restatement. It starts with exoneration and merely saves the right to tax the portions completed by a proviso which, in this case, fulfils the proper function of that much-abused term. If any doubt were raised by § 17, which does not seem to us to be the case, it would be relieved by this further section of the same act. Nothing else seems to us to need mention in the present posture of the case.

Judgment affirmed.

HONOLULU RAPID TRANSIT & LAND
COMPANY, Plff. in Err.,

v.

CHARLES T. WILDER, Assessor.†

(See S. C. Reporter's ed. 144, 145.)

Error to Hawaiian supreme court — jurisdictional amount.

1. A writ of error from the Supreme Court of the United States to the Hawaiian supreme court, to review a judgment sustaining an assessment for taxation, will not lie under the act of March 3, 1905 (33 Stat. at L. 1035, chap. 1465), § 3, where the amount of the tax assessed is less than

†Substituted as a party in place of James L. Holt.

the jurisdictional amount prescribed by that section.

[For other cases, see *Appeal and Error*, 488, 489, in *Digest Sup. Ct.* 1908.]

Error to Hawaiian supreme court — Federal question.

2. The failure of the record to show that any Federal question was raised or suggested before the assignment of error in the Federal Supreme Court precludes the maintenance of a writ of error from that court under the act of April 30, 1900 (31 Stat. at L. 141, chap. 339), § 86, to review a judgment of the Hawaiian supreme court. [For other cases, see *Appeal and Error*, 1044, 1045, in *Digest Sup. Ct.* 1908.]

[No. 22.]

Argued October 28, 29, 1908. Decided November 16, 1908.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a decision of the Tax Appeal Court of the First Judicial Circuit of that territory, sustaining an income tax, Dismissed for want of jurisdiction.

See same case below, 18 Haw. 15.

The facts are stated in the opinion.

Mr. David L. Withington argued the cause, and, with Mr. William R. Castle, filed a brief for plaintiff in error.

Mr. Aldis B. Browne also argued the cause for plaintiff in error.

Mr. Charles R. Hemenway argued the cause, and, with Mr. Mason F. Prosser, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This case is intended to bring up a question of deductions from gross income in assessing the income tax of the appellant, as well as that of the liability of the plaintiff in error to the tax. The liability to taxes not mentioned in the charter has been disposed of by the preceding case. As to the former question, the plaintiff in error says that it has no net income liable to taxation. But the whole tax assessed was \$588.20, and therefore the case cannot be brought here under the act of March 3, 1905, chap. 1465, § 3, 33 Stat. at L. 1035. On the other hand, the record does not show that any Federal question was raised or suggested before the assignment of error in this court, and therefore the plaintiff in error has no standing under the act of April 30, 1900, chap. 339, § 86, 31 Stat. at L. 141. It is true that, in the decision of the tax appeal court, it is said that the appellant

NOTE.—On Federal questions as sustaining the appellate jurisdiction of the Federal Supreme Court over territorial supreme courts—see note to *New York Foundling Hospital v. Gatti*, 51 L. ed. U. S. 254.

claims, under § 17 of its charter, a right to charge certain amounts against income. But it does not appear there or elsewhere that the appellant set up that the charter was a statute of the United States, or that it relied upon article 1, § 10, or any other clause of the Constitution of the United States.

Writ dismissed.

146] *MORITA KEIZO, Plff. in Err.,
v.

WILLIAM HENRY, High Sheriff of the Territory of Hawaii.

(See S. C. Reporter's ed. 146-149.)

Habeas corpus — scope — questions reviewable.

Questions respecting the qualifications of the grand jurors, open to the accused in the original case, cannot, after conviction, be raised collaterally by habeas corpus, which may not, in this manner, usurp the functions of a writ of error.

[For other cases, see Habeas Corpus, 52, 164-168, in Digest Sup. Ct. 1908.]

[No. 27.]

Argued October 29, 1908. Decided November 16, 1908.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment discharging a writ of habeas corpus. Affirmed.

The facts are stated in the opinion.

Messrs. Duane E. Fox and Arthur S. Browne argued the cause, and with Mr. A. S. Humphreys, filed a brief for plaintiff in error.

Mr. Charles R. Hemenway argued the cause, and, with Mr. M. F. Prosser filed a brief for defendant in error.

Mr. Justice Moody delivered the opinion of the court:

This is a writ of error directed to a judgment of the supreme court of the territory of Hawaii, discharging a writ of habeas corpus and remanding the petitioner to the custody of the sheriff. The plaintiff in error was indicted for murder by a grand jury at a term of a circuit court of the territory, held in August, 1905. The grand jury was composed of sixteen members. A plea in abatement was seasonably filed, alleging that

*eight of the grand jurors were[147 not citizens of the United States or of the territory,—a qualification prescribed by the laws of the territory. The territory joined issue on this plea. The parties then agreed upon the facts upon which it was based; namely, that the eight grand jurors questioned were citizens only by virtue of judgments of naturalization in a circuit court of the territory. The plea, with the agreed facts, raised the question of the jurisdiction of the circuit court of the territory to naturalize aliens. Under a statute of the territory that question was certified to the supreme court, and that court held that the circuit courts of the territory had jurisdiction to naturalize, and that the grand jury possessed the necessary qualifications. Thereupon the trial judge overruled the plea in abatement, and an exception was taken. After due proceedings, plaintiff in error was found guilty as charged, and, on March 22, 1906, sentenced to death. Thereupon he prosecuted a writ of error to the supreme court of the territory, assigning, among other errors, the overruling of the plea in abatement. The judgment of the lower court was affirmed by the supreme court on October 23, 1906, and a death warrant thereupon was issued by the governor of the territory, commanding the high sheriff to execute the sentence of death on January 22, 1907. No writ of error was sued out on the foregoing judgments of the supreme court. The plaintiff in error, however, six days before the date fixed for his execution, filed a petition for habeas corpus in the supreme court of the territory, basing his claim for discharge from custody upon the same facts set forth in the plea of abatement and in the agreed statement of facts. The petition alleged that, for the reason of the disqualification of eight members of the grand jury, the indictment was void, and that the trial court was without jurisdiction to proceed against him under it. The writ of habeas corpus was discharged and the petition remanded to the custody of the sheriff, and to this judgment the present writ of error is directed.

The principal question argued before us by counsel is, whether the eight members of the grand jury, whose qualifications were *questioned, were naturalized by courts[148 having the authority to naturalize aliens. But we find no occasion to decide or consider this question. If the plaintiff in error desired the judgment of this court upon it, he should have brought a writ of error to the judgment of the supreme court of the territory which passed upon it in affirming the judgment of conviction in the trial court. He may not lie by, as he did in this case, until the time for the execution of the judgment comes near, and then seek

NOTE.—As to questions reviewable by habeas corpus—see notes to State v. Jackson, 1 L.R.A. 373; Bion's Appeal, 11 L.R.A. 694; United States v. Hamilton, 1 L. ed. U. S. 490; Ex parte Carll, 27 L. ed. U. S. 288; Oteiza y Cortes v. Jacobus, 34 L. ed. U. S. 464; Pearce v. Texas, 39 L. ed. U. S. 164; and Glass v. The Betsey, 1 L. ed. U. S. 489.

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to raise collaterally, by habeas corpus, questions not affecting the jurisdiction of the court which convicted him, which were open to him in the original case, and, if properly presented then, could ultimately have come to this court upon writ of error. Unquestionably, if the trial court had exceeded its jurisdiction, a prisoner held under its judgment might be discharged from custody upon a writ of habeas corpus by another court having the authority to entertain the writ (*Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Ex parte Siebold*, 100 U. S. 371, 25 L. ed. 717; *Ex parte Yarbrough*, 110 U. S. 651, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Ex parte Wilson*, 114 U. S. 417, 29 L. ed. 89, 5 Sup. Ct. Rep. 935), though even in a case of this kind a court will sometimes refrain from releasing a prisoner upon writ of habeas corpus, and will remit him to his remedy by writ of error (*Riggins v. United States*, 199 U. S. 547, 50 L. ed. 303, 26 Sup. Ct. Rep. 147; *Urquhart v. Brown*, 205 U. S. 179, 51 L. ed. 760, 27 Sup. Ct. Rep. 459). But no court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the cause of person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of habeas corpus, which may not, in this manner, usurp the functions of a writ of error. *Ex parte Parks*, 93 U. S. 18, 23 L. ed. 787; *Ex parte Siebold*, *supra*, 375; *Ex parte Yarbrough*, *supra*, 651, 653; *Ex parte Wilson*, *supra*, 421; *Re Delgado*, 140 U. S. 586, 35 L. ed. 578, 11 Sup. Ct. Rep. 874; *United States v. Pridgeon*, 153 U. S. 48, 59, 63, 38 L. ed. 631, 635, 637, 14 Sup. Ct. Rep. 746; *Andrews v. Swartz*, 156 U. S. 272, 276, 39 L. ed. 422, 423, 15 Sup. Ct. Rep. 389; *Riggins v. United States*, *supra*; *Felts v. Murphy*, 201 U. S. 123, 50 L. ed. 689, 26 Sup. Ct. Rep. 366; *Valentina v. Mercer*, 201 U. S. 131, 50 L. ed. 693, 26 Sup. Ct. Rep. 368.

149] *These well-settled principles are decisive of the case before us. Disqualifications of grand jurors do not destroy the jurisdiction of the court in which an indictment is returned, if the court has jurisdiction of the cause and of the person, as the trial court had in this case. *Ex parte Harding*, 120 U. S. 782, 30 L. ed. 824, 7 Sup. Ct. Rep. 780; *Re Wood*, 140 U. S. 278, 35 L. ed. 505, 11 Sup. Ct. Rep. 738; *Re Wilson*, 140 U. S. 575, 35 L. ed. 513, 11 Sup. Ct. Rep. 870. See *Re Moran*, 203 U. S. 96, 104, 51 L. ed. 105, 108, 27 Sup. Ct. Rep. 25. The indictment, though voidable, if the objection is seasonably taken, as it was in this case,

is not void. *United States v. Gale*, 109 U. S. 65, 27 L. ed. 857, 3 Sup. Ct. Rep. 1. The objection may be waived, if it is not made at all or delayed too long. This is but another form of saying that the indictment is a sufficient foundation for the jurisdiction of the court in which it is returned, if jurisdiction otherwise exists. That court has the authority to decide all questions concerning the constitution, organization, and qualification of the grand jury, and, if there are errors in dealing with these questions, like all other errors of law committed in the course of the proceedings, they can only be corrected by writ of error.

Judgment affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Appt.,

v.

ERASMUS L. MOTTLEY and Annie E. Mottley, His Wife.

(See S. C. Reporter's ed. 149-154.)

Courts — jurisdiction — Federal question — anticipated defense.

A suit to compel the specific performance by a carrier of its agreement to issue free passes annually to the complainants is not brought within the original jurisdiction of a Federal circuit court as one arising under the Constitution or laws of the United States, within the meaning of the act of August 13, 1888 (25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 509), by allegations in the bill that the refusal to comply with the contract is based upon the provision of the act of Congress of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), and that such act does not prohibit the giving of passes under the circumstances of the case, and, if construed as having such effect, violates U. S. Const., 5th Amend., by denying due process of law.

[For other cases, see *Courts*, 506-508, in *Digest Sup. Ct.* 1908.]

[No. 37.]

Submitted October 13, 1908. Decided November 16, 1908.

APPEAL from the Circuit Court of the United States for the Western District of Kentucky to review a decree overruling a demurrer to and granting the relief prayed for in a bill to compel specific performance. Reversed and remanded with instructions to dismiss the suit for want of jurisdiction.

See same case below, 150 Fed. 406.

NOTE.—As to Federal question as concerning jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7; and *Bailey v. Mosher*, 11 C. C. A. 308.

Statement by Mr. Justice Moody:

The appellees (husband and wife), being residents and citizens of Kentucky, brought this suit in equity in the circuit court of the United States for the western district of Kentucky against the appellant, a railroad company and a citizen of the same state. The object of the suit was to compel the specific performance of the following contract:

Louisville, Ky., Oct. 2d, 1871.

The Louisville & Nashville Railroad Company, in consideration that E. L. Mottley and wife, Annie E. Mottley, have this day released company from all damages or claims for damages for injuries received by them on the 7th of September, 1871, in consequence of a collision of trains on the railroad of said company at Randolph's Station, Jefferson County, Kentucky, hereby agrees to issue free passes on said railroad and branches now existing or to exist, to said E. L. & Annie E. Mottley for the remainder of the present year, and thereafter to renew said passes annually during the lives of said Mottley and wife or either of them.

The bill alleged that in September, 1871, plaintiffs, while passengers upon the defendant railroad, were injured by the defendant's negligence, and released their respective claims for damages in consideration of the agreement for transportation during their lives, expressed in the contract. It is alleged that the contract was performed by the defendant up to January 1, 1907, when the defendant declined to renew the passes. The bill then alleges that the refusal **151**]to comply with the contract*was based solely upon that part of the act of Congress of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), which forbids the giving of free passes or free transportation. The bill further alleges: First, that the act of Congress referred to does not prohibit the giving of passes under the circumstances of this case; and, second, that, if the law is to be construed as prohibiting such passes, it is in conflict with the 5th Amendment of the Constitution, because it deprives the plaintiffs of their property without due process of law. The defendant demurred to the bill. The judge of the circuit court overruled the demurrer, entered a decree for the relief prayed for, and the defendant appealed directly to this court.

Mr. Henry Lane Stone submitted the cause for appellant.

Mr. Lewis McQuown submitted the cause for appellees. Mr. Clarence U. McElroy was on the brief.
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Mr. L. A. Shaver, as *amicus curiæ*, filed a brief for the Interstate Commerce Commission.

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court:

Two questions of law were raised by the demurrer to the bill, were brought here by appeal, and have been argued before us. They are, first, whether that part of the act of Congress of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), which forbids the giving of free passes or the collection of any different compensation for transportation of passengers than that specified in the tariff filed, makes it unlawful to perform a contract for transportation of persons who, in good faith, before the passage of the act, had accepted such contract in satisfaction of a valid cause of action against the railroad; and, second, whether the statute, if it should be construed to render such a contract unlawful is in *violation of the 5th Amendment of **[152]** the Constitution of the United States. We do not deem it necessary, however, to consider either of these questions, because, in our opinion, the court below was without jurisdiction of the cause. Neither party has questioned that jurisdiction, but it is the duty of this court to see to it that the jurisdiction of the circuit court, which is defined and limited by statute, is not exceeded. This duty we have frequently performed of our own motion. *Mansfield, C. & L. M. R. Co. v. Swan*, 111 U. S. 379, 382, 28 L. ed. 462, 463, 4 Sup. Ct. Rep. 510; *King Iron Bridge & Mfg. Co. v. Otoe County*, 120 U. S. 225, 30 L. ed. 623, 7 Sup. Ct. Rep. 552; *Blacklock v. Small*, 127 U. S. 96, 105, 32 L. ed. 70, 73, 8 Sup. Ct. Rep. 1096; *Cameron v. Hodges*, 127 U. S. 322, 326, 32 L. ed. 132, 134, 8 Sup. Ct. Rep. 1154; *Metcalf v. Watertown*, 128 U. S. 586, 587, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Continental Nat. Bank v. Buford*, 191 U. S. 120, 48 L. ed. 119, 24 Sup. Ct. Rep. 54.

There was no diversity of citizenship, and it is not and cannot be suggested that there was any ground of jurisdiction, except that the case was a "suit . . . arising under the Constitution or laws of the United States." 25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 509. It is the settled interpretation of these words, as used in this statute, conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough that the plaintiff alleges some anticipated defense to his cause of action, and asserts

that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do not show that the suit, that is, the plaintiff's original cause of action, arises under the Constitution. In *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654, the plaintiff, the state of Tennessee, brought suit in the circuit court of the United States to recover from the defendant certain taxes alleged to be due under the laws of the state. The plaintiff alleged that the defendant claimed an immunity from the taxation by virtue of its charter, and that therefore the tax was void, because in violation of the provision of the Constitution of the United States, which forbids any state from passing a law impairing the obligation of contracts. The cause was held to be beyond the jurisdiction of the circuit court, the court saying, by Mr. Justice Gray (p. 464): "A suggestion of one party, that the other will or may set up a claim under the Constitution or laws of the United States, does not make the suit one arising under that Constitution or those laws." Again, in *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434, the plaintiff brought suit in the circuit court of the United States for the conversion of copper ore and for an injunction against its continuance. The plaintiff then alleged, for the purpose of showing jurisdiction, in substance, that the defendant would set up in defense certain laws of the United States. The cause was held to be beyond the jurisdiction of the circuit court, the court saying, by Mr. Justice Peckham (pp. 638, 639):

"It would be wholly unnecessary and improper, in order to prove complainant's cause of action, to go into any matters of defense which the defendants might possibly set up, and then attempt to reply to such defense, and thus, if possible, to show that a Federal question might or probably would arise in the course of the trial of the case. To allege such defense and then make an answer to it before the defendant has the opportunity to itself plead or prove its own defense is inconsistent with any known rule of pleading, so far as we are aware, and is improper.

"The rule is a reasonable and just one that the complainant in the first instance shall be confined to a statement of its cause of action, leaving to the defendant to set up in his answer what his defense is, and, if anything more than a denial of complainant's cause of action, imposing upon the

defendant the burden of proving such defense.

"Conforming itself to that rule, the complainant would not, in the assertion or proof of its cause of action, bring up a single Federal question. The presentation of its cause of action would not show that it was one arising under the Constitution or laws of the United States.

"*The only way in which it might be claimed that a Federal question was presented would be in the complainant's statement of what the defense of defendants would be, and complainant's answer to such defense. Under these circumstances the case is brought within the rule laid down in *Tennessee v. Union & Planters' Bank*, supra. That case has been cited and approved many times since."

The interpretation of the act which we have stated was first announced in *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173, and has since been repeated and applied in *Colorado Cent. Consol. Min. Co. v. Turek*, 150 U. S. 138, 142, 37 L. ed. 1030, 1031, 14 Sup. Ct. Rep. 35; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 459, 38 L. ed. 511, 513, 14 Sup. Ct. Rep. 654; *Chappell v. Waterworth*, 155 U. S. 102, 107, 39 L. ed. 85, 87, 15 Sup. Ct. Rep. 34; *Postal Teleg. Cable Co. v. United States (Postal Teleg. Cable Co. v. Alabama)* 155 U. S. 482, 487, 39 L. ed. 231, 232, 15 Sup. Ct. Rep. 192; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 494, 40 L. ed. 1048, 1049, 16 Sup. Ct. Rep. 869; *Walker v. Collins*, 167 U. S. 57, 59, 42 L. ed. 76, 77, 17 Sup. Ct. Rep. 738; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 436, 42 L. ed. 531, 533, 18 Sup. Ct. Rep. 109; *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226, 236, 42 L. ed. 1017, 1020, 18 Sup. Ct. Rep. 603; *Third Street & Suburban R. Co. v. Lewis*, 173 U. S. 457, 460, 43 L. ed. 766, 767, 19 Sup. Ct. Rep. 451; *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 327, 44 L. ed. 486, 489, 20 Sup. Ct. Rep. 399; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66, 78, 44 L. ed. 673, 680, 20 Sup. Ct. Rep. 545; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185, 188, 46 L. ed. 144, 146, 22 Sup. Ct. Rep. 47; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 68, 46 L. ed. 808, 809, 22 Sup. Ct. Rep. 585; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 639, 47 L. ed. 626, 631, 23 Sup. Ct. Rep. 434; *Minnesota v. Northern Securities Co.* 194 U. S. 48, 63, 48 L. ed. 870, 877, 24 Sup. Ct. Rep. 598; *Joy v. St. Louis*, 201 U. S. 332, 340, 50 L. ed. 776, 780, 26 Sup. Ct. Rep. 478; *Devine v. Los Angeles*, 202 U. S. 313, 334, 50 L. ed. 1046, 1053, 26 Sup. Ct. Rep. 652. The application of this rule to the

case at bar is decisive against the jurisdiction of the circuit court.

It is ordered that the judgment be reversed and the case remitted to the circuit court with instructions to dismiss the suit for want of jurisdiction.

**155]*AMERICAN SUGAR REFINING
COMPANY OF NEW YORK, Appt.,
v.
UNITED STATES.**

(See S. C. Reporter's ed. 155-162.)

**Direct appeal from circuit court — case
involving Federal Constitution.**

A contention by importers that the Treasury regulations respecting the polariscopic test for sugar assumed to add something to the dutiable standard prescribed by the tariff act of July 24, 1897 (30 Stat. at L. 168, chap. 11, U. S. Comp. Stat. 1901, p. 1647), par. 209, and that the Secretary of the Treasury thus exercised legislative power confided by the Constitution solely to Congress, does not constitute a real and substantial dispute or controversy concerning the construction or application of the Federal Constitution within the meaning of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, so as to sustain a direct appeal from a Federal circuit court to the Supreme Court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 3.]

Argued November 11, 1908. Decided November 30, 1908.

APPEAL from the Circuit Court of the United States for the Southern District of New York to review a judgment which affirmed a decision of the Board of General Appraisers, overruling protests of importers against the classification of certain imported sugars. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. John G. Johnson argued the cause, and, with Messrs. Henry B. Closson and John E. Parsons, filed a brief for appellant:

Where the validity of Treasury regulations is attacked as an illegal exercise of power lodged with another branch of the government, a Federal question is presented to this court for review.

Boske v. Comingore, 177 U. S. 459, 44 L. ed. 846, 20 Sup. Ct. Rep. 701; *United States ex rel. Steinmetz v. Allen*, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416.

NOTE.—On direct review of decisions of district and circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

53 L. ed.

Mr. James C. McReynolds argued the cause and filed a brief for appellee:

A mere allegation that some constitutional question is involved does not suffice to give jurisdiction; the record must show a real, substantial dispute or controversy concerning the construction or application of the Constitution, upon which the result depends.

Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 243, 44 L. ed. 1052, 1054, 20 Sup. Ct. Rep. 867; *Lampasas v. Bell*, 180 U. S. 276, 45 L. ed. 527, 21 Sup. Ct. Rep. 368; *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 281, 45 L. ed. 859, 861, 21 Sup. Ct. Rep. 646.

The admitted duty of the Secretary of the Treasury was to construe as best he could the paragraph relating to collection of duty upon sugars, and to promulgate regulations for carrying it into effect. This, and this alone, he did. The only real, substantial point involved is whether or not he properly construed the statute; and that gives this court no jurisdiction upon direct appeal.

Sloan v. United States, 193 U. S. 614, 620, 48 L. ed. 814, 817, 24 Sup. Ct. Rep. 570; *Beavers v. Haubert*, 198 U. S. 77, 85, 49 L. ed. 950, 25 Sup. Ct. Rep. 573.

It may not be doubted that Congress, without violating any constitutional provision, could have, in terms, directed exactly what was prescribed by the Treasury regulations. If, attempting to act under the statute, executive officers have imposed an unauthorized burden upon appellant, no constitutional rights have been violated; there has been, at most, a misconstruction of the law.

South Carolina v. Seymour (*United States ex rel. South Carolina v. Seymour*) 153 U. S. 353, 358, 38 L. ed. 742, 744, 14 Sup. Ct. Rep. 871; *Linford v. Ellison*, 155 U. S. 503, 508, 39 L. ed. 239, 241, 15 Sup. Ct. Rep. 179; *Rawlins v. Georgia*, 201 U. S. 638, 50 L. ed. 899, 26 Sup. Ct. Rep. 560, 5 A. & E. Ann. Cas. 783; *Re Moran*, 203 U. S. 96, 104, 51 L. ed. 105, 108, 27 Sup. Ct. Rep. 25.

Mr. Chief Justice Fuller delivered the opinion of the court:

The tariff act of July 24, 1897, provides:

*"209. Sugars not above number six-[158 teen Dutch standard in color, tank bottoms, syrups of cane juice, melada, concentrated melada, concrete and concentrated molasses, testing by the polariscope not above seventy-five degrees, ninety-five one-hundredths of one cent per pound, and for every additional degree shown by the polariscopic test, thirty-five one thousandths of one cent per pound additional, and fractions of a degree in proportion; and on sugar above number sixteen

Dutch standard in color, and on all sugar which has gone through a process of refining, one cent and ninety-five one-hundredths of one cent per pound; molasses testing above forty degrees and not above fifty-six degrees, three cents per gallon; testing fifty-six degrees and above, six cents per gallon; sugar drainings and sugar sweepings shall be subject to duty as molasses or sugar, as the case may be, according to polariscopic test." [30 Stat. at L. 168, chap. 11, U. S. Comp. Stat. 1901, p. 1647.]

In October, 1897, the Treasury Department issued general regulations (subsequently modified in particulars not material here) governing sampling and classification of sugars under the above-quoted paragraph, which, among other things, declared:

"The expression 'testing . . . degrees by the polariscope,' occurring in the act, is construed to mean the percentage of pure sucrose contained in the sugar as ascertained by polarimetric estimation."

It was further stated that changes of temperature affect the indications of a polariscope, and to determine by means of it true sucrose contents apparent readings must be corrected as shown by a table accompanying each instrument and embodying the results of careful experiments therewith; when the thermometer is above 17.5° centigrade, the point of standardization, additions must be made; when below, corresponding subtractions.

159] *The interpretation of the statute and validity of the regulations were at once challenged by importers, who claimed that the reading of a polariscope is not affected by change in temperature; and, further, that the term "polariscopic test" in the tariff act of 1897, according to its well-settled commercial use, as well as by the language itself, requires testing only in the way theretofore observed by merchants, and forbids any correction of the result observed by the eye. These contentions were denied by the collector.

The importers appealed to the board of general appraisers, and in March, 1899, their protest was overruled in a considered opinion. G. A. 4386.

Under the titles *Bartram Bros. v. United States*, *Howell v. United States*, and *American Sugar Ref. Co. v. United States*, appeal was taken to the circuit court, southern district of New York, which was decided May 4, 1903. 123 Fed. 327. That court reversed the judgment of the general appraisers, holding that the term, "testing by the polariscope," had a well-settled commercial meaning prior to 1897, and must be interpreted according thereto. It declared, however, the preponderance of proof sustained the contention "that there is a vari-

ation in the reading of the polariscope, according to variations in temperature at the place where the sugar is tested, and that the corrections and additions provided for by the regulations merely consist in an addition of .3 per cent for each 10 degrees centigrade of temperature above that at which the polariscope is standardized, and that in this way the actual amount of pure sucrose in each sample is more accurately determined than was the case under the old eye test."

The circuit court of appeals (65 C. C. A. 557, 131 Fed. 833) reversed the circuit court and sustained the general appraisers. It held Congress intended there should be a scientific determination, by means of the polariscope, of sucrose contents, and that the method prescribed by the Treasury regulations was proper in order to secure the desired result.

*The rulings are correctly stated in [160 the headnotes thus:

"In construing the provision in paragraph 209, tariff act July 24, 1897, chap. 11, § 1, schedule E, 30 Stat. at L. 168, U. S. Comp. Stat. 1901, p. 1647, regulating duty on sugars according to the polariscopic test, held that the expressions therein, 'testing by the polariscope' and 'shown by the polariscopic test,' are not used with any special trade meaning that would confine them to a particular method of conducting such test, but import an intention on the part of Congress that the method adopted should be the one best calculated to make a scientific determination.

"Under the general power of the Secretary of the Treasury to make customs regulations not inconsistent with law, granted by § 251, U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 138, it is competent for that officer to prescribe the method of 'testing by the polariscope' the sugars dutiable according to such test under paragraph 209, tariff act July 24, 1897, chap. 11, § 1, schedule E, 30 Stat. at L. 168, U. S. Comp. Stat. 1901, p. 1647; and so long as he acts in good faith, and it does not appear that his regulations operate to make the polariscopic test less accurate than when Congress adopted it, the courts should not interfere with the administrative details confided to him.

"Where, for a period of years covering the operation of several tariff acts, the Secretary of the Treasury has made regulations for carrying out certain provisions in those acts, it is to be presumed that subsequent legislation by Congress was enacted with reference to such regulations."

At October term, 1904, a petition for a writ of certiorari to bring up these cases for review was presented to this court, and

denied. 195 U. S. 635, 49 L. ed. 354, 25 Sup. Ct. Rep. 792.

In the present cause counsel stipulated:

"It is agreed that the sugars in question were tested and classified in accordance with the Treasury regulations of October 27, 1897, and of February 17, 1899, and that the questions raised are the same as those in the cases of *Bartram Bros. v. United States*, 161]**Howell v. United States*, and *American Sugar Ref. Co. v. United States*, reported in 123 Fed. 327, and in 65 C. C. A. 557, 131 Fed. 833, and it is agreed that the evidence and exhibits in those cases contained on pages 33 to 364, inclusive, and pages 373 to 734, inclusive, of the transcript of record in those cases prepared for the Supreme Court of the United States and contained in the volume filed herewith . . . are to be treated as duly taken and introduced as evidence in this cause."

By § 6 of the act of 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549], the judgments or decrees of the circuit courts of appeals are made final in all cases arising under the revenue law, and can only be carried to the Supreme Court by certificate, or on a certiorari. In the aforementioned cases there was no certificate for instruction on any question or proposition of law, and the application for certiorari was denied. The present direct appeal to this court is a mere attempt to obtain a reconsideration of questions arising under the revenue laws and already determined by the circuit court of appeals in due course. Such direct appeals, under § 5 of the act of 1891, cannot be entertained unless the construction or application of the Constitution of the United States is involved.

This is conceded, and counsel for appellant attempt to sustain the jurisdiction on the ground that the regulations assumed to add something to the dutiable standard prescribed by the tariff act, and that, in doing so, the Secretary exercised legislative power confided by the Constitution solely to Congress. But this does not constitute a real and substantial dispute or controversy concerning the construction or application of the Constitution upon which the result depends.

The admitted duty of the Secretary of the Treasury was to construe as best he could the paragraph relating to collection of duty upon sugars, and to promulgate regulations for carrying it into effect. Rev. Stat. § 251. This and this alone he did. The only real, substantial point involved is whether or not he misconstrued the statute, and that gives this court no jurisdiction 162]*upon direct appeal. *Sloan v. United States*, 193 U. S. 614, 620, 48 L. ed. 814, 817, 24 Sup. Ct. Rep. 570, and cases cited; 53 L. ed.

United States ex rel. Taylor v. Taft, 203 U. S. 461, 51 L. ed. 269, 27 Sup. Ct. Rep. 148.

Undoubtedly Congress, without violating any constitutional provision, could have in terms directed exactly what was prescribed by the Treasury regulations; and prior decisions have held that the statute was properly construed by the Secretary.

We concur with counsel for the government that, if the construction or application of the Constitution of the United States, within the meaning of § 5, act of 1891, is involved in every case where one claims that, according to his interpretation of a statute, excessive duty or tax has been demanded by executive officers, the provisions of that act making decisions of the circuit court of appeals in revenue cases final are of very limited value, and this court must entertain direct appeals from the circuit courts in most tariff and tax controversies, which we regard as out of the question.

Appeal dismissed.

E. J. COTTON, C. E. Cotton, and James B. Agassiz, Copartners, Doing Business under the Firm Name of Cotton Brothers & Company, Plffs. in Err.,

v.

TERRITORY OF HAWAII, by C. S. Hollo-way, Superintendent of Public Works.

(See S. C. Reporter's ed. 162-175.)

Appeal — finality of judgment.

1. The mere entry upon the minutes by the clerk of the supreme court of the territory of a decision overruling exceptions taken under Haw. Rev. Laws 1905, § 1862 et seq., which did not bring up the whole case, and called upon the reviewing court merely to pass upon specific questions raised by the bill, does not make such decision a final judgment, so as to be subject to review in the Federal Supreme Court.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Appeal — hearing and determination — order not appealed from.

2. The order of a territorial supreme court, reversing the order of the court below, granting a new trial, cannot be reviewed by the Federal Supreme Court on a writ of error directed alone to a later decision in the same case, overruling exceptions, the record of which cannot be regarded as embracing the proceedings had below in respect to the matter of a new trial.

[For other cases, see Appeal and Error, VIII. h, in Digest Sup. Ct. 1908.]

[No. 7.]

Argued October 27, 1908. Decided November 30, 1908.

NOTE—As to what entry or record is necessary to complete a judgment or order—see note to *Re Weber*, 28 L.R.A. 621.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment overruling exceptions from the Circuit Court of the First Judicial Circuit of that territory, and to review a previous order of the Supreme Court of the territory, reversing the order of the court below, granting a new trial. Dismissed for want of jurisdiction.

See same case below, 17 Haw. 618.

The facts are stated in the opinion.

Mr. Charles A. Kelgwin argued the cause, and, with Mr. William B. Matthews, filed a brief for plaintiffs in error:

The question, What amounts to a judgment? is, of course, one of local practice. If, by accepted usage in Hawaii, or in the supreme court of the territory, such a minute entry as appears in this record is regarded as a judgment, then that entry, however meager or technically irregular, may, and should, be accepted as a judgment of that court.

Wheeling & B. Bridge Co. v. Wheeling Bridge Co. 138 U. S. 287, 34 L. ed. 967, 11 Sup. Ct. Rep. 301; *Tippecanoe County v. Lucas*, 93 U. S. 108, 23 L. ed. 822.

It is immaterial whether or not the judgment is ever spread out upon the formal minutes. The neglect of the clerk to mold the original notation into the conventional form of judgments, and to clothe it with the language generally used for that purpose, is the neglect of a purely ministerial duty, which does not at all impair the validity of the judgment minuted.

Freeman, Judgm. 4th ed. §§ 38, 40; *Casement v. Ringgold*, 28 Cal. 335; *McMillan v. Richards*, 12 Cal. 467.

In some of the states no record is ever made up; that is to say, the original minute entries are not drawn out into formal orders and judgments. Such is, or at one time was, the usage in Maryland and Pennsylvania, and it was so formerly in the District of Columbia. In such jurisdictions the files and journal entries stand in place of the record, and memoranda indicating the rendition of judgments are treated as judgments.

Washington, A. & G. Steam Packet Co. v. Sickles, 24 How. 340, 16 L. ed. 652; *Cromwell v. Bank of Pittsburgh*, 2 Wall. Jr. 569, Fed. Cas. No. 3,409; *Boteler v. State*, 8 Gill & J. 381; *Ruggles v. Alexander*, 2 Rawle, 232; *Freeman*, Judgm. § 86.

It has long been agreed that while the entries and memoranda gave data from which a record as technical and prolix as any ever drawn in the court of King's bench could be readily constructed, they ought to be regarded as competent and satisfactory evidence of the judgment, and of

such other judicial proceedings as were necessary to support it.

Freeman, Judgm. § 86.

Orders granting or denying new trials, while generally not the subjects of error, may be reviewed and reversed in error when they are void as being beyond the jurisdiction of the court assuming to make them.

Hume v. Bowie, 148 U. S. 245, 37 L. ed. 438, 13 Sup. Ct. Rep. 582; *Coughlin v. District of Columbia*, 106 U. S. 7, 27 L. ed. 74, 1 Sup. Ct. Rep. 37.

And such an order may be revised in error when it appears that the lower court, in acting upon the motion for a new trial, proceeded upon an erroneous theory of its powers and duties in the matter, or upon incorrect principles of evidence and practice.

Metropolitan R. Co. v. Moore, 121 U. S. 558, 30 L. ed. 1022, 7 Sup. Ct. Rep. 1334; *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50.

Mr. Charles R. Hemenway argued the cause and filed a brief for defendant in error:

The practice in Hawaii as to exceptions is similar to that in Massachusetts and the other states, where bills of exceptions bring up to the appellate court for review certain specific rulings only, and do not bring up the entire case, including the final judgment rendered. In such states writs of error from this court have run to the court where the final judgment was entered.

Atherton v. Fowler, 91 U. S. 143, 23 L. ed. 265; *Wurts v. Hoagland*, 105 U. S. 702, 26 L. ed. 1110; *Polleys v. Black River Improv. Co.* 113 U. S. 83, 28 L. ed. 938, 5 Sup. Ct. Rep. 369; *Stanley v. Schwalby*, 162 U. S. 255, 269, 40 L. ed. 960, 965, 16 Sup. Ct. Rep. 754; *McDonald v. Massachusetts*, 180 U. S. 311, 45 L. ed. 542, 21 Sup. Ct. Rep. 389; *Rothschild v. Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391.

It is the settled rule that a judgment, to be final within the meaning of the acts of Congress giving this court jurisdiction on writs of error over such judgments, must terminate the litigation between the parties on the merits of the case, so that, if this court affirms such judgment, the court below will have nothing to do but to carry it into effect.

Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15; *Macfarland v. Brown*, 187 U. S. 239, 47 L. ed. 159, 23 Sup. Ct. Rep. 105.

Mr. Justice White delivered the opinion of the court:

The errors assigned are directed to the

action of the court below on two subjects. Jurisdiction to consider them is challenged by the defendant in error. To understand the question as to jurisdiction and the issues which it will be necessary to consider, if it be that we have power to decide the merits, requires us to state briefly proceedings which are referred to by both parties and which are embraced in the printed transcript, without determining at this moment how far all the proceedings thus to be referred to may be considered as properly embraced in the record in the legal sense.

167] *On May 27, 1904, as the result of a trial before a jury of an action brought by the territory of Hawaii to recover damages for the loss of a dredge boat belonging to the territory, through the negligence of the defendants (who are now plaintiffs in error), there was a verdict in favor of the territory for the sum of \$25,000. On May 31, 1904, the defendants filed a motion for a new trial, and gave notice that it would be called for a hearing on June 3. On that date the motion was continued to June 7. On June 7 the territory objected to the court entertaining the motion because the defendants had not complied with § 1805, Revised Laws of Hawaii, requiring that the party against whom a verdict or judgment had been rendered should, as a prerequisite to moving for a new trial, "file within ten days after rendition of verdict or judgment" a bond securing the payment of costs, and conditioned against the removal or disposition of any property within the jurisdiction, subject to execution. The defendants thereupon asked further time to file the bond. On the same day the court entered a formal judgment on the verdict, and also granted, over the exception of the plaintiff, the request of the defendants for further time to make and file the bond. The court was of the opinion that the statutory period commenced to run only from the date of the entry of judgment on the verdict. The bond was filed on June 7, the motion for a new trial was renewed on the same day, and was ultimately taken under advisement. The plaintiff, reserving the benefit of its exception as to the power of the court to consider the motion, agreed that the motion might be passed upon in vacation. Meanwhile the defendants presented and filed a summary bill of exceptions relating to certain errors which it was alleged had been committed by the court during the trial. In February following, the judge who presided at the trial, and who was detained in San Francisco by sickness, telegraphed the clerk of the court that he granted the motion for a new trial, and had forwarded his grounds for doing so by mail. This telegram was filed 168] by the clerk. The terms *of office of the 53 L. ed.

judge expired on March 2, 1905. A few days thereafter, viz., on March 4, 1905, the clerk received by mail the opinion of the judge, stating his reasons for granting a new trial, which opinion was also filed. In the following April the defendants moved the court, then presided over by the successor in office of the judge who had tried the cause, to make a formal entry of the granting of the new trial, and this was done over the objection and exception of the plaintiff, who thereupon prosecuted a writ of error to the supreme court of Hawaii. The supreme court, after overruling a motion to quash the writ, based on the ground that the action of the court in granting a new trial was not reviewable (17 Haw. 374), on March 8, 1906, reversed the order granting a new trial. Putting out of view all other questions, in substance, it was held that the filing of the bond within ten days, as required by the statute, was essential to give the court jurisdiction to entertain a motion for a new trial, and that the court had mistakenly decided that the ten days began to run only from the date of formal entry of the judgment. 17 Haw. 445.

The formal judgment entered in the supreme court was simply one reversing the order for a new trial. Thereupon, in the trial court, the defendants moved to be allowed to make the summary bill of exceptions which they had previously taken more specific. Over the objection of the plaintiff this was allowed to be done, and the defendants thereupon filed an amended bill of exceptions, which was allowed, and upon this bill, conformably to the Hawaiian practice, the exceptions were taken by the defendants to the supreme court of Hawaii. In that court a motion was made to quash the bill of exceptions, on the ground that, as amended, it embraced matters not legally included within the bill as originally filed, and which were, in consequence, not cognizable. This motion was overruled, on the ground that, although nothing was open for review on the amended bill but such questions as were legally incorporated in the original bill, the bill as amended could *not be quashed, [169 as it undoubtedly presented matters which were embraced in the first or summary bill. 17 Haw. 645. Thereafter, on the hearing of the exceptions, the court—excluding from consideration such matters as it held were not contained in the original bill, although incorporated in the amended bill—decided that the exceptions were without merit. 17 Haw. 618. Conformably to the opinion an order was entered in the minutes on September 27, 1906, overruling the exceptions. Thereupon the present writ

of error was allowed by the chief justice of the supreme court of the territory.

The two subjects to which, as, at the outset, we stated, all the assignments of error relate, involve the correctness of the action of the supreme court on September 27, 1906, in refusing to consider certain of the exceptions because deemed not to have been embodied in the summary bill previously filed and its decision on the exceptions which were passed upon, and the correctness of the action of the same court, taken nearly six months previously, reversing the order of the trial court, granting a new trial. Have we jurisdiction to pass upon these issues, in the first question for decision.

Our authority to review the judgments of the supreme court of the territory of Hawaii is derived from the act of April 30, 1900 (31 Stat. at L. 158, chap. 339, § 86), and the amendatory act of March 3, 1905 (33 Stat. at L. 1035, chap. 1465, § 3). In the first act jurisdiction is conferred over judgments or decrees of the supreme court of the territory only in cases like unto those where we would be empowered to review the judgments or decrees of the courts of the several states, conferred by § 709, Revised Statutes (U. S. Comp. Stat. 1901, p. 575). By the amendatory act our jurisdiction was extended so as to embrace, in addition, all cases, irrespective of the nature of the questions presented, where the amount involved, exclusive of costs, exceeds the sum or value of \$5,000. In other words, whilst the first act conferred the power only in cases where it would exist if the decree or judgment had been rendered in [170] a state court, the *second, adopting the principle and necessarily therefore carrying with it the rules generally prevailing as to the review of judgments or decrees of the supreme court of the incorporated territories of the United States, gives an additional right to review, depending solely upon the amount involved. *Bierce v. Hutchins*, 205 U. S. 340, 344, 51 L. ed. 828, 832, 27 Sup. Ct. Rep. 524. As jurisdiction, if it exists in this cause, depends not upon the existence of questions under Rev. Stat. § 709, but entirely upon the amount involved, the authority conferred by the act of 1900 may be at once put out of view. It is elementary, however, that the power to review, both under § 709, Revised Statutes, and under the laws governing the right to review the judgments or decrees of the supreme courts of the incorporated territories generally, extends only to final judgments or decrees. It is apparent, therefore, that we have no jurisdiction to review the several rulings of the supreme court of the territory, the last one in September, 1906, overruling the exceptions, and the prior one in April, 1906,

reversing the order granting a new trial, unless those rulings, independently considered, are final in the full sense of the term. Let us test their finality separately.

On its face the proceeding by which the exceptions of the defendants were taken to the court of last resort in Hawaii for review did not purport to present to that court a consideration of the whole record in the cause, but only submitted the particular rulings embraced in the exceptions. The order which the court entered when it disposed of the exceptions was neither in substance nor did it purport in form to be a final judgment, conclusively disposing of the cause. As our power to review depends upon the acts of Congress, which it is beyond the authority of a territory, by forms of legal procedure, to modify or change, it results that, whatever may be the forms of procedure prevailing in the territory for the review of judgments or decrees, nothing in the territorial laws or procedure can have the effect of conferring upon this court the power to consider causes coming from the territory by *piecemeal; that is, to re-[171] view judgments or decrees which, in their essential nature, are not final within the intentment of the legislation of Congress,—in other words, extend our jurisdiction to judgments which do not completely dispose of the controversy. But the application of this latter principle is not now required, since it will appear from a review of the territorial legislation that the decision of the supreme court overruling the exceptions was not, under the territorial laws, in any sense a final judgment. The relevant Hawaiian statutes are copied in the margin†

†Revised Laws of Hawaii for 1905, pp. 732 et seq.

"Exceptions.

"Sec. 1862. Questions Reserved by Court.—Whenever any question of law shall arise in any trial or other proceeding before a circuit court, the presiding judge may reserve the same for the consideration of the supreme court; and in such case shall report the cause, or so much thereof as may be necessary to a full understanding of the questions, to the supreme court. (Laws 1892, chap. 57, § 72; C. L. § 1436.)

"Sec. 1863. Reserved on Motion.—Any question may be reserved in like manner upon the motion of either party, on account of any opinion, direction, instruction, ruling, or order of the judge in any matter of law. (Laws 1892, chap. 57, § 73; C. L. § 1437.)"

Following a paragraph prescribing the method of settling exceptions, it is provided in § 1864 as follows:

"Bills of exceptions upon like terms as to filing bond and payment of costs may be certified to the supreme court from decisions

It is clear that, under these statutes, the 172]supreme court may *review the action of the trial courts by two separate forms of procedure,—either by writ of error or appeal, which brings up the judgment or decree with the entire record, and the other by exceptions, which does not bring up the whole record, and calls upon the reviewing court merely to pass upon specific questions raised by the bill. The statutes, it will be observed, confer no express power upon the supreme court of the territory to enter a final judgment in a cause upon the overruling of exceptions, and, indeed, that the supreme court of the territory does not construe the territorial statutes as giving it such authority, and, therefore, that the court could not have intended to exert such power in this case, so conclusively appears from recent decisions of the supreme court

of Hawaii as to leave the question not open to controversy.

Meheula v. Pioneer Mill Co. 17 Haw. 91, was brought *to the appellate court on ex-[173 ceptions. The exceptions were overruled. Thereupon counsel for the unsuccessful party, in order that the record might be in such form as to permit an appeal to this court, moved in the appellate court that a final judgment be entered, affirming the judgment of the trial court, and remanding the cause, with directions to carry the judgment into execution. The motion was denied. The court rendered a lengthy opinion, in the course of which it was said (17 Haw. 93):

"If the exceptions are overruled, nothing further is required but to notify the circuit court, in the form of a remittitur. . . . A bill of exceptions, unlike a writ of error

overruling demurrers or from other interlocutory orders, decisions, or judgments, whenever the judge, in his discretion, may think the same advisable for a more speedy termination of the case. The refusal of the judge to certify an interlocutory bill of exceptions to the supreme court shall not be reviewable by any other court. (Laws 1892, chap. 57, § 74; C. L. § 1438; Amended Laws 1898, chap. 40, § 2; Amended Laws 1903, chap. 32, § 18.)

"Sec. 1865. Bond.—Upon the allowance of such bill of exceptions and the deposit of \$25, or a bond of the same amount, by the party excepting, with the clerk of such court, for costs to accrue in the supreme court, the questions arising thereon shall be considered by the supreme court; but judgment may be entered and may be enforced or arrested pending such exceptions, as provided in § 1861 in the case of an appeal, *mutatis mutandis*. (Laws 1892, chap. 57, § 75; C. L. § 1439; Amended Laws 1903, chap. 32, § 19.)

"Sec. 1866. Exceptions, Frivolous, Immaterial.—When, upon the hearing of a cause brought before the supreme court upon exceptions, it shall appear that the exceptions are frivolous or immaterial, or were intended for delay, the court may award against the party taking the exceptions double costs from the time when the same were alleged; and also interest, from the same time, at the rate of 9 per cent per annum on the sum, if any, found due for debt or damages; or may award any part of such additional costs and interest as it may deem proper. (Laws 1892, chap. 57, § 76; C. L. § 1440.)

"Sec. 1867. Vacating Judgment by Supreme Court.—When judgment has been entered in any cause in which exceptions have been allowed, the judgment may be vacated by the supreme court without any writ of error in like manner as if it had been entered by mistake; and thereupon such further proceedings shall be had in the cause as to law and justice shall appertain. (Laws 1892, chap. 57, § 77; C. L. § 1441.)

53 L. ed.

"Sec. 1868. Jury Trial Not Delayed.—No trial by jury shall be prevented or delayed by the alleging, filing, or allowance of such exceptions; but the verdict shall be received and such further proceedings shall be had in the cause as the court may order, in pursuance of the foregoing provisions. (Laws 1892, chap. 57, § 78; C. L. § 1442.)

"Writs of Error.

"Sec. 1869. Had When.—A writ of error may be had by any party deeming himself aggrieved by the decision of any justice, judge, or magistrate, or by the decision of any court except in the supreme court, or by the verdict of a jury, at any time before execution thereon is fully satisfied, within six months from the rendition of judgment. (Laws 1892, chap. 95, § 1; C. L. § 1443.)

"Sec. 1870. In Jury-Waived Cases.—Writs of error shall lie to any decision or ruling by a judge in any case in which jury has been waived. (Laws 1892, chap. 95, § 2; C. L. § 1444.)

"Sec. 1871. To Correct What.—A writ of error may be had to correct any error appearing on the record, either of law or fact, or for any cause which might be assigned as error at common law; provided, however, that no writ of error shall issue for any defect of form merely in any declaration, nor for any matter held for the benefit of the plaintiff in error. (Laws 1892, chap. 95, § 3; C. L. § 1445.)

"Sec. 1872. No Reversal When.—There shall be no reversal on error of any finding depending on the credibility of witnesses or the weight of evidence. (Laws 1892, chap. 95, § 5; C. L. § 447.)

"Sec. 1873. Record.—For all purposes of §§ 1869-1883, the record shall be deemed to include all pleadings, motions, notes, or bills of exceptions, exhibits, clerk's or magistrate's notes or proceedings, and, if so desired by the plaintiffs in error, a transcript of the evidence in the case. (Laws 1892, chap. 95, § 4; C. L. § 1446.)"

or an appeal, does not bring the entire case or its record to this court. We have merely to decide whether the exceptions are good or bad. If they are overruled, that is the end of the functions of this court relating thereto, nothing remaining but the order, notice, or remittitur, on receipt of which 174] the *judgment in the circuit court, if it had been entered, but suspended pending the exceptions, by the provisions of §§ 1861 and 1865, Rev. Laws, remains in full force, requiring no affirmance or other recognition from this court. If no judgment was entered on the verdict, it is entered by the circuit court upon notice of the overruling of the exceptions. This result follows as a matter of law, and not in consequence of any direction of this court."

In the same case the court also took occasion to condemn the practice stated to be sometimes followed, of sending to the appellate court, with a bill of exceptions, "the records of the case and all papers filed in the circuit court."

So, also, as also said by the territorial court in this case, in passing upon the motion of the territory to quash or dismiss the exceptions (17 Haw. 379):

"Exceptions and error are inherently proceedings of different character. On exceptions, various specific rulings, whether interlocutory or final, whether brought up immediately or only after final judgment, are made direct and independent subjects for review; only so much of the record is brought up as is necessary for passing upon the specific exceptions; the decision usually is that the exceptions be sustained or overruled and that such further proceedings be had as the rulings on the exceptions call for. On error the final judgment alone is brought up, and specific rulings, whether excepted to or not, are considered only incidentally in passing upon the correctness of the final judgment; the entire record is brought up, and the judgment of the appellate court is such as the facts and law warrant, as shown by the entire case."

Applying the construction thus given by the supreme court of Hawaii to the statutes of the territory, there being no reason to doubt their correctness, it clearly follows that the mere entry by the clerk, on the minutes, of the decision of the court overruling the exceptions, did not constitute a final judgment, subject to review by this court. Of course, our decision is confined to the case before us. We must not, therefore, 175]*be considered as holding that if, on a case before it on exceptions, the supreme court of the territory, in sustaining exceptions, considered that the effect of its ruling was such as to justify the entry of

a judgment finally disposing of the cause, under the discretionary power conferred by § 1867 of the Revised Laws of Hawaii, previously cited in the margin, that such a judgment, depending upon the circumstances of the case, might not be a final judgment, within our competency to review.

Coming, then, to test whether we have jurisdiction to review the action of the supreme court of the territory reversing the order granting a new trial, it is apparent that our power must rest either upon the proposition that the order overruling the granting of a new trial was a final judgment in an independent proceeding, or was but an interlocutory step in the cause, which would be subject to our review because of jurisdiction to revise the action of the territorial court in ruling on the exceptions, under the assumption that such ruling was a final judgment. The latter is disposed of by what we have previously said. As to the former, if the premise upon which the proposition rests be assumed, it would follow that we are without power to review the judgment, for the reason that this writ is directed alone to the so-called judgment of September 27, 1906, and the record of that judgment cannot be regarded as embracing the proceedings had below in respect to the matter of a new trial.

Writ of error dismissed for want of jurisdiction.

*BOWERS HYDRAULIC DREDGING[176
COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 176-188.)

Custom — trade meaning — effect on unambiguous contract.

1. Payment for removing the earth which may slide into the channel from the sides or slopes during excavation is so clearly excluded by a dredging contract as to prevent giving the words "measured in place" a trade meaning which demands a different construction, where the specifications provide for payment by the cubic yard, measured in place, determined by surveys made before dredging is commenced and after completion, require that the work shall be plainly located by stakes and ranges, which

NOTE.—On the effect of custom or usage on construction of contract—see notes to Newhall v. Appleton, 3 L.R.A. 860; Smith v. Clews, 4 L.R.A. 392; MacCulsky v. Klosterman, 10 L.R.A. 785; and Adams v. Otterback, 14 L. ed. U. S. 805.

On the practical construction of contracts by parties—see note to Davis v. Alpha Portland Cement Co. 73 C. C. A. 392.

shall be kept continually in place, and preclude extra allowance for excavating material different from that therein described, or payment for work outside the designated lines of excavation or below the specified depth, and state that any material deposited otherwise than specified and agreed upon must be removed by the contractor at his own expense, that no guaranty is given as to the nature of the bottom, and that no claim will be made for any excess or deficiency in the estimate of quantity.

[For other cases, see Custom and Usage, 21-27, in Digest Sup. Ct. 1908.]

Contracts — construction by parties — supplemental contract.

2. A contractor for a public improvement, who, pending a dispute with the government as to his right to compensation for certain work, enters into a supplemental contract with the same terms and specifications as the original, with full knowledge of the meaning affixed by the government to the terms of such original contract, which had been insisted upon by it in carrying on previous operations, is precluded from claiming compensation under the new contract for any work of that character.

[For other cases, see Contracts, 258-263, in Digest Sup. Ct. 1908.]

[No. 9.]

Argued November 11, 1908. Decided November 30, 1908.

APPEAL from the Court of Claims to review a judgment denying the claim of a dredging company of a right to compensation for removing the earth which fell into the excavation from the sides or slopes during the dredging of a channel. Affirmed.

See same case below, 41 Ct. Cl. 214.

The facts are stated in the opinion.

Mr. L. T. Michener argued the cause, and, with Messrs. W. W. Dudley and P. G. Michener, filed a brief for appellant:

A dredging operation is the reverse of making an embankment on dry land; it is, in its essential features as to measurement, like making a cut or tunnel in earth or rock. To ascertain the amount of material taken from a cut or tunnel made in earth or rock, measurements and surveys of the entire cut or tunnel would have to be made. That would be measurement in place. To ascertain the amount of material used in making an embankment, a measurement of the entire embankment would have to be made.

Collins v. United States, 34 Ct. Cl. 307.

That would be like measurement in place in such a case as this.

When, as in the case at bar, the contract provides that the engineer shall determine the amount of work, it does not give him the exclusive determination of the manner in which it shall be done according to con-

tract. It does not give him the interpretation of the contract.

Galveston, H. & S. A. R. Co. v. Henry, 65 Tex. 685; Galveston, H. & S. A. R. Co. v. Johnson, 74 Tex. 256, 11 S. W. 1113; Williams v. Chicago, S. F. & C. R. Co. 112 Mo. 463, 34 Am. St. Rep. 403, 20 S. W. 631.

The contractor may show that the engineer misconstrued the contract in his classifications of the work, and did not measure the work according to the contract, and he may show these things by evidence without alleging fraud.

Collins v. United States, 34 Ct. Cl. 294; Beckwith v. United States, 38 Ct. Cl. 294; Williams v. Chicago, S. F. & C. R. Co. supra; Lewis v. Chicago, S. F. & C. R. Co. 49 Fed. 708; Summers v. Chicago, S. F. & C. R. Co. 49 Fed. 714; King Iron Bridge & Mfg. Co. v. St. Louis, 10 L.R.A. 826, 43 Fed. 768.

The provision in the contract that his decision as to the amount of material excavated and removed should be final "refers only to his measurement in point of fact, and not to the principle of law on which it is made."

Lyons v. United States, 30 Ct. Cl. 352.

The case of Beckwith v. United States, 38 Ct. Cl. 295, is squarely in point here.

See also Seymour v. Long Dock Co. 20 N. J. Eq. 396; Pucci v. Barney, 2 Misc. 354, 21 N. Y. Supp. 1101; Clark v. United States, 6 Wall. 543, 18 L. ed. 916; San Francisco Bridge Co. v. United States, 40 Ct. Cl. 139.

Courts will take judicial notice of natural laws, the well-known qualities and properties of matter, and that which will happen according to the invariable course of nature.

1 Elliott, Ev. §§ 69, 70.

There seems to be no reason why there should not be applied to the contract and the specifications here the principle so often applied to statutes by this court,—that, if Congress had desired to grant a given power, right, or authority, "it would have been easy to have said so in express terms; and, because it did not say so, we are led irresistibly to the conclusion that it did not intend to give any such power."

Tillson v. United States, 100 U. S. 46, 25 L. ed. 543; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 669, 29 L. ed. 771, 6 Sup. Ct. Rep. 625; United States v. Chase, 135 U. S. 259, 34 L. ed. 119, 10 Sup. Ct. Rep. 756.

The principles of interpretation are very similar, whether applied to contracts, to deeds, or to statutes.

2 Parsons, Contr. *494.

The court of claims should have found the technical or trade meaning of the words "measured in place" in connection with the

other language of the specifications; and evidence as to the meaning of those words and specifications was admissible and should have been considered by the court.

2 Parsons, Contr. 7th ed. ** 499, 555, 556; 1 Greenl. Ev. 14th ed. § 280; 1 Elliott, Ev. § 605; 4 Wigmore, Ev. §§ 2458-2467; 1 Starkie, Ev. ** 653, 701; Jones, Constr. of Com. & Trade Contr. §§ 62, 204; Garrison v. Memphis Ins. Co. 19 How. 312, 313, 15 L. ed. 656; Salmon Falls Mfg. Co. v. Goddard, 14 How. 446, 454, 14 L. ed. 493, 496; Moran v. Prather, 23 Wall. 492, 499, 23 L. ed. 121, 122; 17 Cyc. Law & Proc. pp. 685-687; Webster Loom Co. v. Higgins, 105 U. S. 580, 586, 26 L. ed. 1177, 1179; Cadwalader v. Zeh, 151 U. S. 171, 176, 38 L. ed. 115, 117, 14 Sup. Ct. Rep. 288; Gregory v. United States, 33 Ct. Cl. 434; Elgin v. Joslyn, 136 Ill. 525, 26 N. E. 1090; Brennenman v. Bush (Tex. Civ. App.) 30 S. W. 699; St. Martin v. Thrasher, 40 Vt. 461; Highton v. Dessau, 46 N. Y. S. R. 922, 19 N. Y. Supp. 395; Cassidy v. Fontham, 38 N. Y. S. R. 177, 14 N. Y. Supp. 151; Myers v. Tibbals, 72 Cal. 278, 13 Pac. 695; Atlanta v. Schmeltzer, 83 Ga. 609, 10 S. E. 543; Destrehan v. Louisiana Cypress Lumber Co. 45 La. Ann. 920, 40 Am. St. Rep. 265, 13 So. 230; McKenzie v. Wimberly, 86 Ala. 195, 5 So. 468.

Where technical or trade language is used, or common words in a technical or trade sense, their meaning may be proven by persons who possess the peculiar knowledge and skill requisite.

2 Parsons, Contr. ** 555, 556; Texas & St. L. R. Co. v. Rust, 19 Fed. 239; Reed v. Hobbs, 3 Ill. 297; Skelton v. Fenton Electric Light & P. Co. 100 Mich. 90, 58 N. W. 609.

Assistant Attorney General **John Q. Thompson** argued the cause, and, with Mr. Philip M. Ashford, filed a brief for appellee:

The construction or interpretation of a contract has been defined to be the ascertainment of the intention of the parties, as expressed therein.

17 Am. & Eng. Enc. Law, 2d ed. p. 2; Jones, Constr. of Com. and Trade Contr. p. 1; Anderson's Law Dict. p. 240.

The very idea and purpose of construction implies a previous uncertainty as to the meaning of the contract; for where this is clear and unambiguous there is no room for construction and nothing for construction to do.

2 Parsons, Contr. 9th ed. p. 655; 17 Am. & Eng. Enc. Law, p. 4; 21 Am. & Eng. Enc. Law, pp. 1109, 1110; Jones, Constr. of Com. & Trade Contr. pp. 31, 111, 237, 267; Moran v. Prather, 23 Wall. 492, 500, 23 L. ed. 121, 123; Culver v. Wilkinson, 145 U. S. 205, 212, 36 L. ed. 676, 680, 12 Sup. Ct. Rep. 832;
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South Bend Iron Works v. Cottrell, 31 Fed. 256.

Mr. Justice **White** delivered the opinion of the court:

The appellant, the dredge company, sued to recover \$28,321.76. The relief sought was based on the averment that, under a contract for dredging a channel in the Christiana river and in or about the harbor of Wilmington, Delaware, made in 1899, and a supplementary contract made in June, 1901, the dredge company had excavated 260,430 cubic yards *of earth, for which, at [181 the contract price, it should have been paid the sum sued for, but that the United States, in making settlement under the contract, despite the protest of the dredge company, had declined to pay, upon the ground that excavating and removing the earth referred to was not within the contract. The pertinent facts found by the court below are these:

Prior to September, 1899, the United States was engaged in excavating a channel in the Christiana river and about the harbor of Wilmington, Delaware. The work, in September, 1899, was in process of execution, under a contract between the United States and the New York Dredging Company. In the office of the United States engineer in charge of the work there existed maps or drawings showing the condition of the river prior to any work being done by the New York Dredging Company, the location of the channel in which the work was being done, and the specifications controlling the contract, as well as the progress made in the work. Of these facts the dredge company had knowledge. On September 18, 1899, the United States engineer office at Wilmington, through William F. Smith, United States agent, advertised for proposals for the dredging and removing of about 900,000 cubic yards of material in connection with the work then being done, as previously stated. In the advertisement inviting the proposals it was stated that specifications, blank forms for proposals, and all available information would be furnished on application to the engineer office. The specifications for the work in question recited:

"The project, for the completion of which contracts are authorized in the law above quoted, requires the dredging of the Christiana river to a depth of 21 feet at mean low water from the 21-foot curve in the Delaware river to the upper line of the pulp works; thence to the draw pier of the Shellpot branch, No. 4, of the P., W. & B. R. R., so as to give a depth which gradually diminishes to 10 feet at mean low water at the latter-named place and the removal of

182] shoals having less *than seven (7) feet of water over them; thence to Newport,—the width to be 250 feet to the mouth of the Brandywine, 200 feet thence to the upper line of the pulp works, and 100 feet above. Work is now in progress under contracts for dredging to a depth of 18 feet up to the pulp works, the width to be made being 200 feet, and for all above-described dredging above the pulp works. The work required under these specifications is the dredging that remains to complete the project, additional to that done or to be done under the contracts above referred to until their termination or completion. It is estimated that about 900,000 cubic yards will have to be removed."

The character of the work required, the method of carrying on the same, and the steps to be taken to fix the amount to become due under the contract when fully performed, were stated in the specifications as follows:

"The amount of material removed will be paid for by the cubic yard, measured in place, and shall be determined by surveys made before dredging is commenced and after it is completed. All surveys and measurements are to be made under the direction of the engineer in charge, by persons employed by him for that purpose. The decision of the engineer in charge as to the amount of material excavated and removed, as well as to its location and deposit, shall be final and without appeal on the part of the contractor.

"The location of the work shall be plainly located by stakes and ranges. The level of mean low water, as established by the engineer in charge, shall not be changed during the progress of the work. The contractor shall be required to supply the lumber for the necessary stakes and ranges, and shall at all times, when called upon, furnish men and boats to set them and keep them set under the direction of the inspector, the expense thereof to be included in the contract price for the dredging.

"No guaranty is given as to the nature of the bottom, but, as far as it is known, it is sand, mud, clay, and gravel. Bidders 183]*are requested to satisfy themselves upon this point and to examine all other local conditions, as it will be assumed that their bids are based upon personal information. No extra allowance will be made for excavating material differing from that herein described.

"It is understood and agreed that the quantities given are approximate only, and it must be understood that no claim will be made against the United States on account of any excess or deficiency, absolute or relative, in the same. Bidders are expected to

examine the drawings, and are invited to make the estimate of quantities for themselves. It is not expected that the actual quantities will vary more than 10 per centum from the estimates.

"Payments will be allowed for actual dredging to twenty-one (21) feet below mean low-water level. Work done outside of the designated lines of excavation or below the specified depth will not be paid for, and any material deposited otherwise than specified and agreed upon must be removed by the contractor at his own expense."

On November 20, 1899, the claimant (dredge company), whose proposal had been accepted, entered into a contract with the United States through General William F. Smith, United States agent, for the performance of the additional dredging, in conformity with the advertisements and specifications referred to in the preceding findings. It was provided in the contract that "the said Bowers Hydraulic Dredging Company shall furnish all labor, machinery, and appliances necessary or proper for the faithful execution of the contract, and shall do the work called for, and in all respects carry out and comply with the said specifications for dredging." The sum to be paid was fixed by the contract at 10 $\frac{7}{8}$ cents for each and every cubic yard of material dredged, "measured in place," the said price including removal and redeposit.

Presumably, in consequence of knowledge on the part of the dredge company of a refusal by the government to pay the New York Dredging Company for the work being done by *it for the removal of any earth[184 from the excavated channel, derived from the sliding from slopes of the same, the dredging company, before commencing work, addressed a letter to General Smith, engineer in charge, requesting to know whether its contract would be construed as excluding payment for removing such earth. General Smith replied "that payment will be made for the quantity of material removed within the designated lines of excavation as determined by measurement before and after the dredging, and that such measurement does not include material which comes in from the sides during the progress of dredging." The letter stated: "I deem it proper to add that this is in conformity with the instructions received from the chief of engineers on the subject." The dredge company thereupon replied, protesting against this construction, declaring that it was not bound thereby, and that its performance of the work must not be construed as an acceptance of the correctness of such interpretation.

The work was commenced. Whenever a payment was made under the contract, the

dredge company, in receiving the same, asserted that it was entitled to be paid for removing any earth which had fallen into the excavation from the slopes and which had been removed by it, and, on payment for such work being refused, it protested. On June 21, 1901, while the work on the contract was proceeding, the dredge company made a supplementary contract, increasing the amount to be by it excavated, in accordance with the terms and specifications of the prior contract, from 900,000 to 1,300,000 cubic yards. As the work thereafter progressed under both contracts payments were continued to be made by the government and received by the dredge company under protest, as before stated, until the work under the contracts was finally completed.

The court below found:

"The amount of material that fell or slid from the sides or slopes of the vertical walls in front of the dredge and that was removed thereby along with the excavated material [185] within the *designated lines for dredging as provided by the contract was more than 30,000 cubic yards, which, at the contract price of 10 $\frac{7}{8}$ cents per cubic yard, would amount to over \$3,000."

In the opinion delivered by the court below it was said:

"We are therefore of the opinion that the specifications, which are made part of the contract, are plain and unambiguous, and that they not only furnish the basis of *measurement in place* of the material to be excavated, but that the measurements made by the engineer in charge were in strict accord therewith. This being so, any other method of *measurement in place*, even though customary, is excluded by the terms of the contract, and therefore expert testimony is not admissible to explain language that needs no explanation." [41 Ct. Cl. 229.]

And for these reasons the right of the dredge company to recover was denied. A new trial was asked, among others, on the ground that error had been committed in not finding the trade meaning of the words, "measured in place," and because the amount of cubic yards of earth which had slid in from the sides or slopes of the excavation while the contract was being performed, and which had been removed by the company, had not been fixed at 260,430 instead of "as above 30,000," as stated in the findings. In addition a request was made that the findings be amended so as to qualify the finding that the price paid should be 10 $\frac{7}{8}$ cents for each and every cubic yard of material dredged, measured in place, by adding the words, "the same being the trade meaning or understanding of the words 'measured in place.'" In addition it was asked that

the finding as to the amount of cubic yards removed of matter that fell from the sides or slopes be increased from above 30,000 to 260,430. The motion for a new trial and the motion to amend the findings were overruled. The court, in its reasons for denying the motion, while stating that certain expert testimony had been offered as to the meaning of the words "measured in place," further stated that it had declined to consider the same and make a finding thereon, *as it concluded, as said in its previous [186] opinion, that the import of the words "measured in place," as used in the contract, was so free from ambiguity that it did not consider the testimony relevant. This was based upon the opinion that, whatever might be the commercial signification of the words, that meaning could not be imported into the contract for the purpose of destroying its plain and obvious intendment when the terms of the entire contract and the specifications forming part of the same were given their proper weight.

The errors complained of are all embraced under the following headings:

a. The refusal of the court to receive and consider testimony offered as to the trade meaning of the words "measured in place" and its refusal to make a finding on the subject. It being contended that the action of the court in refusing to amend its findings and the statement, in its opinion, that it declined to consider such testimony, adequately preserves the question for review.

b. The refusal of the court to find the precise amount removed of earth which slid in from the sides or slopes, thus leaving the finding uncertain on that subject.

c. The attributing of conclusive efficacy to the action of the officer in charge.

And finally,

d. The construction given by the court to the contract.

It is apparent that the question of construction last stated lies at the foundation of all the assignments, and therefore first commands consideration. We say this because, if it be that the court below was correct in its conclusion that the contract gave to the words "measured in place," as therein used, a plain and unambiguous signification, it is obvious that the abstract or commercial meaning of those words, upon the hypothesis that they have such meaning, was rightly held to be irrelevant. And it is equally plain that, if the court below rightly construed the contract in the particular mentioned, it will be unnecessary to consider the effect which was given *to the [187] action of the officer in charge, since that action was in accordance with the meaning which the court gave to the contract.

Coming to consider the contract, we are

of opinion that the court below correctly enforced its self-evident meaning. The requirement that the amount of material removed should be paid for by the cubic yard, measured in place, and shall be determined by surveys made before dredging is commenced and after its completion, clearly in and of itself established a method for fixing the amount of material which might be excavated, and which was to be paid for, absolutely incompatible with the contention that the contract contemplated that payment should be made for excavated earth which might slide into the channel from the slopes of the same during the progress of the work. And this is fortified by the requirement as to the location of the stakes and the keeping of them continually in place during the performance of the work under the contract. It is, moreover, additionally sustained by the provision, "that no extra allowance will be made for excavating material different from that herein prescribed," and by the stipulations, "that work done outside of the designated lines of excavations or below the specified depth will not be paid for," and "that any material deposited other than that specified and agreed upon must be removed by the contractor at his own expense." When these provisions are read in connection with the specification stating that "no guaranty is given as to the nature of the bottom, but, as far as it is known, it is sand, mud, clay, and gravel; bidders are requested to satisfy themselves as to this point, and to examine all other local conditions, as it will be assumed that their bids are based upon personal information," in connection with the statement of the approximate quantity, and the further condition that "no claim will be made against the United States on account of any excess or deficiency, absolute or relative in the same," we think the conclusion is beyond reasonable controversy that the contract, by its express terms and without ambiguity, excludes the possibility of holding that earth which might slide from the slopes during the excavation was to be paid for by the United States. To separate the words "measured in place" from all the other provisions of the contract, in order to give them an assumed or proven abstract trade meaning, repugnant to their significance in the contract, would be to destroy, and not to sustain and enforce, the contract requirements. Lest our silence upon the subject may give rise to misconception, we deem it well to observe that even if the original contract was susceptible of a different construction from that which we hold arises from its plain import, such result could have no possible influence on the asserted claim of the dredge company, in so

far as that claim is based upon excavation done under the supplementary contract. We say this because that contract was made with the full knowledge of the meaning affixed by the United States to the terms of the contract, and which had been insisted upon in the carrying on of the previous dredging operations.

Affirmed.

PHŒNIX BRIDGE COMPANY, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 188-199.)

Contracts — extra work — public improvement.

The erection, pursuant to the direction of the government officer in charge, of a temporary liftspan, which was the most feasible and least expensive substitute which could be employed after an accident during the performance of a contract to reconstruct and remodel a government bridge over the Mississippi river had carried away a substantial part of the unfinished drawspan, together with the false work supporting the old structure, was contemplated by the contract, so as to preclude extra compensation therefor, where the immediate opening of navigation, which would have been seriously interrupted by the restoration of the false work, was imminent, and the contract, although containing many minute stipulations looking to uninterrupted railway service across the bridge, with no express requirement as to the navigability of the river, had fixed a date for the completion of the drawspan sufficiently early ordinarily to insure noninterruption of navigation.

[For other cases, see Contracts, 608-610, 686-690, in Digest Sup. Ct. 1908.]

[No. 26.]

Argued November 12, 13, 1908. Decided November 30, 1908.

APPEAL from the Court of Claims to review a judgment rejecting a claim of a public contractor to compensation for extra work. Affirmed.

See same case below, 38 Ct. Cl. 492.

The facts are stated in the opinion.

Messrs. John Spalding Flannery and Frederic D. McKenney argued the cause and filed a brief for appellant:

If a party by his contract charge himself with an obligation possible to be performed, he must make it good unless his perform-

NOTE. — On the right to recover for extra work—see notes to Gibson County v. Cincinnati Steam Heating Co. 12 L.R.A. 502, and Ingle v. Jones, 17 L. ed. U. S. 762.

ance is rendered impossible by the act of God, the law, or the other party.

United States v. Gleason, 175 U. S. 588, 602, 44 L. ed. 284, 289, 20 Sup. Ct. Rep. 228; Dermott v. Jones (Ingle v. Jones) 2 Wall. 1, 17 L. ed. 762.

In reconstructing this bridge the company was acting as the agent of the United States, which was clothed with the most ample, if not the sole, authority to make such an improvement. The United States was performing a duty with respect to one great highway of interstate commerce,—the railroad connecting two great sections of the country,—and in so doing had the fullest power to temporarily obstruct and burden another highway of interstate commerce,—the navigable channel of the Mississippi river. Any private inconvenience which might have arisen from such a work of internal and public improvement would have given no cause of action against the United States or against anyone duly authorized to act for it in such an undertaking.

Rhea v. Newport News & M. Valley R. Co. 50 Fed. 23; Leovy v. United States, 177 U. S. 621, 44 L. ed. 914, 20 Sup. Ct. Rep. 797; Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; Scranton v. Wheeler, 179 U. S. 141, 45 L. ed. 126, 21 Sup. Ct. Rep. 48; Bedford v. United States, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238; Cardwell v. American River Bridge Co. 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; Cooke, Commerce Clause of Fed. Constitution, § 52, p. 106.

A fortiori, no right of action could have been predicated upon an obstruction of navigation caused by an act of God.

United States v. Gleason, *supra*.

There is an implied contract to pay for extra and additional material and work not called for by the original contract.

Grants' Case, 5 Ct. Cl. 72; Wood v. Ft. Wayne, 119 U. S. 312, 30 L. ed. 416, 7 Sup. Ct. Rep. 219.

Where the alterations in or additions to a contract were ordered by an officer clothed with responsibility and authority to contract, a contract will be implied to the extent of the benefit which the defendants have received, and the claimants will be entitled to recover in a *quantum meruit*.

Hawkins v. United States, 96 U. S. 689, 24 L. ed. 607; Barlow v. United States, 35 Ct. Cl. 514.

Where a parol contract has been wholly or partly executed on one side, the party performing will be entitled to recover the fair value of his property or services as upon an implied contract for a *quantum meruit*.

Clark v. United States, 95 U. S. 539, 24 L. ed. 518.

The receipt given by the company for the final payment under its contract was not a release of its claim for additional work and material furnished for the erection of the lift span.

3 Addison, Contr. **1221, 1223; Lee v. Lancashire & Y. R. Co. L. R. 6 Ch. 537; Oelrichs v. Spain (Oelrichs v. Williams) 15 Wall. 211, 21 L. ed. 43.

Assistant Attorney General John Q. Thompson argued the cause, and, with Mr. A. C. Campbell, filed a brief for appellee: The decision of Colonel Buffington is final and conclusive.

Hawkins v. United States, 96 U. S. 689, 696, 24 L. ed. 607, 609.

Appellant could not legally obstruct the navigable capacity of the river, even with the consent of the government, without the consent of the state or states that own the bed of the river where it was proposed to place the obstruction.

Cummings v. Chicago, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; Montgomery v. Portland, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735; Kansas v. Colorado, 206 U. S. 46-93, 51 L. ed. 956-973, 27 Sup. Ct. Rep. 655; United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579.

Mr. Justice White delivered the opinion of the court:

This appeal is prosecuted to obtain the reversal of a judgment rejecting a claim of the Phoenix Bridge Company for \$6,958.14. The bridge company based its right to recover upon the averment that, during the performance of a contract entered into by it with the United States for the partial reconstruction and remodeling a bridge belonging to the United States, spanning the Mississippi river between Davenport, Iowa, and Rock Island, Illinois, the company had, under the orders of the United States officer in charge of the work, expended the amount claimed for work not specified in the contract, and for the value of which therefore the United States came under an obligation to respond. Not following the precise order in which the court below recited the facts by it found, we reproduce from such findings the statements made therein of such facts as are in anywise pertinent to the questions which we think the controversy involves.

In July, 1895, the government of the United States issued a circular advertisement, signed by A. R. Buffington, Colonel of Ordnance, U. S. Army, inviting proposals for the construction of a new superstructure and making alterations in the abutments

and piers of the government bridge over the Mississippi river connecting Davenport, Iowa, and Rock Island, Illinois. The bridge company, in answer to this advertisement, submitted a formal proposition, and, in addition, addressed a letter to Colonel Buffington, dated August 10, 1895, which, among other things, contained the following:

190] *Col. A. R. Buffington, Col. Ord., Commanding Rock Island Arsenal, Rock Island, Illinois.

Dear Sir:—

Appreciating the importance of finishing the proposed new bridge at Rock Island at the earliest possible date, we have been making a very careful study of the best method of removing the present structure and erecting the new spans, and have finally decided upon a plan which will enable us to work on the structure regardless of floods and ice in the river, and thereby give you the work at least five or six months before the time mentioned in your letter of July 27th. Our plan of erection is shown in detail on prints 1 and 2 sent herewith.

The erection of the drawspan of course must be done during the closing of navigation, between the 20th of November and the 15th of March of the following year, and this span will be removed in the ordinary manner, by placing false work in the river to support temporarily the old structure and the railway traffic during the removal of the present span, and for supporting the new work during erection, the various parts being put in position by the ordinary overhead traveler shown on plan 2. This particular part of the erection does not need any special explanation. As we have made a specialty of drawspan work and have every facility in our shops for building such a span, we have named a date of completion for the new drawspan of March 1st, 1896. The first small span, "E," we will erect in advance of the drawspan, and will have the same in position on February 1st, 1896. We erect this small span in advance of the draw, that we may bring these two spans up to the new grade together.

In August, 1895, the bridge company was notified of the acceptance of its proposition, such notification stating, however, that decision upon the character of the stone to be used and the form of the solid steel railroad floor was reserved. On October 2, 1895, the contract for the performance of the work was executed.

At the Rock Island end of the bridge there 191] was a stationary *span, and next to that there was a drawspan, and beyond that there were several more stationary spans, extending to the Iowa end of the bridge.

53 L. ed.

The plan adopted for the erection of the bridge contemplated the substitution of new material for the old superstructure without interruption to the railroad traffic over the bridge, and the scheme adopted was to carry such traffic upon false work, consisting of timbers extending from the bed of the stream to the old superstructure, for the purpose of supporting the tracks for such traffic. This false work under the drawspan made a barrier across that portion of the stream, which would have rendered navigation impossible in case such false work was not removed prior to the opening of navigation.

The drawspan was intended for the convenience of navigation upon the river, and said draw was the only means that vessels and other craft on the river had of going from one side of the bridge to the other.

The specifications, as originally prepared, called for the erection of the drawspan by January 1, 1896, and the completion of the bridge on November 1, 1896. Subsequently the specifications were modified so as to fix March 1, 1896, as the date for the erection of the drawspan, and September 15, 1896, for the final completion of the whole bridge.

The object of fixing March 1, 1896, for the completion of the drawspan, was that navigation, which was likely to open at that place in the middle of March, should not be interrupted by the work of construction upon the bridge. This object was well understood by both parties to the contract.

The specifications, forming a part of the contract, provided that the dates given above were of the essence of the contract, and that no payment would be made for any work or material, as provided by the specifications and the contract, to be made with the contractor, while he was in arrears in delivery or erection; and in case of the failure of the contractor to have the work completed by November 1, 1896, *he[192 would be required to pay two hundred dollars (\$200) per day as liquidated damages in consequence of such delay.

The specifications besides contained full details as to the method of doing the work and the supervision thereof by the government officer in charge. They provided that the contractor would be required to remove old superstructure without disturbing trains, and contained many express exactions looking to the execution of the work so as to enable the bridge to be continuously operated for the passage of trains during the progress of the contract. The contract contained the following clause:

"5th. If any default shall be made by the party of the first part in delivering all or any of the work mentioned in this contract, of the quality and at the times and places

herein specified, then in that case the said party of the second part may supply the deficiency by purchase in open market or otherwise (the articles so procured to be of the kind herein specified as near as practicable), and the said party of the first part shall be charged with the expense resulting from such failure. Nothing contained in this stipulation shall be construed to prevent the chief of ordnance, at his option, upon the happening of any such default, from declaring this contract to be thereafter null and void, without affecting the right of the United States to recover for defaults which may have occurred; but, in case of overwhelming and unforeseen accident, by fire or otherwise, the circumstances shall be taken into equitable consideration by the United States before claiming forfeiture for nondelivery at the time specified."

No provision was made for payment as such for any of the false work by which it was stipulated the whole bridge, including the drawspan, should be supported during the work of reconstruction, nor for the cost of removal of the same. The compensation stipulated was a given price per pound for the material to be placed in the new superstructure, and a fixed price per cubic yard for 193]alterations in the old masonry *work, and for excavations for additional foundations in the new masonry work required.

"The claimant proceeded to fulfil the obligations of its contract, and erected the necessary false work, including that for the drawspan, and was proceeding with the erection of the drawspan itself on February 25, 1896, when, as a result of a rise in temperature, the ice in the river at that point moved, taking with it the false work and a substantial portion of the drawspan then in place. In the condition in which the work was at that time nothing could have been done to prevent the destruction of the work. In case the accident had not happened, the drawspan would have been completed by March 15, 1896, to such an extent that it could have been swung so as not to impede navigation. The claimant did not proceed with the erection of the drawspan as expeditiously as it might have done, particularly in that it did not procure the necessary material in the order necessary for the erection of the drawspan. Said span might have been completed a considerable time before February 25, 1896, although the claimant was not bound to have it completed until March 1, 1896, by its contract. The United States was in no way responsible for any delays in the fulfilment of said contract, and was in no wise in default.

"After said accident Col. A. R. Buffington, United States ordnance officer in charge of the construction, together with several of his assistants, had a conference with the representatives of the claimant at the site of the bridge, and it was determined that the most feasible way of repairing the damage and going on with the construction of the drawspan was to erect said span upon the pivot pier running up and down the river, so that the erection of said drawspan should not interfere with navigation, which was likely to open at any time after March 1. It was further determined that the most feasible way of providing for railroad traffic during the erection of said drawspan was to put in place a temporary liftspan, which could be so operated as to allow the passage of vessels. Thereupon *Colonel Buf-[194 fington ordered the claimant to erect such liftspan, which the claimant did, at the expense of \$6,683.59.

"Colonel Buffington's order was intended to meet an exigency caused by the imminence of an immediate opening of navigation, and to avoid the consequent large damage which would have been done to the shipping of the river and the property interests employed therein by the obstruction which would have been caused by work under the contract if navigation had opened about March 1, as might have been apprehended upon February 26.

"At the time of the conference . . . representatives of the claimant demurred to the erection of such liftspan. They claimed that the bridge company could proceed to repair the damage done by the accident and erect the drawspan on false work across the channel of the river prior to the opening of navigation. Colonel Buffington and his assistants maintained that this could not be done.

"Navigation opened in the season of 1896, on March 27. At the time of the accident it could not have been foreseen that navigation would not open several weeks prior to that date. Navigation on the river at this point is heavy and continuous from the opening of navigation. In case navigation had been interrupted up to the date when the drawspan could have been ready to swing, the damage to persons engaged in such navigation would have been greater than the expense of the erection and operation of such liftspan.

"The erection of the liftspan was necessary in order to provide for railroad traffic and the navigation on the river, and was the most feasible and the least expensive method of so doing.

"After the accident on February 25, 1896, the claimant proceeded to erect the drawspan, in accordance with the contract, and

said drawspan was ready to swing June 1, 1896."

After the completion of the work, a voucher was drawn for the final payment under the contract. This voucher recited the total sum agreed to be paid by the contract, 195]deducted the *previous payments made to the bridge company, and stated the balance, it being explained that this balance constituted the full and final payment to the contractor. The amount thus stated to be the sum finally due under the contract was received by the company and a receipt was signed on December 11, 1896, declaring that the amount received was "acknowledged as the final and full payment for all the material furnished, and for all the work performed under the said contract, and in full for all charges, claims, adjustments, differences, or other alleged indebtedness incident to the work, or related to it in any manner whatever."

"At the time of signing this paper the claimant made no protest and understood that it covered all claims it had against the United States growing out of the erection of the said bridge. The final completion of the work provided for in the contract was several months later than the time limited in said contract, and, at the time said instrument was presented to plaintiff's agent for his signature, he objected to signing it. Buffington then informed him if he did not so sign it as a final release of all claims, his instructions were to refer the whole matter, including claims for delay in the completion of the work, to the Department. Claimant's agent then advised directly with his principal, after which he signed the instrument and received the final payment, at the same time, in reply to an inquiry by Colonel Buffington whether he signed without reservation, replied, 'You have our signature to the release as you handed it to me.' Before that time there had been dispute between the parties, both as to the liability of defendant for the liftspan and the plaintiff for delay in the completion of the work. No damages for delay were afterwards claimed or sought to be enforced against the claimant."

Upon these findings it is insisted that the court below erred in holding that the bridge company was not entitled to recover the amount by it expended for the erection of the temporary liftspan, because that work, done by the direction of the officer representing the United States, was not within the 196]contemplation *of the contract, and no duty rested upon the bridge company to do such work. In other words, the contention is that, as the contract provided for supporting the old structure across its entire length, including the drawspan, by false

work which was to hold the old structure until the new was completed, when the false work should be removed, that the bridge company, when the damage caused by the melting of the ice took place, was entitled to continue the use of the false work for supporting the drawspan, although in so doing the navigation of the river would be entirely obstructed. And, upon the assumption that such is the true interpretation of the contract, it is urged the final receipt which was given did not constitute accord and satisfaction for the expenditure made concerning the liftspan. In logical order the question of accord and satisfaction resulting from the giving of the receipt when the final payment was made would first arise for solution. As, however, the contention that accord and satisfaction did not result from the giving of the receipt rests upon the assumption that the work done in the temporary erection of the liftspan was not within the contract, and therefore was not embraced by the receipt, it follows that we must, in order to dispose of the controversy as to accord and satisfaction, consider and determine the nature and character of the obligations which the contract imposed concerning the work done as to the liftspan. For this reason, to avoid repetition, we come at once to the fundamental question, that is, the interpretation of the contract, for the purposes of ascertaining whether the work referred to was within the purview of the contract; for if it was, that will dispose of the whole controversy, including the claim of accord and satisfaction.

The argument by which it is sought to support the contention that the bridge company was entitled, after the accident, to continue the construction of the drawspan by the erection of false work which would entirely bar the navigable channel, insists that, as the contract alone provided for the method of construction by means of false work as a support *for the old struct-[197 ure during the performance of the contract, the contract must be construed as having authorized the bridge company to continue the use of the false work after the accident, even across the navigable channel, despite the injurious consequences to navigation which would have resulted. And from this right to use the false work to the destruction of navigation it is contended that there was no authority to direct the erection of the liftspan, and consequently an implied and contract liability on the part of the United States to pay the cost of the same when the span was erected under the order of the officer of the United States in charge. But we are of opinion that the interpretation of the contract upon which this proposition must rest is unsound, because it is

not supported by the text of the instrument, and is not consonant with the intention of the parties as manifested by the text, and as established as a necessary result of the findings below made.

In considering the text of the contract attention is at once attracted to the important stipulations as to the period in which the work should be carried on and completed, and to the difference between the time fixed for the completion of the work as to the drawspan and that as to the remaining spans. When the fact that the bridge spanned a great navigable river, and the duty of the government to protect that navigability, is borne in mind, moreover, when the facts found by the court below as to the period when navigation would be suspended as the result of natural causes is also considered in connection with the obligation which the contract imposed of completing the drawspan within such non-navigable period, we are of opinion that the contract must be interpreted as exacting that the means employed in constructing the drawspan should be such as would not operate to impede navigation. We think, therefore, that the contract must be held to have empowered the bridge company to use and retain the false work in the navigable channel only during the time expressly stipulated in the contract, and therefore to 198] have imposed *the duty after that period, if the exigencies of the situation required it, to perform the work on the drawspan in some other suitable manner consistent with the noninterruption of the navigation of the river.

This interpretation, which we think the contract requires, as we have said, is directly in accordance with the finding below, that the object of fixing March 1, 1896, for the completion of the drawspan, was that navigation, which was likely to open at that place in the middle of March, should not be interrupted by the work of construction upon the bridge, and that this object was well understood by both parties to the contract.

The argument that, because the contract and its specifications contained many minute stipulations looking to prevent the interruption of railroad traffic across the bridge, and no express requirement as to the preservation of the navigability of the river, therefore, under the rule that the inclusion of one is the exclusion of the other, it should be interpreted as not having contemplated the necessity for preservation of navigability, when the terms of the contract are accurately considered, is self-destructive. We say this because, if the provision of the contract as to the time for completing the drawspan be given its necessary significance

as elucidated by the intention of the parties as expressly established by the findings below, it must result that the insertion of the requirement as to the construction of the drawspan within the period fixed, which was safely within the time when, by the operation of nature, there would be no navigation on the river, excludes the conception that the minds of the parties could have deemed it necessary to expressly provide for the contingency of the interruption of navigation by the execution of the work, when such interruption was impossible to arise if the duties which the contract imposed were executed according to their express requirements.

As the findings, beyond peradventure, established that the liftspan was the most feasible and least expensive substitute *for[199 the false work which could have been employed after the accident, and, as they also established that the objection of the bridge company to pursuing that method was alone based upon the assumed right to complete the work by the use of false work in the navigable channel after the period stipulated in the contract,—a right which we hold the bridge company did not enjoy,—we think no express or implied obligation rested upon the United States to pay for the cost of the temporary liftspan, and that the court below was correct in so holding.

Disposing of the case, as we do, upon the interpretation of the contract heretofore made, it is unnecessary to consider whether, even assuming that there could be a different interpretation, the bridge company would be entitled to recover, in view of the facts found below as to the state of the work on the drawspan at the time the accident occurred, that is, the backwardness of such work, which it was expressly found was due solely to the negligence of the bridge company.

Affirmed.

THOMAS H. PICKFORD and John H. Walter, Plffs. in Err.,

v.

HENRY M. TALBOTT.

(See S. C. Reporter's ed. 199-210.)

Evidence — admissibility under pleadings — cross-examination.

1. Evidence that a prosecuting attorney neglected to investigate the character of

NOTE. — On the scope of cross-examination—see notes to *Hobart v. Young*, 12 L.R.A. 693, and *Rea v. Missouri*, 21 L. ed. U. S. 707.

As to when requested instructions may be refused—see note to *International & G. N. R. Co. v. Keenan*, 9 L.R.A. 703.

the prosecuting witness is inadmissible on the cross-examination of that officer under a plea of the general issue, as tending to rebut the allegation in the declaration in an action for libel in charging him with using his office to procure an indictment as part of a conspiracy to blackmail, that he was upright, honest, just, and faithful in the performance of his official duties.

[For other cases, see Evidence, 2688-2712; Witnesses, V. b, in Digest Sup. Ct. 1908.]

Trial — requested instructions.

2. A requested instruction is properly refused where the instructions given and not objected to embodied everything contained in the instruction refused that was adapted to the testimony and to the consideration which the jury might give to its various phases.

[For other cases, see Trial, 796-818, in Digest Sup. Ct. 1908.]

[No. 13.]

Argued October 26, 27, 1908. Decided November 30, 1908.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District in favor of plaintiff in an action for libel. Affirmed.

See same case below, 28 App. D. C. 498.

The facts are stated in the opinion.

Mr. Henry E. Davis argued the cause, and, with Messrs. Samuel Maddox and H. Prescott Gatley, filed a brief for plaintiffs in error:

The line of inquiry was being pursued during cross-examination, where the rule is different from that which governs tenders of original or direct evidence.

Wigmore, Ev. § 981; Oxier v. United States, 1 Ind. Terr. 85, 38 S. W. 331; People v. Jackson, 3 Park. Crim. Rep. 395; Eames v. Kaiser, 142 U. S. 491, 35 L. ed. 1091, 12 Sup. Ct. Rep. 302; Sonnentheil v. Texas Guaranty & T. Co. 10 Tex. Civ. App. 287, 30 S. W. 945; Griffin v. Henderson, 117 Ga. 383, 43 S. E. 712.

In actions of libel and slander very wide latitude is given defendant, under a plea of not guilty, and in mitigation of damages, to prove that the character of the plaintiff is not so good as claimed by him. If material to the issues, specific acts of wrongdoing may be shown.

Townshend, Slander & Libel, p. 669, § 406; Newell, Defamation, p. 290, § 39; Leicester v. Walter, 2 Campb. 251; Wetherbee v. Marsh, 20 N. H. 563, 51 Am. Dec. 244; Wilson v. Noonan, 27 Wis. 598; Conroe v. Conroe, 47 Pa. 198; B— v. I—, 22 Wis. 372, 94 Am. Dec. 604; Jones v. Townsend, 21 Fla. 447; Williams v. Miner, 18 Conn. 477; Odgers, Libel & Slander, Bigelow's Notes, §§ 304, 305; Treat v. Browning, 4 Conn. 409.

The greatest latitude is and should be al-

lowed on cross-examination, especially of a party to the suit, for the purpose of sifting the conscience of the witness touching his accuracy of statements, veracity, and credibility; and even specific, extraneous offenses and other matters material to the issues may be inquired into, if they have any bearing thereon.

1 Greenl. Ev. § 446; 3 Jones, Ev. § 826; Taylor, Ev. 8th ed. § 1459; Kirschner v. State, 9 Wis. 140; Eames v. Kaiser, supra; Hitchcock v. Moore, 70 Mich. 112, 14 Am. St. Rep. 474, 37 N. E. 914; Hay v. Reid, 85 Mich. 307, 48 N. W. 507; State v. Merriman, 34 S. C. 39, 12 S. E. 619; Kolb v. Union R. Co. 23 R. I. 74, 54 L.R.A. 646, 91 Am. St. Rep. 614, 49 Atl. 392.

The trial court was seemingly frightened by the bogey arising from the rule laid down in Underwood v. Parks, 2 Strange, 1200, that "the truth of words cannot be given in evidence on not guilty."

The interpretation of this rule and the extent of its application have given rise to the greatest possible diversity in the judgments of the courts; at least, in those states where it had not been abolished by statute.

Bush v. Prosser, 11 N. Y. 362; Van Derveer v. Sutphin, 5 Ohio St. 302; Huson v. Dale, 19 Mich. 30, 2 Am. Rep. 66.

The trial court erred in respect of instructing the jury as to the responsibility of the plaintiffs in error for the alleged libel.

Fox v. Vanderbeek, 5 Cow. 513; Olmstead v. Miller, 1 Wend. 506; Whiting v. Smith, 13 Pick. 371; Stanfield v. Boyer, 6 Harr. & J. 248; Winter v. Donovan, 8 Gill, 376; Smith v. Hollister, 32 Vt. 695; Barnett v. State, 35 Tex. Crim. Rep. 281, 33 S. W. 340; Conlee v. State, 14 Tex. App. 222; Frisby v. State, 26 Tex. App. 180, 9 S. W. 463; Riddle v. State, 30 Tex. App. 425, 17 S. W. 1073; State v. Fitzgerald, 20 Mo. App. 408; Atteberry v. Powell, 29 Mo. 429, 77 Am. Dec. 579; Enos v. Enos, 135 N. Y. 609, 32 N. E. 123; Ranson v. McCurley, 140 Ill. 626, 31 N. E. 121; Barrows v. Carpenter, 11 Cush. 456; Howland v. George F. Blake Mfg. Co. 156 Mass. 543, 31 N. E. 656.

Messrs. Andrew Lipscomb and John Ridout argued the cause and filed a brief for defendant in error:

The "English rule" allowed practically a cross-examination of a witness on the whole case; but it is by the "American rule" equally well settled in a large majority of states and all the Federal courts that it is limited to matters brought out by the direct.

Houghton v. Jones, 1 Wall. 702, 17 L. ed. 503; Philadelphia & T. R. Co. v. Stimpson, 14 Pet. 461, 10 L. ed. 542; Jones, Ev. §§ 820, 821, 837; Northern P. R. Co. v. Umlin, 158 U. S. 271, 39 L. ed. 977, 15 Sup. Ct. Rep. 840.

"The truth" or "justification" must be specially pleaded, and with sufficient precision and particularity to enable the plaintiff to know precisely what is the charge he is to meet.

Newell, Defamation, §§ 68-76; Richardson v. State, 66 Md. 205, 7 Atl. 43; Smith v. Tribune Co. 4 Biss. 477, Fed. Cas. No. 13,118; Woodruff v. Richardson, 20 Conn. 238; Knight v. Foster, 39 N. H. 576; Smart v. Blanchard, 42 N. H. 137.

The trial judge is something more than the moderator of a town meeting, and he has affirmative duties to perform in ruling upon questions of evidence.

Patton v. Texas & P. R. Co. 179 U. S. 658, 660, 45 L. ed. 361, 363, 21 Sup. Ct. Rep. 275.

In libel, if the language is clear and unambiguous, it is the province of the court to determine its construction and whether it is actionable *per se*.

Negley v. Farrow, 60 Md. 158, 45 Am. Rep. 715.

All the essential elements to which, under any view of the law, plaintiffs in error were entitled, were given to the jury by the general charge of the court; and it is thoroughly well settled that the trial court is not bound to charge in any case as prayed, if the law be plainly and correctly given in the general charge.

District of Columbia v. Dietrich, 23 App. D. C. 577; Ryan v. Washington & G. R. Co. 8 App. D. C. 542; District of Columbia v. Wilcox, 4 App. D. C. 90; District of Columbia v. Haller, 4 App. D. C. 405; Robinson v. Parker, 11 App. D. C. 132; De Forest v. United States, 11 App. D. C. 458.

Mr. Justice McKenna delivered the opinion of the court:

This is an action for libel, brought in the supreme court of the District of Columbia. The plaintiff in the action, defendant in error here, secured a verdict for \$8,500, upon which judgment was entered. It was affirmed by the court of appeals. 28 App. D. C. 498.

205] *The facts are set out at some length in the opinion of the court of appeals, and need not be repeated. It is enough to say that defendant in error, Talbott, was, at the time of the publication of the libel, state's attorney for the county of Montgomery, in the state of Maryland. During his incumbency of that office an indictment was found upon the testimony of one Hudson, charging plaintiffs in error with the crime of arson, for having set fire, it was charged, to a building owned by them in Montgomery county. The building was insured for \$30,000, of which, after controversy, there was paid \$21,000. The libelous article was published in a paper published in the city of Washington, called

the Sunday Globe, and copies circulated in the county of Montgomery, Maryland. The article was entitled, "History of a Crime in which District Attorney Talbott, of Maryland, Enacts a Leading Role." It accused Talbott of entering into a "criminal scheme" with Hudson and a man by the name of Hopp, to blackmail Pickford and Walter, plaintiffs in error, which "culminated" in the "nefarious indictment;" and, in order that the actors in it might be "unmasked," the facts were said to be stated as they were learned "after a thorough investigation." Certain facts and instances were detailed, among others the association of Hudson and Hopp, an attempt by the latter to obtain money from Pickford to stop the prosecution of the indictment, the payment of Pickford to Hopp of certain marked bills, the arrest of Hopp, the advancement of money by Talbott to Hudson, the demand of Pickford's attorney for trial of the indictment, and motions to continue the same by Talbott, and the final dismissal of the same by him when the court peremptorily ordered him to proceed. The article concluded with these words: "The district attorney [Talbott] thereupon, by leave of the court, entered a *nol. pros.* and the great conspiracy thus came to an inglorious end."

It appeared from the evidence that the predecessor in office of Talbott (Alexander Kilgour) had refused to prosecute plaintiffs in error, and to him, plaintiff in error Pickford, in his *testimony, attributed [206 the declaration that the "whole thing" was a "blackmailing scheme." Kilgour, in his testimony, stated that he did not recall using the word "blackmailing," but said that in all probability he had done so, and "that it was an effort on the part of the insurance companies to use his office for the purpose of collecting their money."

The declaration contained four counts, the first of which was taken from the jury. In all of them, however, Talbott alleged his incumbency of the office of state's attorney for the county of Montgomery, and that, as "such officer, he was always reputed amongst the citizens of said county" and of the United States, "and deservedly so reputed, to be upright, honest, just, and faithful in the performance of the public duties imposed upon him by his oath of office and the laws of the state of Maryland." Injury to his good name and credit was alleged. The defendants pleaded the general issue.

At the trial, Talbott, being on the stand, testified that he had investigated the crime for which Pickford and Walter were indicted, and that it had been brought to his attention by a man by the name of Thompson, "in a vague and indefinite letter," which was followed by another letter, in

which it was stated the crime was arson. He testified that Thompson was a newspaper man, whom he had never seen before, and on whom he called in response to the second letter. He also testified that Thompson told him that Hudson would be a witness, but did not tell him who Hudson was, but that he (Hudson) was thoroughly in touch with the situation. Subsequently he went with Thompson to see Hudson, taking a stenographer with him. He further testified that he did not know whether he asked Thompson if the matter had been brought to the attention of Mr. Kilgour. And further testified that the fire occurred during Kilgour's incumbency, and that he had not inquired of Kilgour about it. He also testified that the fire occurred in September, 1897, two years and four months before he qualified. He testified further that both Thompson and Hudson were strangers to 207]him. At this point *the court interrupted the examination, and the following occurred:

The Court. On what line are you pursuing this inquiry?

Mr. Maddox. I am going to show, if I can, the absence of good faith in this indictment on the part of the district attorney.

Thereupon, after discussion and explanation on the part of counsel for defendants, the following occurred:

The Court. I think I have heard enough to know what your proposition is. I cannot see but that it is an attempt to prove the truth without pleading it. . . . You may prove anything Pickford heard the witness say, before the article was published.

Mr. Maddox. I want to prove by this witness, first by his own testimony in connection with the transaction complained of in this article, that he is not a man of good character, which he says he is.

Mr. Lipscomb. I do not object *by our* [to your] asking him that, Mr. Maddox.

Secondly. I want to show that Mr. Pickford, from what he heard the plaintiff say, had reasonable grounds to believe that he was mixed up in some way with this conspiracy.

The Court. You may prove anything Pickford heard the witness say before the article was published.

Mr. Maddox. I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury, and whether he investigated the character of the man.

Under your statement that you propose by that line of testimony to prove that the district attorney acted in bad faith, I will not hear it, because I do not think it is relevant for that purpose.

This ruling is assigned as error here, as it was in the court of appeals, and it is attacked on the ground that "the 'good faith' of the defendant in error in procuring the Rockville indictment went to the very heart of the action." And counsel *supplement[208 this by saying that, "if it could have been made to appear by the admission of the witness, testifying in his own behalf, that, while state's attorney, he was in league with the man Hudson and the insurance companies in a scheme which his predecessor denominated 'blackmailing,' the jury would have made short work of the case when they retired to consider their verdict; and it was impossible to do this except by probing the conscience of the witness through the medium of cross-examination." It is obvious, by "good faith," counsel mean the truth of the charge. But, in the subsequent discussion, they seem to make it equivalent to good character, and contend that the examination was in rebuttal of the allegation of the declaration that defendant in error "was upright, honest, and just" in the performance of his official duties.

For the right to show the character of the witness, counsel adduce many cases, and assert, besides, the freedom that may be exercised in cross-examination. But the counsel who tried the case marked a distinction between the character of the witness and his good faith, and on that distinction the court made its ruling. It will not do now to identify them and claim a right that was not denied. The attorney for defendants (plaintiffs in error) was careful to say that he made no objections to questions directed to character, and the final purpose, as declared, had no reference to that. But what is the testimony and what is the argument built upon it? Counsel who conducted the defense said: "I understand the court will not let me go into the inquiry as to whether or not the plaintiff knew the man Hudson before he made this presentment to the grand jury, and whether he investigated the character of the man." It is now argued that this was an inquiry of a specific fact affecting the character of Talbott, showing that he exhibited a "reckless disregard of the rights of others," and this, taken in connection with certain facts mentioned, "shows," it is said, "a readiness on the part of the defendant in error to smirch the character of plaintiffs in error amount-

ing to recklessness such that, if the defendant in error were at *bar for his conduct in the premises, would be held to show malice of the degree calling for punitive damages." And it is urged, after considerable discussion, that "the interrupted attempt was to show that the defendant in error, by reason of his conduct in the very matter in controversy, was not entitled to and did not have the peculiar character in respect to which he claimed to have been injured; namely, a character for probity in office."

We are not able to concur in the conclusion. A charge of using an office to procure an indictment as part of a conspiracy to blackmail could not be justified or in any degree excused by the facts offered to be proved. One might be a careful and zealous officer and not stop to investigate the characters of prosecuting witnesses. Besides, the charge was not of careless credence of an accusation of crime against innocent men, but of a scheme deliberately planned, through a "nefarious indictment," to use the words of the libel, to extort money from innocent men. We think, therefore, that the trial court was right in rejecting the proffered evidence as irrelevant. We could not hold otherwise, unless we should hold that crime and credulity are one and the same thing, and we repeat that the mere neglect to investigate the character of witnesses is not equivalent to such disregard of the rights of others as to be tantamount to deliberate design, certainly not a deliberate design to blackmail. We say "mere neglect," because this was all the offer amounted to. It was already in evidence for what it was worth that Hudson was a stranger to Talbott.

The second assignment of error is based upon the contention that the court erroneously instructed the jury in regard to the responsibility of the plaintiffs in error for the libel.

It is not necessary to give the testimony. We will assume that it might have been contended plaintiffs in error were not connected with either the printing or publishing of the first article or the second (there were two), or with either. The instruction asked and the instructions given by the 210]court *are too long to be copied and difficult to summarize. They are set out in the opinion of the court of appeals, and it will be seen from them that those given by the court, which were not objected to, embodied all, as the court of appeals held, that was contained in the instruction refused, adapted to the testimony and the consideration which the jury might give to its various phases.

Judgment affirmed.

ROBERT R. PRENTIS, Henry C. Stuart, and Joseph E. Willard, Individually and as Constituting the State Corporation Commission of Virginia, and R. T. Wilson, Clerk of the State Corporation Commission of Virginia, Appts.,

v.

ATLANTIC COAST LINE COMPANY.
[No. 270.]

SAME, Appts.,

v.

CHESAPEAKE & OHIO RAILWAY COMPANY. [No. 271.]

SAME, Appts.,

v.

CHESAPEAKE WESTERN RAILWAY.
[No. 272.]

SAME, Appts.,

v.

LOUISVILLE & NASHVILLE RAILROAD COMPANY. [No. 273.]

SAME, Appts.,

v.

NORFOLK & WESTERN RAILWAY COMPANY. [No. 274.]

SAME, Appts.,

v.

SOUTHERN RAILWAY COMPANY.
[No. 275.]

(See S. C. Reporter's ed. 210-239.)

Courts — enjoining proceedings in state court — establishment of railway rates.

1. Injunctive relief against railway passenger rates as fixed by the Virginia State Corporation Commission may be granted by a Federal court if such rates are confiscatory, although, for some purposes, the commission is a court, since proceedings to establish rates are legislative, and therefore are not comprehended by the provision of U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, forbidding Federal courts from enjoining proceedings in state courts, which provision looks to the

NOTE. — On enjoining proceedings in Federal courts—see notes to *Garner v. Second Nat. Bank*, 16 C. C. A. 90; *Central Trust Co. v. Grantham*, 27 C. C. A. 575; and *Copeland v. Bruning*, 63 C. C. A. 437.

On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L.R.A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L.R.A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 577; *Morrill v. Morrill*, 11 L.R.A. 155; *Shores v. Hooper*, 11 L.R.A. 308; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street Rail Co. v. Wharton*, 38 L. ed. U. S. 429; and *Southern P. R. Co. v. United States*, 42 L. ed. U. S. 355.

As to conclusiveness and effect of judgments as between Federal and state courts—

character of the proceedings, not the character of the body.

[For other cases, see Courts, 1495-1498, in Digest Sup. Ct. 1908.]

Judgments — res judicata — establishment of railway rates by state commission.

2. The establishment of railway passenger rates by the Virginia State Corporation Commission is not *res judicata* in a suit which seeks injunctive relief on the ground that the rates are confiscatory, although such commission, for some purposes, is a court, and acted only after hearing and investigation, since proceedings to establish rates are legislative, and not judicial, in their nature.

[Judgments of what tribunals are conclusive, see Judgment, III. g, h, in Digest Sup. Ct. 1908.]

Courts — enjoining railway rates — exhausting remedy in state courts.

3. A Federal circuit court, on principles of comity, should not entertain a suit by which injunctive relief is sought against railway passenger rates as fixed by the Virginia State Corporation Commission, in advance of the appeal to the highest state court from the order fixing the rates, which is given by the state Constitution as of right to any aggrieved party.

[For other cases, see Courts, VI. d, 2, in Digest Sup. Ct. 1908.]

States — immunity from suit — enjoining state officers.

4. A bill filed in a Federal court against a state commission to restrain its members from enforcing railway passenger rates established by such commission, on the ground that such rates are confiscatory, is not bad as an attempt to enjoin legislation or as a suit against the state.

[For other cases, see States, IX. c, 2, in Digest Sup. Ct. 1908.]

[Nos. 270-275.]

Argued October 16, 19, 20, 1908. Decided November 30, 1908.

A PPEALS from the Circuit Court of the United States for the Eastern District of Virginia to review decrees enjoining the enforcement of railway passenger rates as fixed by the Virginia State Corporation Commission, on the ground that such rates are confiscatory. Reversed.

The facts are stated in the opinion.

see notes to, *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478, and *Union & Planters' Bank v. Memphis*, 49 C. C. A. 468.

On premature commencement of action generally—see note to *American Bonding & T. Co. v. Gibson County*, 76 C. C. A. 159.

On suits against a state—see notes to *Murdoek Parlor Grate Co. v. Com.* 8 L.R.A. 399; *Carr v. State*, 11 L.R.A. 370; *Beers v. Arkansas*, 15 L. ed. U. S. 991; *Hans v. Louisiana*, 33 L. ed. U. S. 842; and *Tindall v. Wesley*, 13 C. C. A. 165.

On suits against state officers as suits against state—see notes to *Sanders v. Saxton*, 1 L.R.A. (N.S.) 727; *Ex parte Young*, 13 L.R.A. (N.S.) 932; and *Beers v. Arkansas*, 15 L. ed. U. S. 991.

53 L. ed.

Mr. William A. Anderson argued the cause and filed a brief for appellants:

The definitions of a court, as given by law writers and lexicographers, are various; but it will be found that the tribunal whose orders the plaintiffs in these suits seek to nullify satisfies all of the essential requisites of a court of justice as given by these authorities.

See Webster's Dict., Century Dict., Standard Dict., 3 Bl. Com. pp. 24, 25. See also *Fuller v. Colfax County*, 4 McCrary, 537, 14 Fed. 177.

The great object of these suits is to enjoin and stop litigation in the state courts, and to bring all the litigated questions before the United States circuit court. This is one of the things the Federal courts are expressly prohibited from doing.

United States v. Parkhurst-Davis Mercantile Co. 176 U. S. 317, 44 L. ed. 485, 20 Sup. Ct. Rep. 423; *Haines v. Carpenter*, 91 U. S. 254-257, 23 L. ed. 345, 346.

These are really suits against a state.

Re *Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; *Cunningham v. Macon & B. R. Co.* 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *Smith v. Reeves*, 178 U. S. 440, 44 L. ed. 1143, 20 Sup. Ct. Rep. 919; *Minnesota v. Hiteheock*, 185 U. S. 386, 46 L. ed. 962, 22 Sup. Ct. Rep. 650.

The Virginia tribunal, in its origin and constitution, differs essentially from the railroad commissions passed upon in the Railroad Commission Cases, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191, and from the Minnesota Railroad Commission considered in *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702, and from the Texas Railroad Commission discussed in *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 388-413, 38 L. ed. 1014, 1020-1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

If there is a reasonable doubt as to the constitutional validity of the organic and statutory enactments of Virginia which are attempted to be impeached by the appellees, that doubt must be solved in favor of the validity of those laws.

Sinking Fund Cases, 99 U. S. 718, 25 L. ed. 501; *Powell v. Pennsylvania*, 127 U. S. 684, 32 L. ed. 256, 8 Sup. Ct. Rep. 992, 1257; *Sweet v. Rechel*, 159 U. S. 393, 40 L. ed. 194, 16 Sup. Ct. Rep. 43.

If there is any reasonable doubt as to

whether the United States circuit court had jurisdiction of these cases, it was error for the court to take jurisdiction of them.

1 Desty, Fed. Proc. p. 340; *Grace v. American Cent. Ins. Co.* 109 U. S. 278-284, 27 L. ed. 932-935, 3 Sup. Ct. Rep. 207; *Peper v. Fordyce*, 119 U. S. 469, 30 L. ed. 435, 7 Sup. Ct. Rep. 287; *Turner v. Bank of North America*, 4 Dall. 8, 1 L. ed. 718.

Mr. John W. Daniel also argued the cause and filed a brief for appellants:

The state corporation commission fulfils every definition and description of a judicial court ever given by any judicial expounder of, or any intelligent commentator on, the jurisprudence of the English-speaking peoples.

Co. Litt. 58a; 3 Bl. Com. 23, 25; *People ex rel. Garling v. Van Allen*, 55 N. Y. 31; *White County v. Gwin*, 136 Ind. 562, 22 L.R.A. 402, 36 N. E. 237; 11 Cyc. Law & Proc. pp. 653, 654.

No court of the United States can enjoin proceedings in a state court, with the single statutory exception made by the national bankrupt law when such law is in operation; and the further exception, taken from equity principles in the case of concurrent jurisdiction, that the Federal court had assumed prior jurisdiction.

Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587; *Peck v. Jenness*, 7 How. 612-625, 12 L. ed. 841-846; *Slaughter-house Cases*, 10 Wall. 298, 19 L. ed. 922; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Haines v. Carpenter*, 91 U. S. 257, 23 L. ed. 346; *Citizens' Bank v. Board of Liquidation* (*Louisiana ex rel. Citizens' Bank v. Board of Liquidation*) 98 U. S. 140, 25 L. ed. 114; *Williams v. Oliver*, 12 How. 125, 13 L. ed. 921; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *French v. Hay* (*French v. Stewart*) 22 Wall. 253, 22 L. ed. 858; *Bolling v. Lersner*, 91 U. S. 595, 23 L. ed. 367; *United States v. Collins*, 4 Blatchf. 156, Fed. Cas. No. 14,834; *Fisk v. Union P. R. Co.* 6 Blatchf. 362, Fed. Cas. No. 4,827; *Fisk v. Union P. R. Co.* 10 Blatchf. 518, Fed. Cas. No. 4,830; *Cropper v. Coburn*, 2 Curt. C. C. 469, Fed. Cas. No. 3,416; *Hamilton v. Walsh*, 23 Fed. 420; *Chaffin v. St. Louis*, 4 Dill. 24, Fed. Cas. No. 2,573; *McWhirter v. Halsted*, 24 Fed. 828; *Hale v. Bugg*, 82 Fed. 33; *United States v. Parkhurst-Davis Mercantile Co.* 176 U. S. 317, 44 L. ed. 485, 20 Sup. Ct. Rep. 423; *Harkrader v. Wadley*, 172 U. S. 154-165, 43 L. ed. 401-405, 19 Sup. Ct. Rep. 119; *Spear*, Federal Judiciary, 321; *McKim v. Voorhies*, 7 Cranch, 279, 3 L. ed. 342; *Simpkin's*, Suit in Equity in Federal Courts, p. 337; 1 Rose, Code of Federal Procedure, pp. 166, 167-170, § 720; *Cooley*, Const. Lim. 7th ed. pp. 31-35

This prohibition necessarily includes all steps taken by the court or its officers under its process, from the institution of the suit until the close of the final process of execution.

United States v. Collins, supra.

If the nature of an administrative question involve the exercise of the judicial faculties for its solution, it may be made a judicial question, and referred by law to the jurisdiction of the courts.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372; *United States v. Halleck*, 1 Wall. 439, 17 L. ed. 664; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698.

Where a court has the power to refer a question of rate making to a court under the law of a state, it is competent for that court to hear and adjudicate it.

Re Janvrin, 174 Mass. 514, 47 L.R.A. 319, 55 N. E. 381.

Mr. A. Caperton Braxton also argued the cause and filed a brief for appellants:

There are certain functions which are so interwoven and blended as to make it somewhat a matter of opinion and viewpoint, if not of mere taste or fancy, as to how they should be classified. Rate making might, in some aspects, be regarded as one of these hybrid functions.

Spring Valley Waterworks v. Schottler, 110 U. S. 354, 28 L. ed. 176, 4 Sup. Ct. Rep. 48; *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 874; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 196, 40 L. ed. 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 216, 40 L. ed. 946, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 499, 505, 42 L. ed. 253, 255, 17 Sup. Ct. Rep. 896; *McChord v. Louisville & N. R. Co.* 183 U. S. 495, 46 L. ed. 295, 22 Sup. Ct. Rep. 165; *Hibben v. Smith*, 191 U. S. 321, 48 L. ed. 199, 24 Sup. Ct. Rep. 88.

Attention is invited to the very striking analogy between the principles involved in the prescribing of rates by the Virginia commission, and the action of the Federal courts in prescribing future rules for the distribution, without discrimination, of coal cars, and commanding the observance of such rules by the carrier.

United States ex rel. Kingwood Coal Co. v. West Virginia Northern R. Co. 125 Fed. 252.

Federal courts cannot enjoin proceedings in state courts.

Dillon v. Kansas City Suburban Belt R. Co. 43 Fed. 109; Hemsley v. Myers, 45 Fed. 289; Whitney v. Wilder, 4 C. C. A. 510, 13 U. S. App. 180, 54 Fed. 554; Reinach v. Atlantic & G. W. R. Co. 58 Fed. 44; Riggs v. Johnson County (United States ex rel. Riggs v. Johnson County) 6 Wall. 195, 18 L. ed. 776; Orton v. Smith, 18 How. 265, 15 L. ed. 394; Peck v. Jenness, 7 How. 624, 12 L. ed. 846; Haines v. Carpenter, 91 U. S. 257, 23 L. ed. 346; Dial v. Reynolds, 96 U. S. 341, 24 L. ed. 659; Chaffin v. St. Louis, 4 Dill. 19, Fed. Cas. No. 2,572.

Even in a case originally brought in a state court, and afterwards removed to the Federal court, the latter court cannot enjoin proceedings in another case still pending in a state court, although such injunction might have been granted by the state court in which the removal suit was originally brought.

Diggs v. Wolcott, 4 Cranch, 179, 2 L. ed. 587.

It is immaterial that the state court has already rendered its judgment, and that the injunction is merely against the enforcement, or carrying out, or giving effect to, such judgment.

Murray v. Overstoltz, 1 McCrary, 606, 8 Fed. 110; Rensselaer & S. R. Co. v. Bennington & R. R. Co. 18 Fed. 617; Dillon v. Kansas City Suburban Belt R. Co. supra.

Where a Federal right has been ignored or misconstrued or abused by a state court which has originally had rightful jurisdiction of the controversy, the party must seek his remedy by appeal, first, to the highest state tribunal having jurisdiction, and then to the Supreme Court of the United States.

Re Sawyer, 124 U. S. 219, 31 L. ed. 408, 8 Sup. Ct. Rep. 482; Fitts v. McGhee, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; Hemsley v. Myers; Riggs v. Johnson County; and Peck v. Jenness,—supra.

An appeal is not a new case, but, *ex vi termini*, imports the pre-existence of the same case in the tribunal appealed from, the appeal being necessarily a mere continuation of the original suit.

Cohen v. Virginia, 6 Wheat. 409, 5 L. ed. 292; Nations v. Johnson, 24 How. 204, 205, 16 L. ed. 631, 632.

There can surely be no question as to the supreme court of appeals of the state being a judicial court of record in the strictest and fullest sense. When an appeal is actually pending in that court from a ruling of the commission prescribing rates of charge, as was the case in Atlantic Coast Line R. Co. v. Com. 102 Va. 599, 46 S. E. 911, an appeal from an order of the commission prescribing demurrage rates; and in Norfolk &

P. Belt Line R. Co. v. Com. 103 Va. 289, 49 S. E. 39, an appeal from an order of the commission prescribing car-weighting rates,—when such an appeal is actually pending in the supreme court of appeals, no one can question its being, in the strictest sense, a judicial case, in a judicial court, the proceedings in which the Federal circuit courts are prohibited by U. S. Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581, from enjoining.

If, therefore, the proceeding is a judicial cause when it gets into the supreme court of appeals after appeal, then, *ex necessitate*, it must have been equally a judicial cause while before the commission, before the appeal. This is but another demonstration of the fact that the commission is, in truth and in fact, a court.

The highest court of the state itself has repeatedly held the Virginia state corporation commission to be a court, and expressly in the exercise of its rate-making functions.

Norfolk & W. R. Co. v. Tidewater R. Co. 105 Va. 131, 52 S. E. 852; Newport News Light & Water Co. v. Peninsular Pure Water Co. 107 Va. 700, 59 S. E. 1099; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 A. & E. Ann. Cas. 1124.

The following cases are sufficiently analogous to those involved in these appeals to serve as pertinent illustrations of the practical application of the rule laid down in § 720 of the Revised Statutes, forbidding Federal circuit courts to enjoin proceedings in a state court, even though the function being exercised in such proceedings might properly be classified as legislative rather than judicial:

Rensselaer & S. R. Co. v. Bennington & R. R. Co.; Re Sawyer; and Fitts v. McGhee,—supra.

For the lower court to have enjoined the Virginia commission in June, from taking any proceedings towards the enforcement of its own order entered in April, in a proceeding still pending before the commission, and from which order an appeal of right lay to the supreme court of appeals of the state, with absolute right of supersedeas, on substantially the same terms as those upon which the injunction was asked for and granted, was a palpable violation of the inhibition of § 720 of the Revised Statutes. Such an error is jurisdictional.

Diggs v. Wolcott, supra; M'Kim v. Voorhies, 7 Cranch, 279, 3 L. ed. 342; Sargent v. Helton, 115 U. S. 350, 29 L. ed. 413, 6 Sup. Ct. Rep. 78.

All of the matters and things involved in these suits are *res judicata*, and can be reopened only by the supreme court of appeals of Virginia, or the Supreme Court of the United States, on appeal.

Grignon v. Astor, 2 How. 337, 11 L. ed. 290; **Sargeant v. State Bank**, 12 How. 384, 385, 13 L. ed. 1033, 1034; **Marsteller v. Marsteller**, 132 Pa. 517, 19 Am. St. Rep. 604, 19 Atl. 344.

The doctrine is not, by any means, limited to what is technically called, or commonly referred to as, a "court." It extends as well to boards, commissioners and other officers who are required to exercise even quasi-judicial functions.

Southern R. Co. v. Washington, A. & M. V. R. Co. 102 Va. 491, 46 S. E. 784; **Orleans v. Platt**, 99 U. S. 683, 25 L. ed. 406; 24 Am. & Eng. Enc. Law, 2d ed. p. 723; **Mercein v. People**, 25 Wend. 64, 35 Am. Dec. 662; **Culross v. Gibbons**, 130 N. Y. 447, 29 N. E. 841; **People ex rel. Myers v. Barnes**, 114 N. Y. 317, 20 N. E. 609, 21 N. E. 739; **Brooks v. Morgan**, 36 Ind. App. 672, 76 N. E. 333; **Holliston v. New York C. & H. R. R. Co.** 195 Mass. 299, 81 N. E. 205; **State v. Corron**, 73 N. H. 434, 62 Atl. 1050, 6 A. & E. Ann. Cas. 486. See also **Cooper v. Hunt**, 103 Mo. App. 9, 77 S. W. 483; **Close v. Huntington**, 66 Kan. 354, 71 Pac. 812; **Longinette v. Shelton** (Tenn. Ch. App.) 52 S. W. 1084.

Even if the rate order was a legislative act, the Federal circuit court was without jurisdiction to enjoin it.

McChord v. Louisville & N. R. Co. 183 U. S. 494, 46 L. ed. 293, 22 Sup. Ct. Rep. 165.

Mr. Alfred P. Thom argued the cause, and, with Messrs. Alexander Hamilton, William B. McIlwaine, H. T. Wickham, George H. Taylor, Henry Taylor, Jr., S. S. P. Patteson, Henry L. Stone, Joseph I. Doran, Lucian H. Cocke, and John K. Graves, filed a brief for appellees:

The bills of the six appellees show in each case a right to equitable relief in the court below against the threatened invasion of a right or rights secured by the Constitution of the United States.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

No individual interest of any of the defendant members of the state corporation commission of Virginia is necessary to give jurisdiction.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; **Fitts v. McGhee**, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; **Prout v. Starr**, 188 U. S. 544, 47 L. ed. 587, 23 Sup. Ct. Rep. 398; **Reagan v. Farmers' Loan & T. Co.** 154 U. S. 362, 389, 38 L. ed. 1014, 1020, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; **Ex parte Young**, supra.

The rule that recourse to equity is for-

bidden when there is an adequate remedy at law applies only where the remedy at law is as practical and as efficient as the remedy afforded by equity.

Boyce v. Grundy, 3 Pet. 210, 215, 7 L. ed. 655, 657; **Gormley v. Clark**, 134 U. S. 338, 349, 33 L. ed. 909, 914, 10 Sup. Ct. Rep. 554; **Kilbourn v. Sunderland**, 130 U. S. 514, 32 L. ed. 1008, 9 Sup. Ct. Rep. 594; **Walla Walla v. Walla Walla Water Co.** 172 U. S. 12, 43 L. ed. 346, 19 Sup. Ct. Rep. 77; **McConihay v. Wright**, 121 U. S. 206, 30 L. ed. 933, 7 Sup. Ct. Rep. 940.

The proper and the only mode of judicial relief against a tariff of rates established by or enforceable by a commission is by a bill in chancery, asserting its unreasonable character and its conflict with the Constitution of the United States. Only a court of equity is competent to meet such an emergency and determine once for all, and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 460, 33 L. ed. 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; **Reagan v. Farmers' Loan & T. Co.** 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; **Smyth v. Ames**, 169 U. S. 518, 42 L. ed. 839, 18 Sup. Ct. Rep. 418; **Detroit v. Detroit Citizens' Street R. Co.** 184 U. S. 381, 46 L. ed. 605, 22 Sup. Ct. Rep. 410; **Haverhill Gaslight Co. v. Barker**, 109 Fed. 694; **Chicago, M. & St. P. R. Co. v. Tompkins**, 176 U. S. 180, 44 L. ed. 423, 20 Sup. Ct. Rep. 336; **Ex parte Young**, supra.

The equity jurisdiction of the Federal courts cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts, even though a remedy is created by such statute which may be the full equivalent of the jurisdiction of the Federal chancery.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 395, 38 L. ed. 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; **Smyth v. Ames**, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; **Payne v. Hook**, 7 Wall. 425, 19 L. ed. 260; **McConihay v. Wright**, 121 U. S. 201, 30 L. ed. 932, 7 Sup. Ct. Rep. 940; **Sheffield Furnace Co. v. Witherow**, 149 U. S. 574, 37 L. ed. 853, 13 Sup. Ct. Rep. 936; **Mississippi Mills v. Cohn**, 150 U. S. 202, 37 L. ed. 1052, 14 Sup. Ct. Rep. 75; **Eyre v. Everett**, 2 Russ. Ch. 381.

The doctrine of *res judicata* has no application where a rate has been fixed by the legislature of a state or by some rate-making agency of a state.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; **Chicago**, 211 U. S.

M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Chicago, St. P. M. & O. R. Co. v. Becker*, 35 Fed. 883; *Atlantic Coast Line R. Co. v. Com.* 102 Va. 599, 46 S. E. 911.

These suits are not in violation of the 11th Amendment, because they are not suits against the state of Virginia.

Smyth v. Ames, 169 U. S. 518, 42 L. ed. 839, 18 Sup. Ct. Rep. 418; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441; *Fitts v. McGhee*, 172 U. S. 516, 43 L. ed. 535, 19 Sup. Ct. Rep. 269; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362-390, 38 L. ed. 1014-1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Missouri, K. & T. R. Co. v. Missouri R. & Warehouse Comrs.* (*Missouri, K. & T. R. Co. v. Hickman*) 183 U. S. 53, 46 L. ed. 78, 22 Sup. Ct. Rep. 18.

This court, in *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676, distinctly recognized the distinction between judicial and ministerial powers vested in a regular court of justice, and held that whether the act done by a court is a judicial act or not is to be determined, not by the description or character of the court or tribunal, but by the character of the act.

The point is decided by *Upshur County v. Rich*, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651, that a court of West Virginia, on which was imposed the duty of assessing taxes on appeal from an assessment, did not act as a court when it assessed taxes, but lost its judicial function, and, therefore, such a proceeding was not a suit, and was not removable to the circuit court of the United States.

This principle is also a familiar one in the law of Virginia, the court of appeals in that state having differentiated the functions of the county court justices, and held that, in the exercise of their functions as "commissioners of police," they were subject to mandamus.

Brander v. Chesterfield Justices, 5 Call (Va.) 551, 2 Am. Dec. 606; *Dinwiddie Justices v. Chesterfield Justices*, 5 Call (Va.) 556.

The nature of the act sought to be enjoined may be examined by the Federal courts in order to determine whether that act is a "proceeding in a court of a state."

Southern P. Co. v. Railroad Comrs. 78 Fed. 236; *Busch v. Webb*, 122 Fed. 655; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *Southern R. Co. v. Greensboro Ice & Coal Co.* 134 Fed. 94.

Where the power to establish rates is
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delegated to administrative officials, such as a railroad commission, the functions of the commission in considering what rates shall be prescribed by it to control in the future are legislative in character.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 364, 38 L. ed. 1015, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Northern P. R. Co. v. Keyes*, 91 Fed. 47; *San Diego Land & Town Co. v. National City*, 174 U. S. 754, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 377, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 499, 42 L. ed. 253, 17 Sup. Ct. Rep. 896; *Sinking Fund Cases*, 99 U. S. 761, 25 L. ed. 516; *Merrill v. Sherburne*, 1 N. H. 199, 8 Am. Dec. 52; *Western U. Teleg. Co. v. Myatt*, 98 Fed. 345; *Nebraska Teleph. Co. v. State*, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; *Norfolk & P. Belt Line R. Co. v. Com.* 103 Va. 294, 49 S. E. 39; *Winchester & S. R. Co. v. Com.* 106 Va. 264, 55 S. E. 692.

After such rates have been determined upon, the action of the state corporation commission, looking to their enforcement, is ministerial or administrative in character, is no longer legislative in character, and is not judicial in character, and is not the enforcement of any judicial judgment or decree of a court.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 459, 33 L. ed. 970, 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Southern P. Co. v. Railroad Comrs.* supra; *McChord v. Louisville & N. R. Co.* 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. Rep. 165; *Louisville & N. R. Co. v. Brown*, 123 Fed. 946.

The publication or announcement that a railroad rate has been established by a state legislature or a state railroad commission is not part of the act of legislation, but is an administrative act, and may be enjoined when the rate itself is unconstitutional.

Chicago & N. W. R. Co. v. Dey; *Southern P. Co. v. Railroad Comrs.*; and *Northern P. R. Co. v. Keyes*,—supra; *Minneapolis Street R. Co. v. Minneapolis*, 155 Fed. 992; *Wolfe v. McCaull*, 76 Va. 876; *Wise v. Bigger*, 79 Va. 269.

A court taking jurisdiction by anticipation over a nonexistent suit concerning a nonexistent law would be a court taking jurisdiction over illusory or fictitious suits, and not a court proceeding according to the course of the common law and the course of equity.

McChord v. Louisville & N. R. Co. 183 U. S. 483, 502, 46 L. ed. 289, 297, 22 Sup. Ct. Rep. 165.

Even the exercise by a regularly constituted court of justice of a state, of administrative or ministerial power, or powers of a legislative character, vested in it by state authority, does not make such an administrative or ministerial proceeding a suit within the meaning of § 720 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 581).

Re County Levy, 5 Call (Va.) 139; Brander v. Chesterfield Justices, 5 Call (Va.) 548; Dinwiddie Justices v. Chesterfield Justices, *supra*; Peck v. Jenness, 7 How. 612, 12 L. ed. 841.

The foundation of § 720 being in "comity" and "necessity," there is no basis for so applying § 720 as to render a state court immune from Federal injunction with respect to its nonjudicial functions.

Re Chicago, 64 Fed. 899.

Another test whether or not the state corporation commission of Virginia is a court within the meaning of § 720 of the Revised Statutes of the United States, and whether the proceeding commenced before it to fix a rate was in the nature of a suit, is whether or not such proceeding before the state corporation commission was a suit which could have been removed to the circuit court of the United States if the citizenship of the parties had been diverse.

Upshur County v. Rich, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651.

The Virginia commission is authorized to institute and prosecute its own proceedings before itself; and such proceedings are to be heard, decided, and its determination therein is authorized to be enforced by itself. Such a tribunal, from its very nature, is not a court, and such a tribunal cannot be made a court or the members thereof judges by the declaration or enactment of a state in its Constitution or laws to that effect.

Taylor v. Place, 4 R. I. 324; Auditor v. Atchison, T. & S. F. R. Co. 6 Kan. 506, 7 Am. Rep. 575; Western U. Teleg. Co. v. Myatt, 98 Fed. 335; State ex rel. Godard v. Johnson, 61 Kan. 803, 49 L.R.A. 662, 60 Pac. 1068; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Southern R. Co. v. Greensboro Ice & Coal Co. 134 Fed. 94.

To hold such an administrative agency of a state—a body that at the same time is the

prosecutor and arbiter of its own cause, and enforces its decision in its own cause—to be a regularly constituted court of justice of a state would be contrary to the fundamental principles of the common law and of constitutional liberty.

Cooley, Const. Lim. 7th ed. pp. 592, 594; 3 Bl. Com. 24, 25; Todd v. United States 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; Bonham's Case, 8 Coke, 112; Year Book, 8 Hen. VI., fol. 18, pl. 7 [1431]; London v. Wood, 12 Mod. 669; Derby's Case, 12 Coke, 114.

A statute styling a rate-making and rate-administering body a court does not create a state court within the prohibition of § 720 of the Revised Statutes of the United States.

Western U. Teleg. Co. v. Myatt and State ex rel. Godard v. Johnson, *supra*; Re Ziebold, 23 Fed. 791; Re School-Law Manual, 63 N. H. 574, 4 Atl. 878; Norwalk Street R. Co.'s Appeal, 69 Conn. 576, 39 L.R.A. 794, 37 Atl. 1080, 38 Atl. 708; Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377; 1 Bl. Com. chap. 2; Nebraska Teleph. Co. v. State, 55 Neb. 627, 45 L.R.A. 113, 76 N. W. 171; Violet v. Alexandria, 92 Va. 567, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. F. 909.

The bills were not prematurely filed.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 168, 44 L. ed. 418, 20 Sup. Ct. Rep. 336; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Chicago, St. P. M. & O. R. Co. v. Becker, 35 Fed. 883; Northern P. R. Co. v. Keyes, 91 Fed. 47; Western U. Teleg. Co. v. Myatt and McNeill v. Southern R. Co. *supra*.

The supreme court of appeals of Virginia has expressly determined that, in making such a rule or regulation for future conduct as a rate (for a rule or regulation in respect to demurrage stands on the same basis as an order prescribing a rate under the Virginia Constitution, so far as the question of whether or not it has the force of a judicial judgment is concerned), the commission is exercising legislative, and not judicial, functions.

Atlantic Coast Line R. Co. v. Com. 102 Va. 621, 46 S. E. 911; Southern R. Co. v. Com. 107 Va. 771, 17 L.R.A.(N.S.) 364, 60 S. E. 70.

Whether or not a Federal circuit court has power to enjoin an unconstitutional invasion of property rights attempted by state officers depends on the character of the act sought to be enjoined, and not on the title of the officers or tribunals attempting to perform it.

Weil v. Calhoun, 25 Fed. 870; Busch v.

Webb, 122 Fed. 665; Louisville & N. R. Co. v. Brown, 123 Fed. 948; Western U. Teleg. Co. v. Myatt, 98 Fed. 341; Ex parte Candee, 48 Ala. 399; Robey v. Princee George's County, 92 Md. 163, 48 Atl. 48; Upshur County v. Rich, supra; Ex parte Virginia, 100 U. S. 339, 25 L. ed. 676; McNeill v. Southern R. Co. and Southern R. Co. v. Greensboro Ice & Coal Co. supra.

If an act is in essence legislative in character, the fact of a notice and a hearing does not constitute the body performing it a judicial body, and does not make the act a judicial act. If it would be a legislative act without notice and a hearing, it is still a legislative act with notice and a hearing. The claim of the appellants that the notice and hearing before the act is performed and as part of the process of performing the act is "anticipatory litigation" and judicial in character is fundamentally unsound.

Reagan v. Farmers' Loan & T. Co. supra; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 7 L.R.A.(N.S.) 1086, 117 Am. St. Rep. 983, 55 S. E. 572, 9 A. & E. Ann. Cas. 1124; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 460, 33 L. ed. 982, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; Southern P. Co. v. Railroad Comrs. 78 Fed. 259; Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 499, 42 L. ed. 253, 17 Sup. Ct. Rep. 896; Chicago, M. & St. P. R. Co. v. Tompkins, supra; Chicago, M. & St. P. R. Co. v. Smith, 110 Fed. 473; Western U. Teleg. Co. v. Myatt; Louisville & N. R. Co. v. Brown; Chicago & N. W. R. Co. v. Dey; Chicago, St. P. M. & O. R. Co. v. Becker; and Northern P. R. Co. v. Keyes, —supra; Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 683; Kansas City Southern R. Co. v. Railroad Comrs. 106 Fed. 353; Wallace v. Arkansas C. R. Co. 55 C. C. A. 192, 118 Fed. 422; Houston & T. C. R. Co. v. Storey, 149 Fed. 499; Perkins v. Northern P. R. Co. 155 Fed. 445; Railroad Commission v. Texas & P. R. Co. 75 C. C. A. 226, 144 Fed. 68; McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90.

The jurisdiction of the Federal courts in equity is neither impaired nor diminished by the appeal provided for in the Virginia state law from the action of the Virginia commission prescribing rates.

Smyth v. Ames, 169 U. S. 474, 42 L. ed. 437, 18 Sup. Ct. Rep. 418; Mississippi Mills v. Cohn, 150 U. S. 202, 204, 37 L. ed. 1052, 1053, 14 Sup. Ct. Rep. 75; Reagan v. Farmers' Loan & T. Co. 154 U. S. 391, 38 L. ed. 53 L. ed.

1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The contention of counsel for the appellants, insisted on in their pleadings, that the act sought to be enjoined is part of a legislative act, and hence cannot be enjoined by a court, is unsound.

Southern P. Co. v. Railroad Comrs. 78 Fed. 246; State ex rel. Morris v. Mason, 43 La. Ann. 590, 9 So. 776; Wolfe v. McCaull, 76 Va. 876; Wise v. Bigger, 79 Va. 269; Reed v. Woodelliff (N. J. L.) 60 Atl. 1128; Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; Northern P. R. Co. v. Keyes, 91 Fed. 47; Minneapolis Street R. Co. v. Minneapolis, 155 Fed. 992; McChord v. Louisville & N. R. Co. 183 U. S. 483, 497, 46 L. ed. 289, 295, 22 Sup. Ct. Rep. 165; Marbury v. Madison, 1 Cranch, 137, 2 L. ed. 60; Mississippi v. Johnson, 4 Wall. 475, 498, 18 L. ed. 437, 441; Ex parte Young, 209 U. S. 159, 52 L. ed. 728, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

It is only the discretion of the legislative body which is beyond the reach of the process of the court.

Alpers v. San Francisco, 32 Fed. 503; New Orleans Waterworks Co. v. New Orleans, 164 U. S. 481, 482, 41 L. ed. 523, 524, 17 Sup. Ct. Rep. 161.

Mr. Justice Holmes delivered the opinion of the court:

These are bills in equity brought in the circuit court to enjoin the members and clerk of the Virginia State Corporation Commission from publishing or taking any other steps to enforce a certain order fixing passenger rates. The bills allege, with some elaboration of the facts, that the rates in question are confiscatory, and other matters not necessary to mention, and set up the 14th Amendment, etc. The defendants appeared specially, and by demurrer and plea respectively put forward that the proceedings before the commission are proceedings in a court of the state, which the courts of the United States are forbidden to enjoin (Rev. Stat. § 720, U. S. Comp. Stat. 1901, p. 581), and that the decision of the commission makes the legality of the rates *res judicata*. On these pleadings final decrees were entered for the plaintiffs, and the defendants appealed to this court. Therefore, as the case is presented, it is to be assumed that the order confiscates the plaintiffs' property and infringes the 14th Amendment if the matter is open to inquiry. The question principally argued, and the main question to be discussed, is whether the order is one which, in spite of its constitutional invalidity, the courts of the United States are not at liberty to impugn.

224] *The State Corporation Commission is established and its powers are defined at length by the Constitution of the state. There is no need to rehearse the provisions that give it dignity and importance or that add judicial to its other functions, because we shall assume that, for some purposes, it is a court within the meaning of Rev. Stat. § 720, and in the commonly accepted sense of that word. Among its duties it exercises the authority of the state to supervise, regulate, and control public service corporations, and to that end, as is said by the supreme court of Virginia and repeated by counsel at the bar, it has been clothed with legislative, judicial, and executive powers. *Norfolk & P. Belt Line R. Co. v. Com.* 103 Va. 289, 294, 49 S. E. 39.

The state Constitution provides that the commission, in the performance of the duty just mentioned, shall, from time to time, prescribe and enforce such rates, charges, classification of traffic, and rules and regulations for transportation and transmission companies doing business in the state, and shall require them to establish and maintain all such public service facilities and conveniences as may be reasonable and just. Before prescribing or fixing any rate or charge, etc., it is to give notice (in case of a general order not directed against any specific company by name, by four weeks' publication in a newspaper) of the substance of the contemplated action and of a time and place when the commission will hear objections and evidence against it. If an order is passed, the order again is to be published as above before it shall go into effect. An appeal to the supreme court of appeals is given of right to any party aggrieved, upon conditions not necessary to be stated, and that court, if it reverses what has been done, is to substitute such order as, in its opinion, the commission should have made. The commission is to certify the facts upon which its action was based and such evidence as may be required, but no new evidence is to be received, and how far the findings of the commission can be revised perhaps is not quite plain. No other court of the state can review, reverse, correct, or

225] annul *the action of the commission, and, in collateral proceedings, the validity of the rates established by it cannot be called in doubt.

When a rate has been fixed, the commission has power to enforce compliance with its order by adjudging and enforcing, by its own appropriate process, against the offending company, the fines and penalties established by law. But a hearing is required, and the validity and reasonableness of the order may be attacked again in this pro-

ceeding, and all defenses seem to be open to the party charged with a breach.

On July 31, 1906, under the provisions outlined, the commission published in a newspaper notice to the several steam railroad companies doing business in Virginia, and all persons interested, that, at a certain time and place, it would hear objections to an order prescribing a maximum rate of 2 cents a mile for the transportation of passengers, with details not needing to be stated. A hearing was had, and the complainants (appellees) severally appeared and urged objections similar to those set up in the bills. On April 27, 1907, the commission passed an order prescribing the rates, but in more specific form. For certain railroads named, including all of the complainants except as we shall state, the rate was to be 2 cents; for certain excepted branches of the Southern Railway Company, 2½; for others, including the Chesapeake Western Railway, 3; and for others 3½ cents a mile, with a minimum charge of 10 cents. Publication of the order was directed, and at that stage these bills were brought.

In order to decide the cases it is not necessary to discuss all the questions that were raised or touched upon in argument, and some we shall lay on one side. We shall assume that when, as here, a state Constitution sees fit to unite legislative and judicial powers in a single hand, there is nothing to hinder, so far as the Constitution of the United States is concerned. *Dreyer v. Illinois*, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28; *Winchester & S. R. Co. v. Com.* 106 Va. 264, 268, 55 S. E. 692. We shall assume, as we have said, that some of the powers of the commission *are [226 judicial, and we shall assume, without deciding, that, if it was proceeding against the appellees to enforce this order and to punish them for a breach, it then would be sitting as a court and would be protected from interference on the part of courts of the United States.

But we think it equally plain that the proceedings drawn in question here are legislative in their nature, and none the less so that they have taken place with a body which, at another moment, or in its principal or dominant aspect, is a court such as is meant by § 720. A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legisla-

tive, not judicial, in kind, as seems to be fully recognized by the supreme court of appeals (Com. v. Atlantic Coast Line R. Co. 106 Va. 61, 64, 7 L.R.A.[N.S.] 1086, 117 Am. St. Rep. 983, 55 S. E. 572), and especially by its learned president in his pointed remarks in Winchester & S. R. Co. v. Com. 106 Va. 264, 281, 55 S. E. 692. See, further, Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 499, 500, 505, 42 L. ed. 243, 253, 255, 17 Sup. Ct. Rep. 896; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 440, 47 L. ed. 892, 893, 23 Sup. Ct. Rep. 571.

Proceedings legislative in nature are not proceedings in a court, within the meaning of Rev. Stat. § 720, no matter what may be the general or dominant character of the body in which they may take place. Southern R. Co. v. Greensboro Ice & Coal Co. 134 Fed. 82, 94, Affirmed in 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722. That question depends not upon the character of the body, but upon the character of the proceedings. Ex parte Virginia, 100 U. S. 339, 348, 25 L. ed. 676, 680. They are not a suit in which a writ of error would lie under Rev. Stat. § 709, and act of February 18, 1875, chap. 80, 18 Stat. at L. 318, U. S. Comp. Stat. 1901, p. 575. See Upshur County v. Rich, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651; Wallace v. Adams, 227 U. S. 415, 423, 51 L. ed. 547, 551, 27 Sup. Ct. Rep. 363. The decision upon them cannot be *res judicata* when a suit is brought. See Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. And it does not matter what inquiries may have been made as a preliminary to the legislative act. Most legislation is preceded by hearings and investigations. But the effect of the inquiry, and of the decision upon it, is determined by the nature of the act to which the inquiry and decision lead up. A judge sitting with a jury is not competent to decide issues of fact; but matters of fact that are merely premises to a rule of law he may decide. He may find out for himself, in whatever way seems best, whether a supposed statute ever really was passed. In Pickering v. Barkley, Style, 132, merchants were asked by the court to state their understanding as an aid to the decision of a demurrer. The nature of the final act determines the nature of the previous inquiry. As the judge is bound to declare the law, he must know or discover the facts that establish the law. So, when the final act is legislative, the decision which induces it cannot be judicial in the practical sense, although the questions considered might be the same that would arise in the trial of a case. If a state Constitution should pro-

vide for a hearing before any law should be passed, and should declare that it should be a judicial proceeding *in rem* and the decision binding upon all the world, it hardly is to be supposed that the simple device could make the constitutionality of the law *res judicata*, if it subsequently should be drawn in question before a court of the United States. And all that we have said would be equally true if an appeal had been taken to the supreme court of appeals and it had confirmed the rate. Its action in doing so would not have been judicial, although the questions debated by it might have been the same that might come before it as a court, and would have been discussed and passed upon by it in the same way that it would deal with them if they arose afterwards in a case properly so called. We gather that these are the views of the supreme court of appeals itself. Atlantic Coast Line R. Co. v. Com. 102 Va. 599, 621, 46 S. E. 911. They are implied *in many cases in this and [228 other United States courts in which the enforcement of rates has been enjoined, notwithstanding notice and hearing, and what counsel in this case call "litigation" in advance. Legislation cannot bolster itself up in that way. Litigation cannot arise until the moment of legislation is past. See Southern R. Co. v. Com. 107 Va. 771, 772, 60 S. E. 70.

It appears to us that the most plausible objection to these bills is not the one most dwelt upon in argument, but that they were brought too soon. Our doubt is a narrow one and its limits should be understood. It seems to us clear that the appellees were not bound to wait for proceedings brought to enforce the rate and to punish them for departing from it. Those, we have assumed in favor of the appellants would be proceedings in court, and could not be enjoined; while to confine the railroads to them for the assertion of their rights would be to deprive them of a part of those rights. If the railroads were required to take no active steps until they could bring a writ of error from this court to the supreme court of appeals after a final judgment, they would come here with the facts already found against them. But the determination as to their rights turns almost wholly upon the facts to be found. Whether their property was taken unconstitutionally depends upon the valuation of the property, the income to be derived from the proposed rate, and the proportion between the two,—pure matters of fact. When those are settled the law is tolerably plain. All their constitutional rights, we repeat, depend upon what the facts are found to be. They are not to be forbidden to try those facts before a court of their own choosing, if otherwise

competent. "A state cannot tie up a citizen of another state, having property within its territory invaded by unauthorized acts of its own officers, to suits for redress, in its own courts." *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 517, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418. See *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *Ex parte Young*, 209 U. S. 123, 165, 52 L. ed. 714, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441. Other cases further illustrating 229]*this point are *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Northern P. R. Co. v. Keyes*, 91 Fed. 47; *Western U. Teleg. Co. v. Myatt*, 98 Fed. 335.

Our hesitation has been on the narrower question whether the railroads, before they resorted to the circuit court, should not have taken the appeal allowed to them by the Virginia Constitution at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule. Considerations of comity and convenience have led this court ordinarily to decline to interfere by habeas corpus where the petitioner had open to him a writ of error to a higher court of a state, in cases where there was no merely logical reason for refusing the writ. The question is whether somewhat similar considerations ought not to have some weight here.

We admit at once that they have not the same weight in this case. The question to be decided, we repeat, is legislative, whether a certain rule shall be made. Although the appeal is given as a right, it is not a remedy, properly so called. At that time no case exists. We should hesitate to say, as a general rule, that a right to resort to the courts could be made always to depend upon keeping a previous watch upon the bodies that make laws, and using every effort and all the machinery available to prevent unconstitutional laws from being passed. It might be said that a citizen has a right to assume that the Constitution will be respected, and that the very meaning of our system in giving the last word upon constitutional questions to the courts is that he may rest upon that assumption, and is not bound to be continually on the alert against covert or open attacks upon his rights in bodies that cannot finally take them away. It is a novel ground for denying a man a resort to the courts that he has not used due diligence to prevent a law from being passed.

But this case hardly can be disposed of on purely general principles. The question

that we are considering may be termed a question of equitable fitness or propriety, and must *be answered on the particular[230 facts. The establishment of railroad rates is not like a law that affects private persons, who may never have heard of it till it was passed. It is a matter of great interest, both to the railroads and to the public, and is watched by both with scrutinizing care. The railroads went into evidence before the commission. They very well might have taken the matter before the supreme court of appeals. No new evidence and no great additional expense would have been involved.

The state of Virginia has endeavored to impose the highest safeguards possible upon the exercise of the great power given to the State Corporation Commission, not only by the character of the members of that commission, but by making its decisions dependent upon the assent of the same historic body that is intrusted with the preservation of the most valued constitutional rights, if the railroads see fit to appeal. It seems to us only a just recognition of the solicitude with which their rights have been guarded, that they should make sure that the state, in its final legislative action, would not respect what they think their rights to be, before resorting to the courts of the United States.

If the rate should be affirmed by the supreme court of appeals and the railroads still should regard it as confiscatory, it will be understood from what we have said that they will be at liberty then to renew their application to the circuit court, without fear of being met by a plea of *res judicata*. It will not be necessary to wait for a prosecution by the commission. We may add that, when the rate is fixed, a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state, and will be the proper form of remedy. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Hanley v. Kansas City Southern R. Co.* 187 U. S. 617, 47 L. ed. 333, 23 Sup. Ct. Rep. 214; *McNeill v. Southern R. Co.* supra; *Mississippi R. Commission v. Illinois* *C. R. Co. 203[231 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

It is proper before closing to mention one decision that was relied upon by the appellees, and one or two other matters peculiar to the cases before the court. In *McNeill v.*

Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 732, the same moment was selected for bringing suit as in these cases, while an examination of the laws of North Carolina discloses that there were statutory provisions for appeal somewhat similar to those in the Virginia Constitution to which we now are referring. But, apart from other differences, in that case the ground of the decree was that the state commission was dealing with a subject-matter beyond its power; no regulation would have been valid (202 U. S. 561), and the considerations to which we now are giving weight naturally were not urged. But this decision suggests that in three of the present cases an equally potent constitutional bar is alleged against the proceedings of the commission. The Chesapeake & Ohio, the Norfolk & Western, and the Southern Railway Companies all set up general laws, alleged to be incorporated in their charters and to constitute contracts, providing that their tolls should not be diminished except under conditions of fact alleged not to exist.

If the state has bound itself by contract not to cut down the rates as contemplated, there would seem to be no reason why the suit should not be entertained now. See *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 393, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1947. But it would be premature and is unnecessary to decide whether the state has done so or not. No rate is irrevocably fixed by the state until the matter has been laid before the body having the last word. It may be that that body will adhere to the old rate, or will establish one that will not be open to the charge of violating the contracts alleged. The contracts alleged do not prohibit a certain reduction if the profits heretofore realized have exceeded a certain amount. On the question of contract as on that of confiscation, it is reasonable and 232]proper *that the evidence should be laid, in the first instance, before the body having the last legislative word. //

There is yet another difficulty in applying to these cases the comity which it is desirable if possible to apply. The Virginia statute of April 15, 1903, enacted to carry into effect the provision of the Constitution, requires, by § 34, certain, if not all, appeals to be taken and perfected within six months from the date of the order. *Pollard's Code* (Va.) 714. It may be that when an appeal is taken to the supreme court of appeals this section will be held to apply and the appeal be declared too late. We express no opinion upon the matter, which is for the state tribunals to decide, but simply notice a possibility. If the

present bills should be dismissed, and then that possible conclusion reached, injustice might be done. As our decision does not go upon a denial of power to entertain the bills at the present stage, but upon our views as to what is the most proper and orderly course in cases of this sort when practicable, it seems to us that the bills should be retained for the present to await the result of the appeals if the companies see fit to take them. If the appeals are dismissed, as brought too late, the companies will be entitled to decrees. If they are entertained and the orders of the commission affirmed, the bills may be dismissed without prejudice and filed again.

Decrees reversed.

Mr. Justice **Brewer** is of the opinion that the decrees should be affirmed.

Mr. Chief Justice **Fuller**, concurring in reversing the decrees, dissents from the opinion:

I preface what I have to say with a sketch of the record in these cases, abbreviated from the brief of counsel.

The Virginia State Corporation Commission was created and its functions, powers, duties, and the essentials of its procedure *were prescribed in detail by the Con-[233]stitution of the state as well as by statute. It was made primarily a judicial court of record of limited jurisdiction, possessing also certain special legislative and executive powers. When it proposed to make a change in a rate of a public service corporation, or otherwise to prescribe a new regulation therefor, the commission was required, sitting as a court, to issue its process, in the nature of a rule, against the corporation concerned, requiring it to appear before the commission at a certain time and place and show cause, if any it could, why the proposed rate should not be prescribed. The judicial question involved on the return to such rule was whether or not the contemplated rate was confiscatory, or otherwise unjust or unreasonable, and in the hearing and disposition of this question the proceedings of the commission, as prescribed by law, were, in every respect, the same as those of any other judicial court of record. It issued, executed, and enforced its own writs and processes; it could issue and enforce writs of mandamus and injunction; it punished for contempt, and kept a complete record and docket of its proceedings; it summoned witnesses and compelled their attendance and the production of documents; it ruled upon the admissibility of evidence; it certified any exception to its rulings; and its judgments, decrees, and orders had the same force and effect as those

of any other court of record in the state, and were enforced by its own proper processes. It was not subject to restraint by any other state court, and from any and every ruling or decision by it an appeal lay to the supreme court of appeals of the state, and was heard upon the record made for and certified by the commission, exactly as in the case of appeals from any other court; and, pending the decision of such appeal, the order appealed from might, by a supersedeas, be suspended in its operation.

Not only do the Constitution and laws of Virginia make the commission a judicial court of record by clothing it with all the attributes of such a tribunal, but they expressly declare it a court, and require it to [234] proceed only by due process of law *and inquire into and determine every judicial question coming before it. It has repeatedly held itself to be a court and subject to all the obligations thereof, and the supreme court of appeals, the highest state judicial tribunal, has formally and expressly so held.

When this court shall have, in the manner above indicated, fully heard all parties interested, and, proceeding by due process of law as to them, has judicially determined that the proposed rate or regulation is not confiscatory, nor otherwise unjust or unreasonable, then, but not until then, it is authorized by the Constitution and laws of Virginia to enter an order prescribing such rate or regulation, from which order an appeal lies to the supreme court of appeals, with, as has been said, the right of suspension by supersedeas pending the appeal. Assuming that the prescribing of the rate after it has been judicially determined to be reasonable is necessarily a legislative act, then the Constitution of the state expressly confers upon this commission the legislative power of prescribing a rate after it has judicially ascertained and decided it to be not below the limit of "reasonable."

On July 31, 1906, the State Corporation Commission issued and caused to be served a notice to the "steam railroad companies doing business in Virginia and all persons interested," that, at 12 o'clock noon, on November 1, 1906, at Richmond, the commission would "hear and consider any objections which may be urged against a rule, regulation, order, or requirement of the commission fixing and prescribing a maximum rate of charge of 2 cents per mile for the transportation of passengers over the line of any railroad company in this state, operated by steam, between points within the state of Virginia."

Accordingly, on November 1, 1906, the appellee companies appeared before the commission, and filed their answers in writing, setting forth why, in their opinion, the pro-

posed 2-cent rate would be less than reasonable.

The commission thereupon entered into a most thorough *hearing of this ques-[235] tion of the reasonableness of the proposed rate, in which hearing the appellee companies were represented by counsel and introduced elaborate evidence.

No evidence was taken or considered, save publicly, in the open sessions of the commission, when appellees were given the fullest opportunity (of which they availed themselves) to be present, to introduce their own testimony, by witnesses and documents, to cross-examine opposing witnesses, to object to the introduction of witnesses or documents, and to except of record to any ruling whatever of the commission.

No evidence was rejected which any railroad company offered. The hearing was continued for several months, and the case was not closed until the companies involved had formally announced, in open court, that they had nothing more to offer.

On April 27, 1907, practically six months after the hearing began, the commission entered its order (which is the basis of appellees' complaint in this cause), accompanied with an elaborate written opinion, giving the grounds therefor.

By this order certain passenger rates—in no case less than 2 cents per mile—were prescribed for the defendant railroad companies, to go into effect on July 1, 1907, the commission being of opinion, and so deciding, that the rates therein fixed were not confiscatory nor otherwise unjust or unreasonable to said companies.

The appellee companies refused either to obey the order of the commission, or to appeal therefrom, and publication of the order was directed; but, before it had been accomplished, and on May 15, 1907, appellees filed bills in the circuit court of the United States for the eastern district of Virginia, to enjoin the commission from enforcing its order of April 27, 1907, or taking any other steps therein, and a restraining order was entered, enjoining the members of the commission and their clerk from further proceeding in the matter until a motion for an injunction *pendente lite* could be heard, and requiring them to appear before the circuit judge in Asheville, North Carolina, *on June 27, 1907, to show cause why [236] such injunction should not be granted. Appellants entered a special and limited appearance, and filed their joint and separate answers to the rule, in which they denied the jurisdiction of the court.

The cause having been heard on the rule and answers thereto, the circuit judge, on July 10, 1907, overruled the objection to the court's jurisdiction, and granted injunctions

pendente lite, as prayed for. Thereupon the defendant Prentis filed his demurrer, based on substantially the same grounds as those assigned in the answer to the rule, and the three other defendants filed their joint and separate plea, setting up specifically that the commission is a court within the purview of § 720 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 581), and on September 10, 1907, by leave of court, all four of the defendants filed their joint and separate plea of *res judicata*.

December 26, 1907, the court overruled the demurrer and both pleas, and the defendants declining to answer further, a final decree was, on that day, entered in each case, taking the bills *pro confesso*, and perpetuating the injunctions, with costs. Thereupon appeals were allowed and prosecuted from said final decrees.

In my opinion, a preliminary objection is fatal to the maintenance of these bills. It appears on their face that the appellees did not avail themselves of the right of appeal to the court of appeals of Virginia, which was absolutely vested in them by the Constitution and laws of that commonwealth. Such an appeal would have brought up the question of the alleged unreasonableness of the designated rate, and appellees cannot assume that the decision of the commission would necessarily have been affirmed. If reversed or changed to meet appellees' views, the whole ground of equity interposition would disappear. In such circumstances it is the settled rule that courts of equity will not interfere. The transaction must be complete, and jurisdiction cannot be rested on hypothesis. *A fortiori* this must be so where Federal courts are asked to interfere with the legislative, executive, or judicial acts of a state, unless some exceptional and imperative necessity is shown to exist, which cannot be asserted here.

Moreover, this is demanded by comity, and what comity requires is as much required in courts of justice as in anything else.

"Comity," said Mr. Justice Gray in the leading case of *Hilton v. Guyot*, 159 U. S. 163, 40 L. ed. 108, 16 Sup. Ct. Rep. 143, "in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

And, as applied to Federal interference with state acts, the observance of this rule

of comity should be regarded as an obligation. It is recognized as such by § 720 of the Revised Statutes.

By the Constitution of Virginia the commission is vested with legislative as well as judicial powers, and the validity of that union of powers has been repeatedly upheld by the highest judicial tribunal of that commonwealth,—the matter being committed to the determination of the state. It seems equally true, that whether an adjudication by the commission, on notice and hearing, that proposed rates are reasonable, and not confiscatory, may lawfully be had prior to the legislative act of imposing the rates, is also a matter for state determination, and, at all events, that question should, in the first instance, be decided on appeal by the court of appeals. I cannot see why the reasonableness and justness of a rate may not be judicially inquired into and judicially determined at the time of the fixing of the rate, as well as afterwards; but that and kindred questions should be tested as provided by this Constitution and these laws before the controversy is precipitated into a circuit court of the United States. Power grows by what it feeds on, and to hold that state railroad companies can take their chances for the fixing of rates in accordance with their views in a tribunal provided for that purpose by state Constitution and laws, and then, if dissatisfied with the result, decline to seek a review in the highest court of the state, though possessed of the absolute right to do so, and invoke the power of the Federal courts to put a stop to such proceedings, is, in my opinion, utterly inadmissible and of palpably dangerous tendency.

Mr. Justice Harlan, also concurring in the reversal of the decree, but dissenting from the opinion of the court:

I concur in the general observations of the Chief Justice, and, with him, dissent from the opinion of the court. But I go somewhat further than he has done. I hold that the circuit court was entirely without authority, by injunction, to stay the proceedings of the State Corporation Commission. By § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581), it is provided that "the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Such has been the law since 1793. In my judgment, the Virginia State Corporation Commission is, in every substantial sense, a court. It is conclusively shown to be such by the provisions of the Constitution and laws of Vir-

ginia, as interpreted by the highest court of Virginia and as summarized in the opinion of the Chief Justice. If the commission is a court, within the meaning of § 720, then the circuit court of the United States was wholly without authority to stay the proceedings of that tribunal by the writ of injunction. The circuit court could not grant the writ of injunction in face of the act of Congress expressly forbidding such action. No one will question the authority of Congress to prescribe the limits of the jurisdiction of the courts created by it.

It is suggested that, under this view, there is danger that rights granted or secured by the Constitution may be violated 239]*by the judgment of the commission or by the judgment of the court of appeals of Virginia. A conclusive answer to this suggestion is that, if the final action of the commission, in any case of rate-making, amounts to confiscation of the property of the corporation whose rates are regulated, and therefore is to be held wanting in due process of law as taking private property for public use without just compensation, and if such action be sustained by the highest court of Virginia, then the way is plainly open to bring that question to this court upon writ of error. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575. In this way any Federal right, specially set up and denied by the state tribunals, can be adequately protected by the final judgment of this court.

In my opinion, the decree should be reversed, with direction to dismiss the original suit brought in the Federal court.

CHARLES T. WILDER,† Tax Assessor and Collector of the First Taxation Division of the Territory of Hawaii, Plff. in Err.,
v.

INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED.

(See S. C. Reporter's ed. 239-249.)

Execution — exemption — seamen's wages — attachment after judgment — supplementary proceedings.

Seamen's wages are protected from seizure after judgment by attachment or proceedings in aid of execution by the provisions of U. S. Rev. Stat. § 4536, U. S. Comp. Stat. 1901, p. 3082, that no wages due or accruing to any seaman shall be subject to attachment or arrestment from

†Substituted as a party in place of James L. Holt.

NOTE. — On exemption of wages from attachment or garnishment—see note to Todd v. Kentucky Union R. Co. 18 L.R.A. 309.

any court, and declaring that payment of wages to seamen shall be valid notwithstanding any previous sale or assignment or any attachment, encumbrance, or arrestment, and that no assignment or sale of wages, made prior to the accruing thereof, shall be binding, except certain authorized advance securities, when construed in the light of other provisions of the same title, enacted to secure to the seaman his remedy in admiralty for the recovery of his wages by condemnation of the ship.

[For other cases, see Execution, II. a, in Digest Sup. Ct. 1908.]

[No. 30.]

Submitted October 22, 1908. Decided November 30, 1908.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which reversed a judgment of the District Court of Honolulu, Oahu County, in that territory, attaching seamen's wages after judgment. Affirmed.

See same case below, 17 Haw. 416.

The facts are stated in the opinion.

Messrs. Charles R. Hemenway and Mason F. Prosser submitted the cause for plaintiff in error:

"Arrestment" is the order of a judge, by which he who is debtor in a movable obligation to the arrestor's debtor is prohibited to make payment or delivery till the debt due to the arrestor be paid or secured.

1 Bouvier's Law Diet. p. 169; Erskine, Inst. 3, 6, 1; 1, 2, 12.

Where arrestment proceeds on a depending action it may be loosed by the common debtor's giving security to the arrestor for his debt, in the event it shall be found due.

Erskine, Inst. 3, 6, 7.

This would be held to include attachment and necessarily garnishment. There is a clear distinction, however, between attachment and execution.

Thompson v. Baltimore & S. Steam Co. 33 Md. 312; Johnson v. Foran, 58 Md. 148.

It has been held in the United States courts that the provision of U. S. Rev. Stat. § 4536, U. S. Comp. Stat. 1901, p. 3082, does not apply to cases where judgment has been recovered against the defendant in a court of competent jurisdiction. It is only intended to prevent snap judgment against defendants who, by reason of the fact that they are seamen, and not properly versed in business methods, would be only too apt to allow claims against them to go by default.

Telles v. Lynde, 47 Fed. 912; The Queen, 93 Fed. 835. See also Eddy v. O'Hara, 132 Mass. 56; White v. Dunn, 134 Mass. 271; Ayer v. Brown, 77 Me. 195.

Mr. A. Lewis, Jr., submitted the cause for defendant in error. Messrs. Smith & Lewis were on the brief.

Mr. Justice Day delivered the opinion of the court:

This case is one of a number of similar 241]cases arising within *the territory of Hawaii, and is brought here for the purpose of settling the liability of seamen's wages to seizure after judgment by attachment or proceedings in aid of execution. The Inter-Island Steam Navigation Company, defendant in error, was directed by order and judgment of the district magistrate of Honolulu to pay into court, on account of a judgment rendered in favor of plaintiff in error, against one A. Tullet, the sum of \$65. Tullet is a seaman, being master of the steamer Keauhou, plying between ports within the territory. The sum of \$65 was due to Tullet from the Inter-Island Steam Navigation Company for wages for the months of January and February, 1906. The judgment was recovered against Tullet on September 5, 1905, for the sum of \$120.38 and costs. An execution was issued thereon and returned unsatisfied. Upon affidavit being filed an order was issued attaching the sum of \$65, due in manner aforesaid from the navigation company to Tullet. The navigation company filed an answer setting forth that Tullet was an American seaman in the employ of the company, and that the money attached was due to Tullet as wages, and, under § 4536 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3082), the same were not subject to arrestment nor attachment, and that the territorial court had no jurisdiction in the premises. The lower court held that the wages could be attached in this manner. This judgment was reversed in the supreme court of Hawaii.

The laws of Hawaii regulating attachments in cases such as are now under consideration authorize proceedings supplementary to execution, as follows:

"Sec. 2118. Attachment of debts, order.— It shall be lawful for a judge of any court upon the *ex parte* application of such judgment creditor, either before or after such oral examination, and upon affidavit by the judgment creditor or his attorney, stating that judgment has been recovered, and that it is still unsatisfied, and to what amount, and that any other person is indebted to the judgment debtor and is within the jurisdiction, to order that all debts owing or accruing from such third person *(hereinafter called the 'garnishee') to the judgment debtor shall be attached to answer the judgment debt; and by the same or any subsequent order it may be ordered that the garnishee shall appear before the judge to show cause why he should not pay the judgment creditor the debt due from him to the judgment debtor, or so much thereof as 53 L. ed.

may be sufficient to satisfy the judgment debt; provided that the judge may, in his discretion, refuse to interfere when, from the smallness of the amount to be recovered, or of the debt sought to be attached, or otherwise, the remedy sought would be worthless or vexatious."

It was under this section of the Hawaiian statute that the order was made for the payment of the judgment out of the wages due to Tullet, and the question for decision in this case is: Can such an order be made consistently with the maritime law as declared in the Revised Statutes of the United States? The section of the statute construed in the supreme court of Hawaii is 4536, which provides:

"No wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages, or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of wages, or salvage, made prior to the accruing thereof, shall bind the party making the same, except such advance securities as are authorized by this title."

This section was first enacted into the statutes of the United States in 1872, and was § 61 of the act of June 7, 1872, entitled "An Act to Authorize the Appointment of Shipping Commissioners by the Several Circuit Courts of the United States, to Superintend the Shipping and Discharge of Seamen Engaged in Merchant Ships Belonging to the United States, and for the Further Protection of Seamen." 17 Stat. at L. 262, 276, chap. 322, U. S. Comp. Stat. 1901, p. 3082. It afterwards became, in the revision of 1874, § 4536 of the Revised Statutes. This section appears to have been copied from § 233 of 17 and 18 Victoria, chap. 104, which act provides:

"No wages due or accruing to any [243 seaman or apprentice shall be subject to attachment or arrestment from any court; and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of such wages, or of any attachment, encumbrance, or arrestment thereon; and no assignment or sale of such wages, or of salvage, made prior to the accruing thereof, shall bind the party making the same, and no power of attorney or authority for the receipt of any such wages or salvage shall be irrevocable."

We have been unable to discover any English case construing this statute, and none has been called to our attention. In Maclachlan on Merchant Shipping, 4th ed., 231, that author states the effect of the statute to be to except seaman's wages from

liability to attachment by a judgment creditor, as payment of such wages is valid, notwithstanding any previous sale or assignment thereof, or any attachment, encumbrance, or arrestment thereon. In this country the cases, state and Federal, in which this statute has been under consideration, are not in accord. In *Telles v. Lynde*, 47 Fed. 912, and *The Queen*, 93 Fed. 834, the district court in the ninth circuit reached the conclusion that the statute did not prevent the seizure of seamen's wages after judgment upon proceedings in aid of execution, although the seamen's wages were not liable to attachment in advance of judgment.

The question was very fully considered by Judge Benedict in the case of *McCarty v. The City of New Bedford*, 4 Fed. 818. In that case Judge Benedict held the view that the statute of Victoria 17 and 18, above cited, was but declaratory of the law of England as it theretofore existed, and that, in view of the remedies given in the United States courts in admiralty, and the provisions of the Federal statutes enacted in reference to the recovery and protection of the wages of seamen, there was no jurisdiction in the state courts to garnishee the wages of seamen at the instance of a creditor.

244] *With Judge Benedict's opinion before him, Mr. Justice Gray, then of the supreme judicial court of Massachusetts, in the case of *Eddy v. O'Hara*, 132 Mass. 56, said that the court, although recognizing the elaborate and forcible argument of Judge Benedict, had not been able to satisfy itself that such an exemption from attachment had even been recognized, except as created or limited by express statutes or ordinances. The learned justice conceded that a determination of that question was not necessary to the decision then made, because the court held that the trustee in foreign attachment, having been compelled by process from the admiralty court to pay the amount of wages, could not be charged again for the same sum. In the subsequent case of *White v. Dunn*, 134 Mass. 271, the question was directly presented, and the former opinion of Mr. Justice Gray, in 132 Mass. 56, was approved; and it was held that the wages of seamen engaged in the coastwise trade (the act of 1874, 18 Stat. at L. 64, chap. 260, U. S. Comp. Stat. 1901, p. 3064, being construed to exempt coastwise-trading vessels from the provisions of the act of 1872, which included what is now § 4536) are subject to attachment by the trustee process. The court expressed regret at its inability to agree with the district court of the United States for the southern district of New York, evidently referring to Judge Benedict's opinion above cited, and expressed the

opinion that no practical injustice would grow out of the conflict, as the supreme judicial court of Massachusetts had recently held, in *Eddy v. O'Hara*, supra, that where the wages of seamen had been obliged to be paid by a decree in admiralty, a party could not again be charged under attachment proceedings, and the court expressed the opinion that, as the wages were paid upon the judgment upon which trustee process had issued a court of admiralty of the United States would not compel the owners to pay a second time.

In the case of *The City of New Bedford*, 20 Fed. 57, Judge Brown, sitting in admiralty in the southern district of New York, adhered to the views expressed by Judge Benedict *in *McCarty v. The City of New Bedford*, supra, notwithstanding the decision in *Eddy v. O'Hara*, supra, but held that a compulsory payment under garnishee process in Massachusetts, under principles of comity, should be recognized in the admiralty court. In *Ross v. Bourne*, 14 Fed. 858, Judge Nelson, sitting in the United States district court in Massachusetts, held that a suit at law against a seaman, wherein his wages had been attached by a trustee process, but not yet paid, would not bar the seaman's recovery of the whole wages by a suit in admiralty. Upon appeal to the circuit court of the same case (17 Fed. 703), Judge Lowell said that "he did not dissent" from the learned opinion of Mr. Justice Gray, in *Eddy v. O'Hara*, supra, but held that such an attachment proceeding should be respected out of comity only, and that comity did not require actions in favor of seamen in admiralty to be hung up to wait the dilatory proceedings of an attachment suit at common law.

From this conflict of views upon the subject we turn to the consideration of the section (4536) itself. We may premise that no contention was made in the supreme court of Hawaii, or in the assignments of error or argument in this court, that § 4536 was inapplicable because the steamship company was engaged wholly in the coastwise trade. This removes any question on that subject from the case and renders it unnecessary to decide whether the act of 1874, 18 Stat. at L. 64, chap. 260, U. S. Comp. Stat. 1901, p. 3064, had the effect to repeal § 4536, so far as vessels thus engaged are concerned. In the first clause of § 4536 it is provided that no wages due or accruing to any seaman shall be subject to attachment or arrestment from any court; and it is the contention of the plaintiff in error that the words "attachment" or "arrestment" only forbid such proceedings before judgment, but do not protect such wages from proceedings in attachment after judg-

ment. Undoubtedly the word "attachment," as ordinarily understood in American law, has reference to a writ the object of which is to hold property to abide the order of the court for the payment of a judgment in the 246]event *the debt shall be established. And as Mr. Justice Alvey says, in delivering the opinion of the supreme court of Maryland (*Thomson v. Baltimore & S. Steam Co.* 33 Md. 318):

"An attachment has but few of the attributes of an execution; the execution contemplated by the statute being the judicial process for obtaining the debt or damages recovered by judgment, and final in its character, while the attachment is but mesne process, liable at any time to be dissolved, and the judgment upon which may or may not affect the property seized.

"Arrestment," a word derived from the English statute, is a word of Scotch origin, and derived from the Scottish law, and thus defined by Bouvier:

"The order of a judge, by which he who is debtor in a movable obligation to the arrestor's debtor is prohibited to make payment or delivery till the debt due to the arrestor be paid or secured. *Erskine, Inst.* 3, 6, 1; 1, 2, 12. Where arrestment proceeds on a depending action it may be loosed by the common debtor's giving security to the arrestor for his debt, in the event it shall be found due."

And in the *Century dictionary* it is defined to be:

"A process by which a creditor may attach money or movable property which a third person holds for behoof of his debtor. It bears a general resemblance to foreign attachment by the custom of London."

Neither of the words used in the statute, "attachment" or "arrestment," considered literally, has reference to executions or proceedings in aid of execution to subject property to the payment of judgments, but refers, as we have seen, to the process of holding property to abide the judgment. But we are of opinion that this statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to effecting the protection intended to be extended to a class of persons whose improvidence and prodigality have led to legislative provisions in their favor, and which has made 247]them, *as Mr. Justice Story declared, "the wards of the admiralty." *Harden v. Gordon*, 2 Mason, 541, Fed. Cas. No. 6,047.

We think, too, that the section is to be construed in the light of and in connection with the other provisions of the title of which it is a part. And we may notice that, after providing against attachment or arrestment of wages, this very section goes on to enact that payment of wages to seamen

shall be valid, notwithstanding any previous sale or assignment, or any attachment, encumbrance, or arrestment thereon; and that no assignment or sale of wages made prior to the accruing thereof shall bind the party making the same, except such advance securities as are authorized by this statute. When we look to the provisions of the title we see that the field of "advanced securities" for which assignment is authorized is very narrow indeed. U. S. Comp. Stat. 1901, pp. 3079 et seq. It is made unlawful to pay any seaman his wages in advance, and an allotment of his wages is permitted only to grandparents, parents, wives, or children, or, under regulations of the Commissioner of Navigation, made with the approval of the Secretary of the Treasury, not to exceed one month's wages to a creditor in liquidation of a just debt for board or clothing. And it is provided that no allotment note shall be valid unless signed and approved by the shipping commissioner. This statute has been held a valid enactment (*Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821) as to advancements.

Section 4536 therefore has the effect of not only securing the wages of the seaman from direct attachment or arrestment, but further prevents the assignment or sale of his wages, except in the limited cases we have mentioned, and makes the payment of such wages valid notwithstanding any "attachment, encumbrance, or arrestment thereon."

It seems to be clearly inferable from these provisions that wages which have thus been carefully conserved to the seaman were not intended to be subject to seizure by attachment, either before or after judgment.

Furthermore, there are other sections in the title which *strongly support the [248 conclusion that it was not intended that seamen's wages should be seized upon execution or attachment to collect judgments rendered at common law. Section 4535 provides that no seaman shall forfeit his lien upon the ship or be deprived of any remedy for the recovery of his wages by an agreement other than is provided for by this title. U. S. Comp. Stat. 1901, p. 3082. Section 4530 provides for the payment of seamen's wages, one half at every port where such vessel shall load or deliver its cargo, and when the voyage is ended the remainder of his wages, as provided in § 4529. Section 4546 provides for the summons of the master when wages are unpaid within ten days to show cause why process should not issue against the vessel according to the rules of courts of admiralty. Section 4547 provides for process against a vessel in case a seaman's wages are not paid, or the master

does not show that the same are otherwise "satisfied or forfeited," and all the seamen having like cause of complaint may be joined as complainants in a single action.

We think that these provisions, read in connection with § 4536, necessitate the conclusion that it was intended not only to prevent the seaman from disposing of his wages by assignments or otherwise, but to preclude the right to compel a forced assignment, by garnishee or other similar process, which would interfere with the remedy in admiralty for the recovery of his wages by condemnation of the ship. These provisions would be defeated if the seaman's wages, to be recovered at the end of the voyage, could be at once seized by an execution or attachment after judgment in an action at law. The evident purpose of the Federal statutes, that the seaman shall have his remedy in admiralty, would be defeated, and the seaman, in many cases, be turned ashore with nothing in his pocket, because of judgments seizing his wages, rendered, it may be, upon improvident contracts, from which it was the design and very purpose of the admiralty law to afford him protection.

"Ordinarily," says Judge Nelson, in *Ross* 249]v. *Bourne*, 14 **Fed. supra*, "the sailor's only means of subsistence on shore are his wages earned at sea. If these may be stopped by an attachment suit the instant his ship is moored to the wharf, a new hardship is added to a vocation already subject to its full share of the ills of life."

We think that § 4536, construed in the light of the other provisions of the same title, prevents the seizure of the seaman's wages, not only by writs of attachment issued before judgment, but extends the like protection from proceedings in aid of execution, or writs of attachments, such as are authorized by the Hawaiian statutes, after judgment.

Finding no error in the decision of the Supreme Court of Hawaii, the same is affirmed.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Plff. in Err.,
v.

UNITED STATES OF AMERICA EX
RELATIONE JOHN E. GOLDSBY.

(See S. C. Reporter's ed. 249-264.)

Courts — relation to Land Department.

1. The fact that the legal title to allottable Indian lands is still in the government does not defeat the jurisdiction of a court over a suit to compel the Secretary of the Interior to undo, as wholly unwarranted and unauthorized by law, his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who

has received an allotment certificate and is in possession of the land.

[For other cases, see *Courts*, I. e, 6, in *Digest Sup. Ct.* 1908.]

Mandamus — to control executive action.

2. Mandamus is the proper remedy where the Secretary of the Interior, wholly without authority of law, has summarily erased from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received an allotment certificate and is in possession of the land. [For other cases, see *Mandamus*, II. d, 4, in *Digest Sup. Ct.* 1908.]

Indian allotments — control of Interior Department — summarily erasing name from citizenship roll.

3. The Secretary of the Interior is without authority to erase from the approved rolls of citizenship in the Choctaw and Chickasaw Nations, without notice or hearing, the name of one who has received an allotment certificate and is in possession of the land.

[For other cases, see *Indians*, VIII. in *Digest Sup. Ct.* 1908.]

Mandamus — to control executive action.

4. Mandamus to compel the Secretary of the Interior to undo his action in summarily striking from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who has received an allotment certificate and is in possession of the land will not be refused on the theory that his case comes within the provisions of the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), establishing a citizenship court, as one of the claimants whose judgment in the court of the Indian territory was annulled by the subsequent procedure in the citizenship court, leaving him the remedy of appealing to that court, and that, having failed to appeal, he lost all right to enrolment, where it does not ap-

NOTE.—On the relation of the courts to the Executive—see notes to *Fleming v. Guthrie*, 3 L.R.A. 53, and *Bates v. Taylor*, 3 L.R.A. 316.

On the conclusiveness and effect of the decisions of the Land Department—see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 28 C. C. A. 344; and *Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co.* 57 C. C. A. 207.

As to when mandamus is the proper remedy—see notes to *United States v. Lamont*, 39 L. ed. U. S. 160; *M'Cluny v. Silliman*, 4 L. ed. U. S. 263; *Fleming v. Guthrie*, 3 L.R.A. 54; *Burnsville Turnp. Co. v. State*, 3 L.R.A. 265; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 777; and *Ex parte Hurn*, 13 L.R.A. 120.

On mandamus to control official action—see notes to *United States ex rel. Pollok v. Hall*, 1 L.R.A. 738; *Fleming v. Guthrie*, 3 L.R.A. 53; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 778; *People ex rel. Brokaw v. Highway Comrs.* 6 L.R.A. 161; and *Territory ex rel. Coteau County v. Cascade County*, 7 L.R.A. 105.

pear whether or not his name was on the original or other tribal rolls.

[For other cases, see *Mandamus*, II. d, 4, in *Digest Sup. Ct. 1908.*]

[No. 248.]

Argued October 15, 16, 1908. Decided November 30, 1908.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, granting a writ of mandamus to compel the Secretary of the Interior to undo his action in summarily erasing from the approved rolls of citizenship in the Choctaw and Chickasaw Nations the name of one who had received an allotment certificate and was in possession of the land. Affirmed.

See same case below, 30 App. D. C. 177.

The facts are stated in the opinion.

Assistant Attorney General Fowler and Attorney General Bonaparte argued the cause, and, with Mr. William R. Harr, filed a brief for plaintiff in error:

The matters referred to in the petition are within the exclusive jurisdiction of the Secretary of the Interior, and not subject to judicial review.

McKay v. Kalyton, 204 U. S. 458, 468, 51 L. ed. 566, 570, 27 Sup. Ct. Rep. 346; *Stephens v. Cherokee Nation*, 174 U. S. 445, 43 L. ed. 1041, 19 Sup. Ct. Rep. 722; *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 47 L. ed. 183, 23 Sup. Ct. Rep. 115; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; *Blackfeather v. United States*, 190 U. S. 373, 47 L. ed. 1101, 23 Sup. Ct. Rep. 772.

The legal title to the lands claimed by the relator being still in the United States and the Choctaw and Chickasaw nations, the lower court should have declined to interfere.

Brown v. Hitchcock, 173 U. S. 473, 476, 43 L. ed. 772, 774, 19 Sup. Ct. Rep. 485; *United States v. Schurz*, 102 U. S. 378, 396, 26 L. ed. 167, 171; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Humbird v. Avery*, 195 U. S. 480, 505, 49 L. ed. 286, 297, 25 Sup. Ct. Rep. 123; *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 337, 338, 50 L. ed. 499, 505, 506, 26 Sup. Ct. Rep. 282; *Love v. Flahive*, 205 U. S. 195, 198, 51 L. ed. 768, 770, 27 Sup. Ct. Rep. 486.

The power of the Land Department to cancel the final receiver's certificate has been often adjudged.

Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635; *Parsons v. Venzke*, 164 U. S. 89, 41 L. ed. 360, 17 Sup. Ct. Rep. 27; *Thayer v. Spratt*, 189 U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576; 53 L. ed.

Hawley v. Diller, 178 U. S. 476, 44 L. ed. 1157, 20 Sup. Ct. Rep. 986.

To say that a certificate of allotment is conclusive as against the Secretary would be to compel the allotment of land in these nations without his supervision or approval, in face of the fact that he is given exclusive jurisdiction in regard thereto.

The rule is well settled that the courts will not interfere, by injunction, or mandamus, with the action of executive officers requiring the exercise of judgment and discretion.

United States ex rel. Riverside Oil Co. v. Hitchcock, 190 U. S. 324, 47 L. ed. 1078, 23 Sup. Ct. Rep. 698.

Whether a patent shall issue is certainly a matter involving the exercise of judgment and discretion. Mandamus will not lie to compel its issuance.

United States v. The Commissioner (United States ex rel. McConnell v. Edmunds) 5 Wall. 563, 18 L. ed. 692; *The Secretary v. McGarrahan (Cox v. United States)* 9 Wall. 298, 19 L. ed. 579.

The utmost the courts have ever done is to compel the delivery of a patent where it has been recorded and the title has passed.

United States v. Schurz, 102 U. S. 378, 26 L. ed. 167.

The control and development of the tribal property still remains subject to the administrative control of the government, even though the members of the tribe have been invested with the status of citizenship under recent legislation.

Cherokee Nation v. Hitchcock, 187 U. S. 307, 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123.

The rule as to the effect to be given the contemporaneous and long-continued construction of statutes by executive officers charged with their administration is well settled. It is said that it is entitled to great respect, and should not be disregarded except for cogent reasons and when it is clear that such construction is erroneous.

United States v. Johnston, 124 U. S. 236, 253, 31 L. ed. 289, 396, 8 Sup. Ct. Rep. 446; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699.

The matter before the court is not affected by the question of vested rights. If, by reason of the selection of land made to him, the relator has acquired any vested rights therein, as he alleges, he can assert them in the proper court after the title to the land has passed from the United States and the Chickasaw Nation. But that the mere expectation of a share in the property of the Nation, arising from the fact of his once having been enrolled, does not create a vested right therein, is settled.

Stephens v. Cherokee Nation; Cherokee

Nation v. Hitchcock; and Lone Wolf v. Hitchcock,—supra; Morris v. Hitchcock, 194 U. S. 384, 48 L. ed. 1030, 24 Sup. Ct. Rep. 712; Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363.

Assistant Attorney General Fowler and Attorney General Bonaparte also filed a separate brief for plaintiff in error:

Inasmuch as the commission and the Secretary of the Interior had no jurisdiction over the application of Goldsby, which was made in 1905, the entering of his name upon the roll by the Secretary of the Interior was a nullity.

Wallace v. Adams, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363; United States use of Wilson v. Walker, 109 U. S. 258, 265, 27 L. ed. 927, 929, 3 Sup. Ct. Rep. 277; Bigelow v. Forrest, 9 Wall. 339, 351, 19 L. ed. 696, 700; Horn v. Lockhart, 17 Wall. 570, 580, 21 L. ed. 657, 660.

If petitioner had alleged in his petition that he was on the tribal roll, yet he would have been put upon proof of that fact, inasmuch as it was not admitted in the answer.

United States v. Low, 16 Pet. 162, 168, 10 L. ed. 923, 925; Brown v. Pierce, 7 Wall. 205, 211, 19 L. ed. 134, 136.

The writ of mandamus is not one granted *ex debito justitiæ*, but its allowance rests in the sound discretion of the court.

Union P. R. Co. v. Hall, 91 U. S. 356, 23 L. ed. 432.

It will not be granted to correct irregular or unauthorized action by a public official when it appears from the face of the record that the result of this action has been to do justice, and that obedience to the mandamus would involve injustice.

Wiedwald v. Dodson, 95 Cal. 450, 30 Pac. 580; State ex rel. McBride v. Phillips County, 26 Kan. 419; State ex rel. Office Specialty Mfg. Co. v. Beck, 25 Nev. 105, 57 Pac. 935; Allen v. Robinson, 17 Minn. 113, Gil. 90; Van Akin v. Dunn, 117 Mich. 421, 75 N. W. 938; State ex rel. O'Hara v. Fagan, 56 N. J. L. 279, 27 Atl. 1089.

The writ will not issue in support of unjust claims, although they may technically be regular.

26 Cyc. Law & Proc. p. 155, title "Mandamus;" People ex rel. Wood v. Board of Assessors, 137 N. Y. 201, 33 N. E. 145; McQueen v. Detroit, 116 Mich. 90, 74 N. W. 387.

Mr. Charles H. Merillat argued the cause, and, with Messrs. Charles J. Kappler and James K. Jones, filed a brief for defendant in error:

After receipt of an allotment certificate, the allottee became entitled to a patent, is-

suance of the same being a mere ministerial act.

Garfield v. United States, 30 App. D. C. 165.

The Secretary of the Interior, having been invested with authority to approve the rolls, his approval, whether right or wrong, is not open for review here.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 450, 27 L. ed. 228, 1 Sup. Ct. Rep. 389; Johnson v. Towsley, 13 Wall. 83, 20 L. ed. 485.

Executive officers derive their powers from the statutes. Not only must an officer have jurisdiction of the subject-matter, but he must also keep within the limits of the power conferred on him by statute.

United States v. Macdaniel, 7 Pet. 1-14, 8 L. ed. 587-592; United States v. Thurber, 28 Fed. 56.

Any contention that, because of his general power of supervision over enrolment, allotments, and the Five Civilized Tribes, the Secretary must be held to have power to cancel enrolments which he ascertains he has approved by reason of fraud or mistake of law, counsel think can best be answered by citation of the case of Mosgrove v. Harper, 33 Or. 252, 54 Pac. 187, wherein it was held that the Secretary was without authority, for any cause, to cancel a once-approved lease.

Conceding that Congress could confer power on the Secretary to cancel an allotment certificate, it has not done so, whereas such express authority has been by statute conferred as to receivers' certificates, and the change in the statute naturally was followed by a change in the current of judicial decision.

Lytle v. Arkansas, 9 How. 333, 13 L. ed. 160; Orchard v. Alexander, 157 U. S. 372, 39 L. ed. 737, 15 Sup. Ct. Rep. 635.

The right to public lands is not complete until the action of the register and receiver of the Land Office is approved by the Commissioner of the General Land Office and the Secretary of the Interior, because, by statute, they now are vested with supervisory control; but, under the general land laws, there are stages at which their action is beyond recall.

United States v. Schurz, 102 U. S. 407, 26 L. ed. 175.

And, even with the supervisory power vested in the Secretary, the receiver's certificate carries with it property rights which cannot be lightly set aside by the Secretary.

Orchard v. Alexander, supra; Brown v. Gurney, 201 U. S. 192, 50 L. ed. 721, 26 Sup. Ct. Rep. 509.

The cases arising in this court under special acts go much further and are more nearly analogous to the situation presented by

the issuance of allotment certificates, especially under the Choctaw-Chickasaw agreement of July 1, 1902, and to almost or quite the same extent under the Cherokee agreement of the same year. The allotment certificates, like certification of lists of lands under these special acts, convey a title as complete as patents.

Frasher v. O'Connor, 115 U. S. 102, 29 L. ed. 311, 5 Sup. Ct. Rep. 1141; *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271; *Stark v. Starr*, 6 Wall. 402, 18 L. ed. 925; *Barney v. Dolph*, 97 U. S. 652, 24 L. ed. 1063.

Patent to the public lands, it has been held, is but evidence of the right and title thereto of the patentee. The patent, being but evidence, relates back to the inception of the equitable right.

United States v. Detroit Timber & Lumber Co. 200 U. S. 335, 50 L. ed. 505, 26 Sup. Ct. Rep. 282.

Enrolment gave a vested right to an undivided share, and the allotment certificate was the conclusive evidence of the right to a particular segregated tract, and the patent but a more formal and recorded muniment of title.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 716; *Garfield v. United States*, supra.

Even were jurisdiction to cancel names on the final approved rolls conceded, notice and opportunity of hearing in defense are absolute prerequisites to its exercise.

People ex rel. Van Petten v. Cobb, 13 App. Div. 56, 43 N. Y. Supp. 120; *Orchard v. Alexander*, 157 U. S. 382, 39 L. ed. 741, 15 Sup. Ct. Rep. 635.

Enrolment was, in effect, the execution of a contract between the individual, the Indian Nations, and the United States, in accordance with conventions assented to by the United States and the other parties. Canceling an executed contract is an exertion of the most extraordinary power of a court of equity.

Atlantic Delaine Co. v. James, 94 U. S. 207, 24 L. ed. 112; *Conner v. Groh*, 90 Md. 686, 45 Atl. 1024.

Mandamus is the proper remedy.

Virginia v. Rives, 100 U. S. 338, 25 L. ed. 676; *Ex parte Roberts*, 15 Wall. 385, 21 L. ed. 132; *People ex rel. Burroughs v. Brinkerhoff*, 68 N. Y. 262; *People ex rel. Van Petten v. Cobb*, supra; *Wise v. Bigger*, 79 Va. 269; *Crane v. Barry*, 47 Ga. 476; *Raymond v. Villere*, 42 La. Ann. 490, 7 So. 900; *State ex rel. Columbus v. Mitchell*, 31 Ohio St. 592; *State ex rel. Brickman v. Wilson*, 123 Ala. 259, 45 L.R.A. 772, 26 So. 482; *United States ex rel. Reinach v. Cortelyou*, 28 App. D. C. 570, 12 L.R.A. (N.S.) 166; *United States ex rel. West v. Hitchcock*, 19 App. D. C. 333; *Union P. R.* 53 L. ed.

Co. v. Hall, 91 U. S. 343-353, 23 L. ed. 428-431; *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; *Boston Turnp. Co. v. Pomfret*, 20 Conn. 590; *Schmulbach v. Speidel*, 50 W. Va. 553, 55 L.R.A. 922, 40 S. E. 424; *Baltimore University v. Colton*, 98 Md. 623, 64 L.R.A. 108, 57 Atl. 14; *Harwood v. Marshall*, 9 Md. 83; *Jackson v. State*, 57 Neb. 183, 42 L.R.A. 792, 77 N. W. 662; *Dawson v. Thurston*, 2 Hen. & M. 132; *Re Strong*, 20 Pick. 484; *People ex rel. Pulford v. Fire Department*, 31 Mich. 458.

The enrolment of defendant in error exhausted judgment, discretion, and controversy.

Belcher v. Linn, 24 How. 526, 16 L. ed. 758; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 450, 27 L. ed. 228, 1 Sup. Ct. Rep. 389; *Johnson v. Towsley*, 13 Wall. 83, 20 L. ed. 486; *Noble v. Union River Logging R. Co.* 147 U. S. 170, 37 L. ed. 125, 13 Sup. Ct. Rep. 271.

A claim of discretion will not bar the writ, provided the construction of the acts of Congress is plain and unmistakable, since that would be to enable the executive officer to render valueless the writ of mandamus.

Roberts v. United States, 176 U. S. 221, 44 L. ed. 443, 20 Sup. Ct. Rep. 376.

The Secretary of the Interior had jurisdiction to enroll all the defendants in error because the subject-matter of enrolments was expressly committed to his care.

McNitt v. Turner, 16 Wall. 364, 21 L. ed. 347; *Daniels v. Tearney*, 102 U. S. 418, 26 L. ed. 187; *Foltz v. St. Louis & S. F. R. Co.* 8 C. C. A. 635, 19 U. S. App. 581; 60 Fed. 316; *Grignon v. Astor*, 2 How. 341, 11 L. ed. 292; *Cornett v. Williams* (*Nash v. Williams*) 20 Wall. 226, 22 L. ed. 254; *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931.

While the construction of a statute by a body charged with its enforcement, which has long obtained and which has been impliedly sanctioned by its re-enactment, must be treated, when not plainly erroneous, as read into the statute, its binding force is restricted to the exact point passed on.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

The original enrolments are an admitted fact and must be legally treated as such. The court will not go back of that. It cannot inquire into what means or methods brought the Secretary to his final approval of the rolls, nor whether that final approval was correct. It has no general supervisory power over the Secretary, and can only act where he exceeds his jurisdiction or acts arbitrarily, capriciously, and without due process of law.

De Cambra v. Rogers, 189 U. S. 121, 47 L.

ed. 734, 23 Sup. Ct. Rep. 519; *United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 323, 47 L. ed. 1076, 23 Sup. Ct. Rep. 698; *United States ex rel. West v. Hitchcock*, 205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423.

Allotment gave the enrolled a designated and segregated tract of land, subject to sale, lease, or mortgage, with approval of the Secretary. Many such approvals were made. Such acts, as well as the statutes, are inconsistent with a claim that enrolments were only tentative until final closure of rolls.

Wallace v. Adams, 74 C. C. A. 540, 143 Fed. 721.

Mr. Justice Day delivered the opinion of the court:

This action was brought in the supreme court of the District of Columbia for a writ of mandamus against the Secretary of the Interior in his official capacity, to require him to erase certain marks and notations theretofore made by his predecessor in office upon the rolls, striking therefrom the name of the relator, Goldsby, as an approved member of the Chickasaw Nation, and to restore him to enrolment as a member of the nation.

Goldsby, in his petition, claimed that he was a recognized citizen of the Chickasaw Nation and entitled to an equal, undivided interest in the lands of the Choctaw and Chickasaw Nations; that he was an owner of an allotment of land which had been made to him as hereinafter stated, and that he was entitled to an equal, undivided, distributive share of the funds and other lands of the nation. The petition for the writ recites at length the acts of Congress supposed to bear upon the subject, and avers that the Secretary of the Interior, on October 6, 1905, affirmed a decision of the Commission to the Five Civilized Tribes, holding that the petitioner and his children were entitled to enrolment, and that relator's name was placed on the final roll of citizenship by blood of the Chickasaw Nation, and that the list was approved by the Secretary of the Interior on November 27, 1905, and that thereafter the petitioner secured an allotment of 320 acres of the allottable lands of the Chickasaw Nation, and an allotment certificate was issued to him by the Commission to the Five Civilized Tribes for the lands thus selected, and the same are now held by him. The petition then goes on to aver, in substance, that relator's name was stricken from the rolls on March 4, 1907. And it is averred that this action was unauthorized, *was beyond the power of the Secretary, and deprived the relator of valuable rights in the lands and funds of the

Choctaw and Chickasaw Nations without due process of law.

The supreme court of the District of Columbia issued an order to show cause and the Secretary appeared and answered. The answer, we think, may be fairly construed to contain a denial of the allegation, if the petition might be construed to make the claim, that the relator was an enrolled member of the Chickasaw Nation, but it does admit that he had been enrolled by the Commission to the Five Civilized Tribes; that the list had been approved by the First Assistant Secretary of the Interior, and averred that, before the time fixed by Congress for the completion of the rolls of members of the nation, the then Secretary of the Interior had disapproved the enrolment of the petitioner and stricken his name from the rolls. The answer admits that the certificate of allotment had been issued to petitioner by the Commission to the Five Civilized Tribes for lands selected by petitioner; and further avers that the Secretary of the Interior had not approved of such allotment, and no patent had been issued therefor.

The answer also admits that it had been the practice of Secretaries of the Interior to give notice before striking names from the approved lists of the Five Civilized Tribes, and avers that, owing to the limited time before the expiration of the time fixed by Congress for the completion of the rolls, March 4, 1907, it was impossible to give notice and opportunity to be heard to relator and a large number of other persons. The answer avers that the respondent's predecessor, the then Secretary of the Interior, had no jurisdiction or authority to enroll the petitioner. It also avers that the allotment of lands in severalty of the Chickasaw Nation was delegated exclusively to the Secretary of the Interior. That, by the acts of Congress, exclusive jurisdiction in matters involving the making of rolls of citizenship of the Five Civilized Tribes was conferred *upon the Secretary of the Interior, and the determination of such matters was within his exclusive judgment and discretion.

A general demurrer was filed to the answer, with a note thereto stating that one matter to be argued on demurrer is that the answer sets forth no sufficient reason in law for the cancellation of relator's enrolment by the Secretary of the Interior without notice or hearing. In the supreme court of the District of Columbia the demurrer to the answer was sustained upon that ground. The respondent elected to stand upon his answer. Judgment was entered, requiring the Secretary to erase from the rolls the statements placed thereon derogatory to the

relator's rights in said tribe, and to recognize relator as an enrolled member of the nation. Upon appeal to the court of appeals of the District of Columbia this judgment was affirmed (30 App. D. C. 177), and the case comes here.

While it does not appear from the allegations and admissions of the pleadings that Goldsby was an original enrolled member of the tribe, it does appear that, under the act of Congress of June 10, 1896 (29 Stat. at L. 339, chap. 398), Goldsby made application to the Dawes Commission and was enrolled as a member of the Chickasaw Nation. It appears from a letter of the Secretary of the Interior to the commission, attached as an exhibit to the petition, and dated October 6, 1905, that the commission to the Five Civilized Tribes, on May 24, 1905, following instructions of the Department of April 2, 1905, and in accordance with the opinion of the Assistant Attorney General of March 24, 1905, in the case of Vaughn et al., rescinded its action of September 23, 1904, dismissing the application for the enrollment of Goldsby and his minor children, and held that they should be enrolled as citizens, by blood of the Chickasaw Nation; and that on July 7, 1905, the Indian Office recommended that the commission's decision be approved. The Secretary's letter of October 6, 1905, concluded with a finding that the applicants, including Goldsby, should be enrolled as citizens of the Chickasaw Nation, affirming the commission's decision. The Secretary of the Interior, on April 26, 1906, reported his approval to the Dawes Commission, the roll as approved was kept in the Secretary's office, and copies sent out as the statute required.

Goldsby selected his land and received a certificate of allotment from the commission, but no patent has been issued for the same. On March 4, 1907, the Secretary of the Interior, without notice to the relator and without his knowledge, erased his name from the rolls and opposite the same caused the entry to be made, "canceled March 4, 1907."

In the view which we take of this case it is unnecessary to recite at length the numerous acts of Congress which have been passed in aid of the purpose of Congress to extinguish the tribal titles to Indian lands and to allot the same among the members thereof with a view of creating a state or states which should embrace these lands.

The act of June 10, 1896 (29 Stat. at L. 339, chap. 398), empowered the Dawes Commission to hear and determine applications for citizenship, and gave an appeal to the United States court in the Indian territory from the decisions of the commission; made the judgment of that court final,

and required the commission to complete its roll of citizens of the several tribes, and to include therein the names of citizens, in accordance with the requirements of the act. And the commission was required to file the list of members as they finally approved them, with the Commissioner of Indian Affairs.

The act of June 28, 1898 (30 Stat. at L. 497, chap. 517, § 11), made provision that when the roll of citizenship of any one of the nations or tribes is complete, as provided by law, and a survey of the land is made, the Dawes Commission should proceed to allot the lands among the citizens thereof, as shown by the roll.

By the act of March 3, 1901 (31 Stat. at L. 1077, chap. 832), it was provided that the rolls made by the Commission to the Five Civilized Tribes, as approved by the Secretary of the Interior, should be final, and authorized the Secretary of the Interior to fix the time by agreement with the tribes for the closing of the roll, and, upon failure of such agreement, then the Secretary of the Interior should fix the time for the closing of the rolls, and after which no name should be added thereto.

The act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), ratifies an agreement with the Choctaw and Chickasaw Nations, providing for the allotment of lands, and provides in § 23:

"23. Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union Agency shall, upon the application of the allottee, place him in possession of his allotment, and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

Section 31 of the act made provision for the establishment of a citizenship court. The provisions of the act, in this respect, are fully reviewed in former decisions of this court. *Wallace v. Adams*, 204 U. S. 415, 51 L. ed. 547, 27 Sup. Ct. Rep. 363.

It is sufficient to say that, by the act of July 1, 1902, a suit was authorized in the citizenship court to annul the citizenship decrees made in the United States court in the Indian territory, under the act of June 10, 1896; provision was made for general suits in which a nation might be represented by ten representative defendants; and it was provided that when citizenship judgments in the court of the Indian territory were annulled in the authorized test suit, the party aggrieved, by being deprived of favor-

able judgment upon his claim of citizenship, might himself appeal to the citizenship court, and such proceeding should be had as ought to have been had in the court to which the same was taken from the commission, as if no judgment or decision had been rendered therein. And it was further provided that no person whose name did not appear upon the rolls, as provided for in this act, should be entitled to participate in the common property of the Choctaw and Chickasaw tribes.

260] *The act of April 26, 1906 (34 Stat. at L. 137, chap. 1876), provided that the rolls of the tribes should be fully complete on or before the 4th day of March, 1907, and after that day the Secretary of the Interior should have no jurisdiction to approve the enrolment of any person.

It is insisted by the learned counsel for the government that the court had no jurisdiction to entertain this suit, because the legal title has not as yet passed from the government, as no patent has passed. We have no disposition to question those cases in which this court has held that the courts may not interfere with the Land Department in the administration of the public lands while the same are subject to disposition under acts of Congress intrusting such matters to that branch of the government. Some of these cases are cited in the late case of *United States v. Detroit Timber & Lumber Co.* 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282, and the principle to be gathered from them is, that while the land is under the control of the Land Department prior to the issue of patent, the court will not interfere with such departmental administration. This was held as late as the case of *Love v. Flahive*, 205 U. S. 195-198, 51 L. ed. 768-770, 27 Sup. Ct. Rep. 486.

But the question presented for adjudication here does not involve the control of any matter committed to the Land Department for investigation and determination. The contention of the relator is, that as the Secretary had exercised the authority conferred upon him and placed his name upon the rolls, and the same had been certified to the commission, and he had received an allotment certificate, and was in possession of the lands, the action of the Secretary in striking him from the roll was wholly unwarranted, and not within the authority and control over public land titles given to the Interior Department.

By the conceded action of the Secretary prior to the striking of Goldsby's name from the rolls, he had not only become entitled to participate in the distribution of the funds of the nation, but, by the express terms of § 23 of the act of July 1, 1902 (32 Stat. at L. 641, chap. 1362), it was pro-

vided that the certificate *should be[261 conclusive evidence of the right of the allottee to the tract of land described therein. We have therefore under consideration in this case the right to control by judicial action an alleged unauthorized act of the Secretary of the Interior for which he was given no authority under any act of Congress.

It is insisted that mandamus is not the proper remedy in cases such as the one now under consideration. But we are of opinion that mandamus may issue if the Secretary of the Interior has acted wholly without authority of law. Since *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60, it has been held that there is a distinction between those acts which require the exercise of discretion or judgment and those which are purely ministerial, or are undertaken entirely without authority, which may become the subject of review in the courts. The subject was under consideration in *Noble v. Union River Logging R. Co.* 147 U. S. 165, 37 L. ed. 123, 13 Sup. Ct. Rep. 271, and Mr. Justice Brown, delivering the opinion of the court, cites many of the previous cases of this court, and, speaking for the court, says:

"We have no doubt the principle of these decisions applies to a case wherein it is contended that the act of the head of a department, under any view that could be taken of the facts that were laid before him, was *ultra vires*, and beyond the scope of his authority. If he has no power at all to do the act complained of, he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do. As observed by Mr. Justice Bradley in *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 25 L. ed. 623, 628: 'But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a mandamus to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction *to prevent it. In[262 such cases the writs of mandamus and injunction are somewhat correlative to each other.'"

We think this principle applicable to this case, and that there was jurisdiction to issue the writ of mandamus.

In our view, this case resolves itself into a question of the power of the Secretary of the Interior in the premises, as conferred by the acts of Congress. We appreciate fully the purpose of Congress in numerous

acts of legislation to confer authority upon the Secretary of the Interior to administer upon the Indian lands, and previous decisions of this court have shown its refusal to sanction a judgment interfering with the Secretary where he acts within the powers conferred by law. But, as has been affirmed by this court in former decisions, there is no place in our constitutional system for the exercise of arbitrary power, and, if the Secretary has exceeded the authority conferred upon him by law, then there is power in the courts to restore the status of the parties aggrieved by such unwarranted action.

In the extended discussion which has been had upon the meaning and extent of constitutional protection against action without due process of law, it has always been recognized that one who has acquired rights by an administrative or judicial proceeding cannot be deprived of them without notice and an opportunity to be heard.

The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court.

The acts of Congress, as we have seen, have made provision that the commission shall certify from time to time to the Secretary of the Interior the lists upon which the names of persons found by the commission to be entitled to enrolment shall be placed. Upon the approval of the Secretary of the Interior these lists constitute a 263]part and parcel of the final *rolls of citizens of the Choctaw and Chickasaw tribes and Chickasaw freedmen, upon which allotments of lands and distribution of tribal property shall be made.

The statute provides in § 30, act of July 1, 1902, *supra*:

"Lists shall be made up and forwarded when contests of whatever character shall have been determined, and when there shall have been submitted to and approved by the Secretary of the Interior lists embracing names of all those lawfully entitled to enrolment, the rolls shall be deemed complete. The rolls so prepared shall be made in quintuplicate, one to be deposited with the Secretary of the Interior, one with the Commissioner of Indian Affairs, one with the principal chief of the Choctaw Nation, one with the governor of the Chickasaw Nation, and one to remain with the Commission to the Five Civilized Tribes."

The Secretary took the action contemplated by this section and acted upon the list forwarded by the commission. The roll was made up and distributed in quintuplicate, as required by the statute. Notice was given to the commission, and land was allotted to the relator, as provided by § 23 of the act of July 1, 1902, *supra*. The relator thereby acquired valuable rights, his name was upon the rolls, the certificate of his allotment of land was awarded to him. There is nothing in the statutes, as we read them, which gave the Secretary power and authority, without notice and hearing, to strike down the rights thus acquired.

Nor do we think it is an answer to the petition for a writ of mandamus to say, as is earnestly contended by the counsel for the government, that Goldsby's case comes within the provisions of the act of July 1, 1902, establishing a citizenship court, as it appears in this record that he was one of the claimants whose judgment in the court of the Indian territory was annulled by the subsequent procedure in the citizenship court, leaving to Goldsby the remedy of appealing himself to that court, which, having failed to do, he has lost all right to enrolment, and therefore the decision of the Secretary of March 4, 1907, *striking[264 him from the rolls, ought not to be interfered with, for the reason that the writ of mandamus, upon well-settled principles, ought not to issue to require the Secretary to do that which it now appears he never had any lawful authority to do. But we are of opinion that the facts now adduced are insufficient to require us to say that Goldsby could not establish a right to enrolment. The government contends, and we have held, that it does not appear in this case whether Goldsby's name was on the original or other tribal rolls,—a fact essential to be known in order to determine whether his contention be sound that such an enrolment gave him the right to participate in the division of the funds and lands of the nation, irrespective of the action of the Dawes Commission, the court of the Indian territory, or the citizenship court. The question here involved concerns the right and authority of the Secretary of the Interior to take the action of March 4, 1907, in summarily striking the relator's name from the rolls. That is the question involved in this case.

For the reasons given we think this action was unwarranted, and that the relator is entitled to be restored to the status he occupied before that order was made.

The judgment of the Court of Appeals of the District of Columbia is affirmed.

JAMES RUDOLPH GARFIELD, Secretary
of the Interior, Plff. in Err.,
v.

UNITED STATES EX REL. IDA ALLI-
SON. [No. 249.]

JAMES RUDOLPH GARFIELD, Secretary
of the Interior, Plff. in Err.,
v.

UNITED STATES EX REL. GEORGE A.
ALLISON. [No. 250.]

(See S. C. Reporter's ed. 264, 265.)

These cases are governed by the decision
in *Garfield v. United States*, ante, p. 168.

[Nos. 249, 250.]

Argued October 15, 16, 1908. Decided No-
vember 30, 1908.

IN ERROR to the Court of Appeals of the
District of Columbia to review two judg-
ments which affirmed judgments of the Su-
preme Court of the District, granting writs
of mandamus to compel the Secretary of the
Interior to undo his action in summarily
erasing certain names from the approved
rolls of citizenship in the Cherokee Nation.
Affirmed.

See same case below, No. 249, 30 App. D.
C. 190; No. 250, 30 App. D. C. 188.

The facts are stated in the opinion.

Assistant Attorney General **Fowler** and
Attorney General **Bonaparte** argued the
causes, and with Mr. William R. Harr, filed
a brief for plaintiff in error.

Mr. Charles H. Merillat argued the
causes, and, with Messrs. Charles J. Kapp-
ler and James K. Jones, filed a brief for
defendant in error.

For contentions of counsel, see their briefs
as reported in *Garfield v. United States*,
ante, 168.

Mr. Justice **Day** delivered the opinion
of the court:

These cases were argued and submitted
with the *Goldsby Case*, No. 248, just decided.
[*Garfield v. United States*, 211 U. S. 249,
ante, 168, 29 Sup. Ct. Rep. 62]. In the case
of George A. Allison, a patent had been is-
sued for his lands and duly recorded. In
the case of Ida Allison, an allotment cer-
tificate had been issued.

The relators are Cherokees, but the legis-
lation herein involved is not different from
that governing allotments to members of
the Chickasaw Nation.

The Allisons made application to the com-
mission for admission to citizenship under
the act of June 10, 1896 (29 Stat. at L. 321,
chap. 398). Their applications were denied

and no appeal taken. Afterwards a deci-
sion by the commission, granting the appli-
cation of the Allisons for enrolment as citi-
zens by blood, was affirmed by the Depart-
ment of the Interior as of April 16, 1904.
Their names were summarily stricken from
the rolls by the Department's order of
March 4, 1907. The cases are controlled by
the decision in *Goldsby's Case*.

Judgments affirmed.

HOME TELEPHONE & TELEGRAPH COM-
PANY, Appt.,
v.

CITY OF LOS ANGELES, A. C. Harper,
Mayor, and R. W. Dromgold, Edward A.
Clampitt, Walter J. Wren, Niles Pease,
A. J. Wallace, Henry H. Yonkin, Henry
Lyon, Bernard Healy, and Everett L.
Blanchard, Members of the Common Coun-
cil.

(See S. C. Reporter's ed. 265-281.)

**Telephones — municipal regulation —
contracting away power to fix rates.**

1. Municipal authority to enter into a
contract fixing unalterably, during the term
of the franchise, charges for telephone ser-
vice, and disabling itself from exercising the
charter power of regulation, must, at the
very least, necessarily be implied from the
controlling statutes, even if it be conceded
that anything less than a clear and affirma-
tive legislative expression is a sufficient
foundation upon which to rest an authority
of this nature.

**Telephones — municipal regulation —
contracting away power to fix rates.**

2. Charter authority to regulate tele-
phone service and to fix and determine the
charges therefor does not empower a mu-
nicipality to enter into a contract fixing
unalterably, during the terms of the fran-
chise, the charges for such service, and
disabling itself from exercising the power
of regulation.

**Telephones — municipal regulation —
contracting away power to fix rates.**
3. Municipal authority to contract away

NOTE. — On legislative power to regulate
telephone rates—see note to *Chesapeake &
P. Teleph. Co. v. Manning*, 46 L. ed. U. S.
1144.

On the power of the legislature generally
to fix tolls, rates, and prices—see note to
*Winchester & L. Turnp. Road Co. v. Crox-
ton*, 33 L.R.A. 177.

On unconstitutional inequality or discrim-
ination in state regulation of tolls or rates
—see note to *Cotting v. Godard*, 46 L. ed.
U. S. 92.

On notice and hearing required to con-
stitute due process of law—see notes to
Kuntz v. Sumption, 2 L.R.A. 657; *Chauvin
v. Valiton*, 3 L.R.A. 194; and *Ulman v.
Baltimore*, 11 L.R.A. 225,

the charter power to regulate telephone rates cannot be gathered from the provisions of Cal. act March 11, 1901 (Cal. Stat. 1901, p. 265), under which the telephone company obtained its franchise from the city, that application for a franchise must be filed, and, in the discretion of the council, published, that the city is entitled to a percentage of the receipts, that the grantee must give bond to perform every term and condition of the franchise, that no condition shall be inserted which restricts competition, or favors one person against another, and that the franchise must be sold to the highest bidder, especially since the 1st section of the act provides that franchises "shall be granted upon the conditions in this act provided, and not otherwise."

Constitutional law — due process of law — notice and hearing.

4. Municipal ordinances fixing telephone rates do not deny the due process of law guaranteed by U. S. Const., 14th Amend., because the section of the municipal charter under the authority of which they were enacted does not expressly provide for notice and hearing, where both notice and an opportunity to be heard were in fact accorded by ordinances providing that the rates be fixed at a meeting of the city council held in February in each year, and requiring the telephone company to furnish the city council annually in that month a statement of its receipts, expenditures, and property employed in the business.

[For other cases, see Constitutional Law, 696-773, in Digest Sup. Ct. 1908.]

Constitutional law — delegation of power.

5. No valid objection to intrusting a municipal council with the power to regulate telephone rates can be based upon the theory that the council is not an impartial tribunal because it is, in effect, made a judge in its own case, or that the judgment and sense of justice of the councilmen will be distorted by their dependence upon the will of the people which results from a provision in the city charter empowering 25 per cent of the electors to recall a member of the council and require him again to stand for election.

[For other cases, see Constitutional Law, III. b, 3, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws.

6. Municipal regulation of the rates which a telephone company may charge, on a lower scale than those prescribed for a competitor, does not necessarily deny the equal protection of the laws, since such competitor may bring its patrons into communication with a larger number of persons, dwelling in a more widely-extended territory, and may render much more valuable service.

[For other cases, see Constitutional Law, 343-346, in Digest Sup. Ct. 1908.]

[No. 173.]

Argued October 21, 1908. Decided November 30, 1908.

APPEAL from the Circuit Court of the United States for the Southern District of California to review a decree sustaining a demurrer to the bill in a suit to restrain the enforcement of municipal ordinances fixing telephone rates. Affirmed.

See same case below, 155 Fed. 554.

The facts are stated in the opinion.

Mr. Oscar A. Trippet argued the cause, and, with Mr. A. Haines, filed a brief for appellant:

The California statute of 1901 and the provisions of the charter are to be read together as bearing upon the power of the city of Los Angeles to grant a franchise for a telephone system, and to fix therein rates chargeable for telephone service during the term of the franchise; and ultimately, in the light of such power, as bearing on the question whether the ordinance embodies a contract as to rates.

Los Angeles v. Davidson, 150 Cal. 63, 88 Pac. 42.

The granting of a franchise is a legislative act.

People ex rel. Dean v. Contra Costa County, 122 Cal. 422, 55 Pac. 131.

In considering the question of power to contract, the principle that the right to compensation is an inseparable incident to every franchise affected with a public use is to be kept in view.

Stockton Gas & Electric Co. v. San Joaquin County, 148 Cal. 321, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 A. & E. Ann. Cas. 511; Truckee & T. Turnp. Road Co. v. Campbell, 44 Cal. 90; State v. Boston, C. & M. R. Co. 25 Vt. 433; State ex rel. St. Louis v. Laclede Gaslight Co. 102 Mo. 472, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383; Los Angeles City Water Co. v. Los Angeles, 88 Fed. 720.

So vital is this right and so absolutely incident is it, that even when it is left to continuous public regulation, unrestrained by contract, it comes under the guaranty of the 14th Amendment of the Constitution of the United States.

Smyth v. Ames, 169 U. S. 466, 522-526, 42 L. ed. 819, 840, 842, 18 Sup. Ct. Rep. 418.

The power to agree upon maximum rates is incident to the power to grant the franchise, even though the governmental power to regulate rates by enactments in the nature of laws has not been conferred upon the municipality.

Noblesville v. Noblesville Gas & Improv. Co. 157 Ind. 162, 60 N. E. 1032.

The procedure to sell, prescribed by the statute, is contractual at every stage.

a. Because every franchise under the Broughton act contemplates a new public utility.

Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 5.

b. Because the statutory application for a franchise may embrace a proposal as to rates.

c. Because, in exercising the discretion reposed in the council by the statute to pass on such application, the council is empowered to exercise its discretion on the rates proposed in it.

d. Because the power to sell a franchise inevitably includes the power to prescribe maximum rates as a term of the franchise.

California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100.

e. Because the discretion conferred by the Broughton act on the council, to define the character of the franchise to be advertised for sale, includes the power to fix maximum rates or charges under the franchise.

f. Because the fact that the Broughton act required the legislative body of the municipality to fix the term for which the proposed franchise is to be granted, and to state such term in the advertisement for bids, is consistent with the prescribing of maximum rates in the sale and grant of the franchise, but inconsistent with any recognized principles for exercising continuing power by the city council to legislate as a political superior upon the rates from time to time during such term.

It is not apparent how ultimate compensation for capital invested in or the cash price paid for the franchise can be provided, as justice and equity require, otherwise than by an agreement fixing maximum rates for the term. It would seem that the system of continuous rate fixing is inadequate to that end. For it is now to be considered as the settled law, that all fixing of rates by governmental authority, acting purely in the lawmaking capacity, proceeds upon the legal basis of "a fair return upon the reasonable value of the property at the time it is being used for the public." This is the utmost the holder of a franchise can expect.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; Smyth v. Ames, 169 U. S. 466, 544, 546, 547, 42 L. ed. 819, 848, 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. Jacer, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; Redlands, L. & C. Domestic Water Co. v. Redlands, 121 Cal. 365, 53 Pac. 843; Spring Valley Waterworks v. San Francisco, 124 Fed. 574; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 86, 91, 46 L. ed. 92, 99, 101, 22 Sup. Ct. Rep. 30.

The value of the plant and franchise themselves, whether taken separately, or as a whole, is affected by the character and duration of the franchise.

Kennebec Water Dist. v. Waterville, 97 Me. 201, 60 L.R.A. 856, 54 Atl. 12; Bristol v. Bristol & W. Waterworks, 19 R. I. 413, 32 L.R.A. 740, 34 Atl. 359; Re Brooklyn, 143 N. Y. 596, 26 L.R.A. 270, 38 N. E. 983, affirmed in 166 U. S. 685, 41 L. ed. 1165, 17 Sup. Ct. Rep. 718.

Every consideration shows that the Broughton act conferred power upon the municipalities of the state to contract as to rates for telephone service.

Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 382, 46 L. ed. 592, 605, 22 Sup. Ct. Rep. 410; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 496, 508, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762; Los Angeles v. Los Angeles City Water Co. 177 U. S. 558, 570, 44 L. ed. 886, 892, 20 Sup. Ct. Rep. 736, 88 Fed. 730; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 3, 14, 43 L. ed. 341, 342, 347, 19 Sup. Ct. Rep. 77; Cleveland v. Cleveland City R. Co. 194 U. S. 517, 533, 534, 48 L. ed. 1102, 1107, 1108, 24 Sup. Ct. Rep. 756; Cleveland v. Cleveland Electric R. Co. 201 U. S. 529, 540, 541, 50 L. ed. 854, 859, 26 Sup. Ct. Rep. 513; Omaha Water Co. v. Omaha, supra; Santa Ana Water Co. v. San Buenaventura, 56 Fed. 339; State ex rel. St. Louis v. Laclede Gaslight Co. 102 Mo. 485, 22 Am. St. Rep. 789, 14 S. W. 974, 15 S. W. 383; Bessemer v. Bessemer Waterworks (Ala.) 44 So. 663.

The charter expressly confers the power to fix and determine rates for a definite period.

7 Words & Phrases, p. 641; 3 Words & Phrases, p. 829; Detroit v. Detroit Citizens' Street R. Co. 184 U. S. 368, 383-385, 397, 46 L. ed. 592, 606, 607, 611, 22 Sup. Ct. Rep. 410.

The fixing and determining of rates for a definite period is neither an abandonment or a suspension of the power to regulate by the exercise of it.

Bessemer v. Bessemer Waterworks, supra; Vicksburg v. Vicksburg Waterworks Co. 206 U. S. 510, 51 L. ed. 1161, 27 Sup. Ct. Rep. 762; Stone v. Yazoo & M. Valley R. Co. 62 Miss. 607, 52 Am. Rep. 193; California Reduction Co. v. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100.

In California the right of a municipality to make a contract for a term of years, controlling the further exercise of legislative or governmental power over its subject-matter during such term, is judicially established.

McBean v. Fresno, 112 Cal. 161, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; Contra Costa Water Co. v. Breed, 139 Cal. 432,

73 Pac. 189; *Doland v. Clark*, 143 Cal. 176, 76 Pac. 958; *Los Angeles City Water Co. v. Los Angeles*, 88 Fed. 720, 177 U. S. 558, 44 L. ed. 886, 20 Sup. Ct. Rep. 736; *Santa Ana Water v. San Buenaventura*, supra.

The contemporaneous construction of the Broughton act and of the powers of the city under its charter are controlling.

Railroad Comrs. v. Market Street R. Co. 132 Cal. 680, 64 Pac. 1065; *McPherson v. Blacker*, 146 U. S. 27, 36 L. ed. 874, 13 Sup. Ct. Rep. 3; *Packard v. Richardson*, 17 Mass. 143, 9 Am. Dec. 123; *Hovey v. State*, 119 Ind. 386, 21 N. E. 890; *Woods v. Potter* (Cal. App.) 95 Pac. 1126; *Omaha Water Co. v. Omaha*, 12 L.R.A.(N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; *Port Huron v. McCall*, 46 Mich. 565, 10 N. W. 23; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368-398, 46 L. ed. 592, 611, 22 Sup. Ct. Rep. 410.

The fixing of rates to be charged by public utilities corporations has often been said to be judicial in its nature, when exercised by a board or municipality.

San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *Spring Valley Waterworks Co. v. Schottler*, 110 U. S. 347, 384, 28 L. ed. 173, 186, 4 Sup. Ct. Rep. 48; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Cleveland Gaslight & Coke Co. v. Cleveland*, 71 Fed. 614; *Agua Pura Co. v. Las Vegas*, 10 N. M. 6, 50 L.R.A. 224, 60 Pac. 208; *Louisville & N. R. Co. v. McChord*, 103 Fed. 224; *Cumberland Teleph. & Teleg. Co. v. Railroad Commission*, 156 Fed. 829; *Mercantile Trust Co. v. Texas & P. R. Co.* 51 Fed. 542; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

The power to regulate rates of public utilities is akin to the power of taxation and of eminent domain, and the authorities concerning the constitutionality of acts of legislatures authorizing the levying of taxes and the condemnation of property are in point when construing the constitutionality of an act authorizing a municipality to fix rates.

San Diego Water Co. v. San Diego, 118 Cal. 567, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 594; *Consolidated Gas Co. v. New York*, 157 Fed. 875; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 168, 174, 41 L. ed. 392, 394, 17 Sup. Ct. Rep. 56.

There is a wide difference between a tax
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or assessment prescribed by a legislative body having full authority over the subject, and one imposed by a municipal corporation acting under a limited and delegated authority; and the difference is still wider between a legislative act making an assessment, and the act of mere functionaries whose authority is derived from municipal ordinances. Where the legislature has submitted these questions for inquiry to a commission, or to official persons to be appointed under municipal ordinances or regulations, the inquiry becomes in its nature judicial in such a sense that the property owner is entitled to a hearing, or to notice, or an opportunity to be heard.

Parsons v. District of Columbia, 170 U. S. 47, 51, 52, 42 L. ed. 944, 946, 18 Sup. Ct. Rep. 521; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663.

The act authorizing the levying of an assessment must itself provide for notice; and it is of no avail that notice is given when not provided for by the act.

Stuart v. Palmer, supra; *Kuntz v. Sumption*, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474; *Ferry v. Campbell*, 110 Iowa, 290, 50 L.R.A. 92, 81 N. W. 604; *Re Union College*, 129 N. Y. 308, 29 N. E. 460; *Remsen v. Wheeler*, 105 N. Y. 573, 12 N. E. 564; *Violett v. Alexandria*, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; *Re Grout*, 34 N. Y. Civ. Proc. Rep. 231, 93 N. Y. Supp. 711; *Mulligan v. Smith*, 59 Cal. 230; *Boorman v. Santa Barbara*, 65 Cal. 313, 4 Pac. 31; *Hutson v. Woodbridge Protection Dist. No. 1*, 79 Cal. 90, 21 Pac. 435, 16 Pac. 549; *Brandenstein v. Hoke*, 101 Cal. 131, 35 Pac. 562; *Lower Kings River Reclamation Dist. No. 531 v. Phillips*, 108 Cal. 306, 39 Pac. 630, 41 Pac. 335.

The principle announced in the foregoing cases is applicable to a charter of a city.

Savannah, F. & W. R. Co. v. Savannah, 96 Ga. 680, 23 S. E. 848.

The mayor and council to whom it is claimed is referred the power to fix rates in the city of Los Angeles is not an impartial tribunal nor a freely deliberative body.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; *Cleveland Gaslight & Coke Co. v. Cleveland*, 71 Fed. 612; *Mills v. Chicago*, 127 Fed. 734; *Agua Pura Co. v. Las Vegas*, supra.

A classification by which the power to fix rates for a telephone company is given to a municipality is denying the equal protection of the law.

Darcy v. San José, 104 Cal. 642, 38 Pac. 500; *Pasadena v. Stimson*, 91 Cal. 248, 27 Pac. 604; *State ex rel. Garner v. Missouri &*

K. Teleph. Co. 189 Mo. 83, 88 S. W. 42; Guthrie, 14th Amend. 110, 111, 114; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 160, 41 L. ed. 666, 670, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stockyards Co. (Cotting v. Godard) 183 U. S. 79, 105, 46 L. ed. 92, 107, 22 Sup. Ct. Rep. 30; Builders' Supply Depot v. O'Connor, 150 Cal. 265, 17 L.R.A.(N.S.) 909, 119 Am. St. Rep. 193, 88 Pac. 982.

Classifying companies by name for rate regulation purposes is not a proper classification.

Cooley Const. Lim. 484, 486, 487; Stratton Claimants v. Morris Claimants (Dibrell v. Lanier) 89 Tenn. 497, 12 L.R.A. 70, 15 S. W. 87; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 155, 41 L. ed. 666, 668, 17 Sup. Ct. Rep. 255; Louisville & N. R. Co. v. McChord, 103 Fed. 216.

Arbitrary exercise of the police power which tends to build up one company at the expense of a rival will be restrained by the courts.

Dobbins v. Los Angeles, 195 U. S. 223, 238, 49 L. ed. 169, 176, 25 Sup. Ct. Rep. 18.

Mr. Leslie R. Hewitt argued the cause, and, with Messrs. John W. Shenk and W. B. Mathews, filed a brief for appellees:

The following conclusions are deducible from and sustained by the decisions of the supreme court of California:

First: A freeholders' charter may contain provisions that include powers properly belonging to the state, exercisable by the legislature in the form of general laws. The only limitation in that domain placed, or that ever was placed, upon freeholders' charters, is that their provisions were subject to and controlled by general laws.

Second: The very language of the Constitution (§ 6, art. XI.) contemplates that matters other than "municipal affairs" might be provided for in a freeholders' charter.

Third: That if a power within the sphere of state action and exercisable by the legislature is embodied in such charter, nevertheless such power is perfectly valid, and remains in the city until the legislature takes that power from the city by enacting a general law upon the subject. When such a power is delegated to a city in a freeholders' charter, it is not invalid on any theory that it is a power the state cannot abdicate; it is incident to the grant of power to frame a charter for city government, and is valid until superseded by the state.

Fourth: The doctrine that powers not strictly incident or necessary to the city government cannot be delegated to a city under a freeholders' charter does not pre-

vail in California. On the contrary, such a power is capable of being so delegated, and its exercise by the city is valid until the state steps in and resumes that which it has extended to the city.

Davies v. Los Angeles, 86 Cal. 37, 24 Pac. 771; Martin v. Election Comrs. 126 Cal. 404, 58 Pac. 932; Miner v. Justice's Court, 121 Cal. 266, 53 Pac. 795; Ex parte Sparks, 120 Cal. 395, 52 Pac. 715; People ex rel. Lawlor v. Williamson, 135 Cal. 417, 67 Pac. 504; Ex parte Braun, 141 Cal. 204, 74 Pac. 780; Fritz v. San Francisco, 132 Cal. 373, 64 Pac. 566; Popper v. Broderick, 123 Cal. 456, 56 Pac. 53; Byrne v. Drain, 127 Cal. 663, 60 Pac. 433; Morton v. Broderick, 118 Cal. 474, 50 Pac. 644; Weaver v. Reddy, 135 Cal. 430, 67 Pac. 683; Ex parte Helm, 143 Cal. 553, 77 Pac. 453; Ex parte Lemon, 143 Cal. 558, 65 L.R.A. 946, 77 Pac. 455; Ex parte Jackson, 143 Cal. 564, 77 Pac. 457; Re Pfahler, 150 Cal. 71, 11 L.R.A.(N.S.) 1092, 88 Pac. 270; Frangley v. Phelan, 126 Cal. 383, 58 Pac. 923. See also 1 Dill. Mun. Corp. 4th ed. pp. 39, 165, §§ 20, 102; 28 Cyc. Law & Proc. p. 153; St. Louis v. Western U. Teleg. Co. 149 U. S. 465, 467, 468, 37 L. ed. 810, 812, 813, 13 Sup. Ct. Rep. 990.

Appellant's contention that there is no provision of law in California by which municipalities in general can guard themselves against undue charges for telegraph and telephone service, except the power to agree upon maximum rates in the sale of a franchise under the "Broughton act," is unfounded.

Denninger v. Recorder's Court, 145 Cal. 629, 79 Pac. 360.

The appellant acquired its franchise with notice of the city's charter power under § 31, and that such power might be exercised at any time.

St. Louis v. United Railways Co. 210 U. S. 266, 52 L. ed. 1054, 28 Sup. Ct. Rep. 630.

The power of the city of Los Angeles to fix telephone rates is a continuing one, and the city is not bound to refrain from the exercise of that power in the matter of readjusting, by ordinance, the rates which had been prescribed in its franchise. Even if it had been the express intention of the city council to fix rates once for all, to be charged by appellant, such action on the part of the city council would amount to the abrogation of a chartered power, which is impossible under any circumstances here appearing.

Freeport Water Co. v. Freeport, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493; Danville Water Co. v. Danville City, 180 U. S. 619, 45 L. ed. 696, 21 Sup. Ct. Rep. 505; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490;

Cooley, Const. Lim. 7th ed. p. 295; Milhau v. Sharp, 17 Barb. 435; Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Owensboro v. Owensboro Waterworks Co. 191 U. S. 370, 48 L. ed. 224, 24 Sup. Ct. Rep. 82; Buffalo East Side R. Co. v. Buffalo Street R. Co. 111 N. Y. 132, 2 L.R.A. 384, 19 N. E. 63; Brick Presby. Church v. New York, 5 Cow. 538.

Contracts are presumed to have been entered into with reference to the laws then in force, which therefore are to be deemed as forming a portion of their essence, and with reference to which they are to be construed.

Endlich, Interpretation of Statutes, § 274; Stohr v. San Francisco Musical Fund Soc. 82 Cal. 557, 22 Pac. 1125; Pignaz v. Burnett, 119 Cal. 160, 51 Pac. 48.

When the legislature acts directly in establishing rates, no notice and hearing are necessary.

Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

One is charged with notice of a fact who has information putting him on inquiry, if, by following up such information with diligence and understanding, the truth could have been ascertained.

Jennings v. Todd, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

A rate which might be fair for one company would be very unjust if equally applied to another. There are conditions which require the adjustment of rates according to the circumstances of each company, and objection to an ordinance cannot be sustained merely because another ordinance, relating to another company, fixes different rates, even though the maximum rates prescribed for the other company are greater. The question must be confined to the reasonableness and fairness of the rates fixed in the ordinance objected to.

Chicago v. Chicago Union Traction Co. 199 Ill. 259, 59 L.R.A. 666, 65 N. E. 243.

The objection to conferring upon municipal legislative bodies or other boards the rate-fixing power, on the ground that they are interested parties, is not a new one. The question has, however, been passed upon by this court and settled.

Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48.

It is quite true that a provision providing for the "recall" of public officers, including councilmen, has been adopted by the people of Los Angeles as a part of the charter of the city. But that is the concern of the people, and the validity of the "recall" was assumed by the supreme court in a case which arose out of the exercise of that provision against a member of the council. The case

was decided upon an issue that did not directly involve the validity of the "recall" provisions of the charter, but they were treated as though valid.

Davenport v. Los Angeles, 146 Cal. 508, 80 Pac. 684.

Mr. Justice Moody delivered the opinion of the court:

This is a suit in equity brought in the circuit court of the United States by the appellant, a telephone company, against the city of Los Angeles and its officers. The object of the suit is to restrain the enforcement of certain ordinances which fixed the rates to be charged for telephone service; required every person, firm, or corporation supplying telephone service to furnish annually to the city council a statement of the revenue from, and expenditures in, the business, and an itemized inventory of the property used in the business, with its cost and value; and provided a penalty for charges in excess of the rates fixed and for failure to furnish the required statements. The defendants demurred to the bill, the demurrer was sustained, and an appeal was taken directly to this court on the constitutional questions, which will be stated.

The ordinances complained of were enacted by virtue of the powers contained in § 31 of the city charter, which is as follows:

"(Sec. 31.) The council shall have power, by ordinance, to regulate and provide for lighting of streets, laying down gas pipes, and erection of lamp-posts, electric towers, and other apparatus, and to regulate the sale and use of gas and electric *light, and [271 fix and determine the price of gas and electric light, and the rent of gas meters within the city and regulate the inspection thereof, and to regulate telephone service, and the use of telephones within the city, and to fix and determine the charges for telephones and telephone service and connections; and to prohibit or regulate the erection of poles for telegraph, telephone, or electric wire in the public grounds, streets, or alleys, and the placing of wire thereon; and to require the removal from the public grounds, streets, or alleys of any or all such poles, and the removal and placing under ground of any or all telegraph, telephone, or electric wires."

It was decided by the judge of the court below, and is agreed by the parties, that this section of the charter conferred upon the city council, in conformity with the Constitution and laws of the state of California, the power to prescribe charges for telephone service. Not doubting the correctness of this view, we accept it without extended discussion. The power to fix, subject to constitutional limits, the charges of

such a business as the furnishing to the public of telephone service, is among the powers of government, is legislative in its character, continuing in its nature, and capable of being vested in a municipal corporation.

The company, however, insists that the city, having the authority so to do, has contracted with it that it may maintain the charges for service at a specified standard, and that, as the rates prescribed in the ordinances complained of are less than that standard, the ordinances therefore impair the obligation of the contract, in violation of the Constitution of the United States. This is the first question to be considered, and the facts out of which the contention arises are alleged in the bill and admitted by the demurrer.

The company obtained its franchise under the provisions of a statute of the state enacted March 11, 1901 (Stat. 1901, p. 265), which was later than the adoption of § 31 of the city charter. This statute provides 272] that, among other franchises, "the franchise "to erect or lay telephone wires . . . upon any public street or highway" shall be granted by municipal corporations only upon the conditions prescribed in the act. The conditions enumerated are that an application for the franchise shall be filed with the governing body of the municipality, of which advertisement, in the discretion of the city council, shall be made; that the advertisement must describe the character of the franchise to be granted and state that it will be sold to the highest bidder, who must pay annually to the municipality, after five years, 2 per cent of the gross annual receipts of the business; that the franchise shall be struck off to the highest bidder; and that a bond must be given by the purchaser to secure the performance of "every term and condition" of the franchise. There are other provisions not material here. By proceedings conforming to this statute a franchise to construct and operate a telephone system for fifty years was sold to M. Adrian King, which, by assignment, assented to by the city, came into the hands of the plaintiff company, which constructed the works and has since operated them. The franchise was granted by an ordinance. In the view we take of the case we need do no more than state very briefly the main features of the ordinance. It grants a franchise for fifty years, which is to be enjoyed in accordance with terms and conditions named, stipulates for certain free service for the city, and the payment to it, after five years, of 2 per cent of the gross receipts, and provides that the

charges for service shall not exceed specified amounts.

This ordinance, enacted by the city council, which exercises the legislative and business powers of the city, and, as has been shown, the charter power of regulating telephone service and of fixing the charges, contains, it is contended, the contract whose obligation the subsequent ordinances fixing lower rates impaired. Two questions obviously arise here. Did the city council have the power to enter into a contract fixing, unalterably, during the term of the franchise, charges for telephone service, and disabling itself from exercising the charter *power of regulation? If so, was such [273 a contract in fact made? The first of these two questions calls for earlier consideration, for it is needless to consider whether a contract in fact was made until it is determined whether the authority to make the contract was vested in the city. The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature (in this case, the legislature of the state) has the authority to make such a surrender, unless the authority is clearly delegated to it by the supreme legislature. The general powers of a municipality or of any other political subdivision of the state are not sufficient. Specific authority for that purpose is required. This proposition is sustained by all the decisions of this court, which will be referred to hereafter, and we need not delay further upon this point.

It has been settled by this court that the state may authorize one of its municipal corporations to establish, by an inviolable contract, the rates to be charged by a public service corporation (or natural person) for a definite term, not grossly unreasonable in point of time, and that the effect of such a contract is to suspend, during the life of the contract, the governmental power of fixing and regulating the rates. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 382, 46 L. ed. 592, 605, 22 Sup. Ct. Rep. 410; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 508, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762. But for the very reason that such a contract has the effect of extinguishing *pro tanto* an undoubted power of government, both its existence and the authority to make it must clearly and unmistakably appear, and all doubts must be resolved in favor of the continuance of the power. *Providence Bank v. Billings*, 4 Pet. 514, 561, 7 L. ed. 939, 955;

Railroad Commission Cases, 116 U. S. 307, 325, 29 L. ed. 636, 642, 6 Sup. Ct. Rep. 334, 388, 1191; Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665, 29 L. ed. 770, 6 Sup. Ct. Rep. 625; Freeport Water Co. v. Freeport, 180 U. S. 587, 599, 611, 45 L. ed. 679, 688, 693, 21 Sup. Ct. Rep. 493; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 211, 48 L. ed. 406, 412, 24 Sup. Ct. Rep. 241; New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs. 199 U. S. 1, 50 L. ed. 65, 25 Sup. Ct. Rep. 705. And see Water, Light, 274] & Gas *Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135. It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves, may, through their relation with other facts, turn the balance one way or the other. Illustrations of the truth of this may be found in the cases of Freeport Water Co. v. Freeport, supra; Rogers Park Water Co. v. Fergus, 180 U. S. 624, 45 L. ed. 702, 21 Sup. Ct. Rep. 490; and Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531, where no authorized contract was found, as contrasted with Detroit v. Detroit Citizens' Street R. Co. supra, and Cleveland v. Cleveland City R. Co. 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, where a contrary conclusion was reached.

The facts in this case which seem to us material upon the questions of the authority of the city to contract for rates to be maintained during the term of the franchise are as follows: The charter gave to the council the power "by ordinance . . . to regulate telephone service and the use of telephones within the city, . . . and to fix and determine the charges for telephones and telephone service and connections." This is an ample authority to exercise the governmental power of regulating charges, but it is no authority to enter into a contract to abandon the governmental power itself. It speaks in words appropriate to describe the authority to exercise the governmental power, but entirely unfitted to describe the authority to contract. It authorizes command, but not agreement. Doubtless, an agreement as to rates might be authorized by the legislature to be made by ordinance. But the ordinance here described was not an ordinance to agree upon the charges, but an ordinance "to fix and determine the charges." It authorizes the exercise of the governmental power and nothing else. We find no other provision in the charter which, by any possibility, can be held to authorize a contract upon this important and vital subject. Those relied

on for that purpose are printed in the margin.†

*This being the condition of the charter powers, the act of 1901, under which the company derived its franchise, was passed.

†Section 2 (article 1).

"(12) To manage, control, sell, lease, or otherwise dispose of any or all the property of the said corporation; and to appropriate the income or proceeds thereof to the use of the said corporation; provided that it shall have no power to mortgage or hypothecate its property for any purpose.

"(17.) To provide and maintain a proper and efficient fire department, and make and adopt such measures, rules, and regulations for the prevention and extinguishment of fires, and for the preservation of property endangered thereby, as may be deemed expedient.

"(22.) To make and enforce within its limits such local police, sanitary, and other regulations as are not in conflict with general laws and are deemed expedient to maintain the public peace, protect property, promote the public morals, and to preserve the health of its inhabitants.

"(23.) To exercise all municipal powers necessary to the complete and efficient management and control of the municipal property, and for the efficient administration of the municipal government, whether such powers be expressly enumerated herein or not, except such powers as are forbidden or are controlled by general law.

"(24.) The powers conferred by this article shall be exercised by ordinance, except as hereinafter provided.

"(Section 12, article 3.) All legislative power of the city is vested in the council, subject to the power of veto and approval by the mayor, as hereinafter given, and shall be exercised by ordinance; other action of the council may be by order upon motion.

"(Sec. 16.) Six members of the council shall constitute a quorum for the transaction of business, but no ordinance shall be passed or other act done granting a franchise, making any contract, auditing any bill, ordering any work to be done, or supplies to be furnished, disposing of or leasing the city property, ordering any assessment for street improvement, or building sewers, or any other act to be done involving the payment of money, or the incurring of debt by the city, unless two-thirds of the members of the whole council vote in favor thereof. All other ordinances may be passed by a vote of a majority of the whole council.

"(Sec. 33.) It shall, by ordinance, provide for maintaining a fire alarm and police telegraph system, and for the cleaning and sprinkling of graded and accepted streets."

The 1st section of that act provided that franchises "shall be granted upon the conditions in this act provided, *and not otherwise.*" Here is an emphatic caution against 276]reading *into the act any conditions which are not clearly expressed in the act itself. In view of this language it cannot be supposed that the legislature intended that so significant and important an authority as that of contracting away a power of regulation conferred by the charter should be inferred from the act, in the absence of a grant in express words. But there is no such grant. The argument of the appellant, that the authority was granted, is based upon the provisions of the act that an application for the franchise must be filed, and, in the discretion of the council, published; that the publication must state "the character of the franchise;" that the city is entitled to a percentage of the receipts; that the grantee must give bond to perform "every term and condition of such franchise;" that no condition shall be inserted which restricts competition or favors one person against another; and that the franchise must be sold to the highest bidder. It is urged that though authority to contract for the maintenance of rates is not expressed in the act, it is necessarily implied from these provisions. But we are of the opinion that there is no such necessary implication, even if anything less than a clear and affirmative expression would be sufficient foundation upon which to rest an authority of this nature. The decisions of this court, upon which the appellant relies, where a contract of this kind was found and enforced, all show unmistakably legislative authority to enter into the contract. In *Los Angeles v. Los Angeles City Water Co.* 177 U. S. 558, 44 L. ed. '886, 20 Sup. Ct. Rep. 736, the contract was in specific terms ratified and confirmed by the legislature. In *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, the contract was made in obedience to an act of the legislature that the rates should be "established by agreement between said company and the corporate authorities." The opinion of the court, after saying (p. 277) [382], "it may be conceded that clear authority from the legislature is needed to enable the city to make a contract or agreement like the ordinances in question, including rates of fare," pointed out (p. 386) that "it was made matter of agreement by the express command of the legislature." In *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756, the legislative authority conferred upon the municipality was described in the opinion of the court (p. 534) as "comprehensive

power to contract with street railway companies in respect to the terms and conditions upon which such roads might be constructed, operated, extended, and consolidated." In *Cleveland v. Cleveland Electric R. Co.* 201 U. S. 529, 50 L. ed. 854, 26 Sup. Ct. Rep. 513, precisely the same authority appeared. In *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 51 L. ed. 1155, 27 Sup. Ct. Rep. 762, the court said (p. 508): "The grant of legislative power upon its face is unrestricted, and authorizes the city 'to provide for the erection and maintenance of a system of waterworks to supply said city with water, and to that end to contract with a party or parties who shall build and operate waterworks.'" Moreover, in this case the construction of the supreme court of Mississippi of its own statutes was followed. On the other hand, it was held in *Freeport Water Co. v. Freeport*, 180 U. S. 587, 45 L. ed. 679, 21 Sup. Ct. Rep. 493, that two acts of the legislature, passed on successive days, authorizing municipalities to "contract for a supply of water for public use for a period not exceeding thirty years," and to authorize private persons to construct waterworks "and maintain the same at such rates as may be fixed by ordinance, and for a period not exceeding thirty years," did not confer an authority upon the municipality to contract that the water company should be exempt from the exercise of the governmental power to regulate rates. In this case, too, the construction of the highest court of the state was followed. See *Rogers Park Water Co. v. Fergus*, *supra*. All these cases agree that the legislative authority to the municipality to make the contract must clearly and unmistakably appear. It does not so appear in the case at bar. The appellant has failed to show that the city had legislative authority to make *a contract of exemption from the exer-[278

cise of the power of regulation conferred in the charter. It therefore becomes unnecessary to consider whether such a contract in fact was made. The appellant's contention, that there was a violation of the obligation of its contract, must therefore be denied.

The appellant also contends that the ordinances fixing rates are wanting in due process of law, and therefore violate the 14th Amendment of the Constitution of the United States, because the section (31) of the charter, under whose authority they were enacted, does not expressly provide for notice and hearing before action. But rate regulation is purely a legislative function and, even where exercised by a subordinate body upon which it is conferred, the notice and hearing essential in judicial proceedings and, for peculiar reasons, in some forms of taxation (see *Londoner v. Denver*, 210 U.

S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708), would not seem to be indispensable. It may be that the authority to regulate rates, conferred upon the city council by § 31 of the charter, is not an authority, arbitrarily, and without investigation, to fix rates of charges, and that, if charges were fixed in that manner, the act would be beyond the authority of the council. It is not unlikely that the California courts would give this construction to the ordinance. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633. Acting within the authority thus limited it would seem that the character and extent of the investigation made and notice and hearing afforded, in the exercise of this legislative function; would be left to the discretion of the body exercising it. It must not be forgotten that, presumably, the courts of the states, and certainly the courts of the United States, are open to those who complain that their property has been confiscated by an act of regulation of this kind, and that the latter courts will, under all circumstances, determine for themselves whether such confiscation exists. But we need not now decide whether notice and hearing were required. Both were given in this case. An ordinance of the city provided that the rates should be fixed at a regular and special meeting of the city council *held during the month of February of each year, and another ordinance, as has been shown, required the telephone company to render annually, in the month of February, to the city council, a statement of its receipts, expenditures, and property employed in the business,—facts which would be material on the question of fixing reasonable rates. This shows that a sufficient notice and hearing were afforded to the appellant, if it had chosen to avail itself of them, instead of declining to furnish all information, as it did. If notice and an opportunity to be heard were indispensable, which we do not decide, it is enough that, although the charter be silent, such notice and hearing were afforded by ordinance, as in this case. So, it was held in *Paulsen v. Portland*, 149 U. S. 30, 38, 37 L. ed. 637, 640, 13 Sup. Ct. Rep. 750, and it was held in *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804, that the kind of notice and hearing (in that case provided by statute) which the ordinance in this case afforded was sufficient. For these reasons the contention of the appellant on this part of the case is denied.

We do not understand that an objection to the ordinance requiring the statement of the appellant's receipts, expenditures, and property is made, except in so far as it is a

step in the rate-making process. If a further objection is made, we see nothing in it. See *San Diego Land & Town Co. v. National City*, supra.

The appellant further insists that the city council is not an impartial tribunal, because, in effect, it is a judge in its own case. It is too late, however, after the many decisions of this court which have either decided or recognized that the governing body of a city may be authorized to exercise the rate-making function, to ask for a reconsideration of that proposition. In this connection the appellant calls attention to the fact that, by the charter of the city, 25 per cent of the electors may recall a member of the council and require him again to stand for election. Nevertheless, he takes part in the rate-making function under his personal responsibility as an officer, and it cannot be presumed, as matter of law, that the *keener sense of dependence upon the [280] will of the people which this feature of his tenure of office brings to him will distort his judgment and sense of justice. It would be conceivable, of course, that the members of the legislature themselves might be subjected to the same process of recall, but it hardly would be contended that that fact would lessen the legislative power vested in them by the Constitution and laws of the state. The charter of the city also contains a provision that, upon petition of 15 per cent of the voters of the city, any ordinance proposed must be submitted to the people and may be by them adopted. It is said, therefore, that the power of rate regulation might be, in this manner, exercised directly by the electorate at large. It may well be doubted whether such a result was contemplated by the legislature. There are certainly grave objections to the exercise of such a power, requiring a careful and minute investigation of facts and figures, by the general body of the people, however intelligent and right-minded. But the ordinance was not adopted in this manner in this case, and it will be time enough for the courts of the states and of the United States to consider, when that is done, whether the objections only go to the expediency of such a method of regulation, or reach deeper and affect its constitutionality.

Passing the questions of power, the appellant contends that it was denied the equal protection of the laws because, contemporaneously with the fixing of rates for it, different rates were fixed for another telephone company doing business within the city. The only information we have on the subject is in the allegations of the bill, that a competitor of the complainant engaged in like business was allowed to charge

for telephone service sums greatly in excess of those prescribed by the ordinance, and that these rates discriminated against the complainant and deprived it of the equal protection of the laws. An important question is thus suggested, but we think the allegations are so vague that we cannot pass upon it. Whether the two companies operated in the same territory, *or afforded equal facilities for communication, or rendered the same services, does not appear. For aught that appears, the other company may have brought its patrons into communication with a very much larger number of persons dwelling in a much more widely-extended territory, and rendered very much more valuable services. In other words, a just ground for classification may have existed. Every presumption should be indulged in favor of the constitutionality of the legislation. In *Sweet v. Rechel*, 159 U. S. 380, 392, 40 L. ed. 188, 193, 16 Sup. Ct. Rep. 43, 46, it was said: "But, in determining whether the legislature, in a particular enactment, has passed the limits of its constitutional authority, every reasonable presumption must be indulged in favor of the validity of such enactment. It must be regarded as valid unless it can be clearly shown to be in conflict with the Constitution. It is a well-settled rule of constitutional exposition that, if a statute may or may not be, according to circumstances, within the limits of legislative authority, the existence of the circumstances necessary to support it must be presumed."

It is to be taken into account in considering this, as well as other questions, that the appellant has declined to furnish to the council facts within its knowledge which would enable the council to exercise their powers intelligently and justly, and that there is no suggestion in the case at bar that the rates actually fixed were so low as to operate as a practical confiscation of property.

For the foregoing reasons we are of the opinion that the action of the court below in sustaining the demurrer was correct, and the decree is affirmed.

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LAND COMPANY, Appt.,
v.

TERRITORY OF HAWAII, by Charles R.
Hemenway, Attorney General of the Ter-
ritory of Hawaii.

(See S. C. Reporter's ed. 282-293.)

Courts — relation to other departments
of government.

The enforcement of the continuance by a
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Hawaiian street railway company of a ten-minute schedule on certain of its lines, upon the ground that the public convenience demands such a schedule, is not within the limits of the judicial power, and is totally inconsistent with the power to regulate the management of the street railway in this respect, which is ultimately vested by Haw. Rev. Laws, § 843, and Session Laws 1905, act No. 78, in the executive authorities.

[For other cases, see Courts, I. e. 4, in Digest Sup. Ct. 1908.]

[No. 412.]

Argued and submitted November 6, 1908.
Decided November 30, 1908.

APPEAL from the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of the Circuit Court of the First Judicial Circuit, in that territory, enjoining a street railway company from reducing its service on certain of its lines. Reversed.

See same case below, 18 Haw. 553.

The facts are stated in the opinion.

Mr. David L. Withington argued the cause, and, with Messrs. Aldis B. Browne, Alexander Britton, W. R. Castle, and A. Perry, filed a brief for appellant:

The officers specifically charged with the duties of inspection and control should be the only officers authorized to initiate proceedings for a violation of its provisions.

Bird v. Merchants' Teleph. Co. 1 Rap. Jud. Quebec, 5 C. S. 445; *State ex rel. Chandler v. Manchester & L. R. Co.* 62 N. H. 29; *State v. Mobile & M. R. Co.* 59 Ala. 321; *Antoni v. Greenhow*, 107 U. S. 769, 27 L. ed. 468, 2 Sup. Ct. Rep. 91; *Anonymous*, 2 Ld. Raym. 989.

This power of fixing time schedules and of regulation of other details of the operation of street railways is oftentimes left with the common councils of cities.

New York v. Dry Dock, E. B. & B. R. Co. 133 N. Y. 104, 28 Am. St. Rep. 609, 30 N. E. 563; *State ex rel. Knight v. Helena Power & Light Co.* 22 Mont. 393, 44 L.R.A. 692, 56 Pac. 685; *Nellis, Street Surface Railroads*, p. 205; *People v. Detroit Citizens' Street R. Co.* 116 Mich. 132, 74 N. W. 520.

Legislative authority would be necessary in order to give power to courts to render a judgment of this kind.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 297, 45 L. ed. 199, 21 Sup. Ct. Rep. 115.

NOTE. — On relation of the courts to the Executive—see notes to *Fleming v. Guthrie*, 3 L.R.A. 53, and *Bates v. Taylor*, 3 L.R.A. 316.

Mr. Charles R. Hemenway submitted the cause for appellee:

The construction placed upon this franchise by the local courts is entitled to great weight in this court.

Kawananakoa v. Polyblank, 205 U. S. 349, 51 L. ed. 834, 27 Sup. Ct. Rep. 526; *Kealoha v. Castle*, 210 U. S. 149, 153, 52 L. ed. 998, 1001, 28 Sup. Ct. Rep. 684; *Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization*, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695.

Mr. Justice Moody delivered the opinion of the court:

The appellant, hereafter called the transit company, was incorporated by a law of the territory of Hawaii. Revised Laws of 287]Hawaii, chap. 66, *§§ 835 to 871. The corporation was granted the right to construct and operate a street railway for a term of thirty years in the district of Honolulu. The character of the construction was, in part, expressly prescribed by the statute, and, in some details, left to be determined by the transit company, subject to the approval of the superintendent of public works. Section 841 enacted that—

"The said association . . . shall at all times maintain a sufficient number of cars to be used upon said railway for the carriage of passengers as public convenience may require, and such other cars designed for the carriage of mails, parcels, and goods as they may deem necessary."

It was provided that, after paying from the income certain charges, including a dividend of 8 per cent on the stock, the excess of the income should be divided equally between the territory and the stockholders, and that "the entire plant, operation, books, and accounts . . . shall, from time to time, be subject to the inspection of the superintendent of public works." Section 868. In certain parts of the field of operation a maximum rate of fare was established by the statute, and in certain other parts it was left to the transit company to fix, subject to the approval of the governor. It was provided by § 843, paragraph 4, that—

"The said association . . . shall make reasonable and just regulations with the consent and approval of the governor regarding the maintenance and operation of said railway on and through said streets and roads; and the said association . . . failing to make such rules and regulations, the superintendent of public works, with the approval of the governor, may make them. All rules and regulations may be changed from time to time as the public interests may demand, at the discretion of the governor."

53 L. ed.

The railway was constructed and its operation was in progress. On certain streets of its line the transit company had been running cars at intervals of ten minutes. It proposed to discontinue this schedule and 288]established one with *somewhat longer intervals, and had applied to the superintendent of public works for permission to lay the switches necessary to put the proposed schedule into convenient operation. Thereupon the territory, on the relation of its attorney general, brought, in one of the circuit courts of the territory, a suit in equity, in which an injunction was sought to prevent the company from running the cars in question at less frequent intervals than ten minutes. In the bill it was alleged that the convenience of the public required that the ten-minute schedule should be maintained and continued. The respondent answered, issue was joined by replication, evidence was taken, and the court found as a fact that the public convenience required the maintenance of the ten-minute schedule. An injunction against the change was accordingly granted. Upon appeal to the supreme court of the territory, the judgment of the lower court was affirmed, and findings of fact made, including the finding that the public convenience required the continuance of the ten-minute schedule. The transit company then appealed here, upon the ground, which is well taken, that the amount in controversy was more than \$5,000.

The dispute between the parties is whether the courts of the territory had jurisdiction in equity to issue the injunction. The transit company contends that no such jurisdiction existed, and, in the alternative, that, if there was jurisdiction in the courts over the subject, it could only be exercised by mandamus. We think it unnecessary to consider the latter proposition, and confine ourselves to a consideration of the broad question whether the court had power, by any form of proceedings, thus to regulate and control the operations of the company. The courts below based the right to issue the injunction upon § 841, correctly interpreting that section as imposing the general duty upon the transit company to operate as well as to maintain such cars as the public convenience requires. The section, however, is not a specific direction to keep in force on the streets covered by the order *of the court a defined schedule,[289 with cars running at named intervals, and the right of a court to enforce by injunction or mandamus such a schedule need not be considered. But the action of the court below went much farther than this, and farther than is warranted by any decision which has been called to our attention. In the absence

of a more specific and well-defined duty than that of running a sufficient number of cars to meet the public convenience, the court, in this case, inquired and determined, as matter of fact, what schedule the public convenience demanded on particular streets, and then, in substance and effect, compelled a compliance with that schedule. And this was done, though, as will be shown, the full power to regulate the management of the railway in this respect was vested by the statute in the executive authorities. In form the order of the court was a mere prohibition against a change of an existing schedule; but its substantial effect was to direct the transit company to operate its cars upon a schedule found to be required by the public convenience. The effect of the order is not changed by the fact that the schedule enforced by the order of the court is that upon which the transit company was then running its cars. The order of the court was not founded upon the consideration that the schedule was the one existing, although that was taken into account; but upon the fact that it was the one which the public convenience required. The question to be determined is whether a court, not invested with special statutory authority, nor having the property in its control by receivership, may, solely, by virtue of its general judicial powers, control to such an extent and in such detail the business of a transportation corporation. The question can be resolved by well-settled principles applicable to the subject. At the threshold the distinction between the case at bar and those cases where there is an enforcement of a specific and clearly-defined legal duty must be observed. This distinction was drawn and acted upon in the case of *Northern P. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. ed. 1092, 12 Sup. Ct. Rep. 283. In that case it appeared that the railroad company *was incorporated by an act of Congress, with power to construct and operate a railroad from Lake Superior to Puget sound, with a branch to Portland. The charter directed that the railroad should be constructed "with all the necessary . . . stations." The territory of Washington filed in the territorial court a petition for mandamus to compel the railroad company to erect and maintain a station at Yakima city, and to stop its trains at that point. The petition alleged, and the jury found, facts which warranted the inference that a station at Yakima city was desirable and necessary for the proper accommodation of traffic. Thereupon a writ of mandamus issued as prayed for, and, upon appeal, the judgment was affirmed by the supreme court of the territory. Upon writ of error this

court reversed the judgment. In the opinion of the court, delivered by Mr. Justice Gray, it was said: "A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty." And the charter direction, that the railroad should construct all necessary stations, was described as "but a general expression of what would be otherwise implied by law," and as not to "be construed as imposing any specific duty or as controlling the discretion in these respects of a corporation intrusted with such large discretionary powers upon the more important questions of the course and the termini of its road." (P. 500.) Accordingly it was held that the determination of the directors with regard to the number, place, and size of the station, having regard to the public convenience as well as the pecuniary interests of the corporation, could not be controlled by the courts by writ of mandamus. And see *People ex rel. Linton v. Brooklyn Heights R. Co.* 172 N. Y. 90, 64 N. E. 788.

The business conducted by the transit company is not purely private. It is of that class so affected by a public interest that it is subject, within constitutional limits, to the governmental power of regulation. This power of regulation *may be exercised to control, among other things, the time of the running of cars. It is a power legislative in its character, and may be exercised directly by the legislature itself. But the legislature may delegate to an administrative body the execution in detail of the legislative power of regulation. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 393, 394, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 494, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896. We need not consider whether that legislative power may be conferred upon the courts of the territory, as it may be upon the courts of a state, so far as the Federal Constitution is concerned. *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, ante, 150, 29 Sup. Ct. Rep. 67. In this case the legislative power of regulation was not intrusted to the courts. On the contrary, it was clearly vested, by § 843, in the governor and the superintendent of public works. By that section the transit company was itself given authority, in the first instance, with the approval of the governor, to make reasonable and just regulations regarding the maintenance and operation of the railway

through the streets. The operation of a railway consists very largely in the running of cars, and the right of the transit company, to regulate, in the first instance, the operation of its railway, clearly includes the power to decide upon time schedules. But the company cannot finally determine, as it chooses, the manner of operating its road in respect of the time, speed, and frequency of its cars. Its primary duty is to operate a sufficient number of cars to meet the public convenience. This duty would rest upon the company, even if it were not expressed, as it is, in § 841. If the company itself complies with its duty by just and reasonable regulations of its own, it is enough. If the company fails in the performance of the duty, its performance is secured in the manner pointed out in the latter part of § 843. The superintendent of public works may make, with the approval of the governor, just and reasonable regulations, and they may be changed from time to time, as the public interest may demand, at the discretion of the governor. Moreover, 292]by an *amendment of the charter (act 78, Session Laws 1905), the superintendent of public works may prescribe the speed of cars. The precise function, therefore, which was exercised by the courts below, is, by the statute, confided primarily to the transit company, and ultimately to the discretion of the governor and superintendent of public works. The courts have no right to intrude upon this function, and subject the company to a species of regulation which the statute does not contemplate. If the courts were held to have the powers which were assumed in this case it would lead to great embarrassment in the operation of the railway, and perhaps to distressing conflict. Can it be that the courts can dictate the frequency of the running of the cars, and the superintendent of public works their speed? If so, the lot of the company is indeed a hard one. The two incidents of operation are not only related, but inseparable. The authority which controls the one must control the other, or operation becomes impossible. Suppose, again, that the courts, upon hearing evidence, should be of opinion that one schedule is required for the public convenience, and the governor and superintendent of public works should be of opinion that another schedule would better subserve that convenience, which order must the company obey? Must it choose between the liability to punishment for contempt for disobeying the order of the court, and the liability to forfeiture of its franchise for failing to obey the order of the governor and

superintendent of public works?† These and other like situations, which easily might *be imagined, are signal illustrations[293 of the importance of observing the boundaries between the judicial and legislative field, and of the confusion and injury which would follow from the failure to respect those boundaries. Nothing is decided as to the power of the courts to review the action of the superintendent or governor.

In our opinion, the injunction which was issued in this case, constituting in substance a regulation of the operation of the railway, was, in the first place, not within the limits of the judicial power, and, in the second place, totally inconsistent with the power of regulation vested unmistakably by the legislature in the executive authorities.

Decree reversed.

The CHIEF JUSTICE dissents.

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MILLER & LUX, INCORPORATED, Appt.,
v.
EAST SIDE CANAL & IRRIGATION COM-
PANY.

(See S. C. Reporter's ed. 293-306.)

Courts — jurisdiction — diverse citizenship — collusive incorporation.

Incorporation in Nevada by direction of a California corporation, for the sole pur-

†Sec. 870. "Whenever the said association or any corporation which may have been duly organized under the laws of this territory for the purpose of constructing, operating, and maintaining the lines of railway mentioned in this chapter, and as by this chapter provided, refuses to do or fails to do or perform or carry out or comply with any act, matter, or thing requisite or required to be done under the provisions of this chapter, and shall continue so to refuse or fail to do or perform or carry out or comply therewith, after due notice by the superintendent of public works to comply therewith, the superintendent of public works shall, with the consent of the governor, cause proceedings to be instituted before the proper tribunal to have the franchise granted by this chapter and all rights and privileges granted hereunder, forfeited and declared null and void."

NOTE. — As to diverse citizenship, as ground of Federal jurisdiction—see notes to *Shipp v. Williams*, 10 C. C. A. 247; *Mason v. Dullagham*, 27 C. C. A. 296; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L.R.A. 108; *Myers v. Murray, N. & Co.* 11 L.R.A. 216; *Emory v. Greenough*, 1 L. ed. U. S. 640; *Strawbridge v. Curtiss*, 2 L. ed. U. S. 435; *M'Donald v. Smalley*, 7 L. ed. U. S. 287; and *Roberts v. Lewis*, 36 L. ed. U. S. 579.

pose of having the matters in dispute between such California corporation and another corporation of that state determined in a Federal rather than in the state court, where they were pending and undetermined, must be regarded as an attempt collusively to make a party plaintiff simply for the purpose of creating a case cognizable by the Federal court, which, under the act of March 3, 1875 (18 Stat. at L. 470, 472, chap. 137, U. S. Comp. Stat. 1901, pp. 508, 511), § 5, requires the dismissal of the suit, where the new corporation assumes to be the owner of the property rights which the old company had asserted only that it may have a standing in the Federal court as a litigant in respect of those rights, and the old corporation can control the conduct of the suit brought by the new corporation at any time up to the date of the decree, and can require the new corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the old corporation without any new or valuable consideration.

[For other cases, see Courts, 697, 698, in Digest Sup. Ct. 1908.]

[No. 518.]

Submitted October 13, 1908. Decided December 7, 1908.

APPPEAL from the Circuit Court of the United States for the Southern District of California to review a decree dismissing the bill in a suit between corporations of different states because of the collusive incorporation of the complainant. Affirmed.

The facts are stated in the opinion.

Mr. Edward F. Treadwell submitted the cause for appellant:

The mere fact (if it be a fact) that complainant was formed and this property transferred to it for the purpose of conferring jurisdiction upon the Federal courts can in no way affect the jurisdiction of those courts.

Dickerman v. Northern Trust Co. 176 U. S. 181, 191, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; McDonald v. Smalley, 1 Pet. 620, 7 L. ed. 287; Smith v. Kernochen, 7 How. 198, 216, 12 L. ed. 666, 673; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Morris v. Gilmer, 129 U. S. 315, 328, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289; Cross v. Allen, 141 U. S. 528, 533, 35 L. ed. 843, 847, 12 Sup. Ct. Rep. 67; Crawford v. Neal, 144 U. S. 585, 36 L. ed. 552, 12 Sup. Ct. Rep. 759; Lake County v. Dudley, 173 U. S. 243, 254, 43 L. ed. 684, 689, 19 Sup. Ct. Rep. 398; South Dakota v. North Carolina, 192 U. S. 286, 310, 48 L. ed. 448, 457, 24 Sup. Ct. Rep. 269; Blair v. Chicago, 201 U. S. 400, 448, 50 L. ed. 801, 821, 26 Sup. Ct. Rep. 427; Briggs v. French, 2 Sumn. 251, Fed. Cas. No. 1,871; Case v. Clarke, 5 Mason, 70, Fed. Cas. No. 2,490; Van Dolsen v. New

York, 17 Fed. 817; Neal v. Foster, 36 Fed. 41; Ashley v. Presque Isle County, 27 C. C. A. 585, 54 U. S. App. 450, 83 Fed. 537; Woodside v. Ciceroni, 35 C. C. A. 177, 93 Fed. 1; Collins v. Ashland, 112 Fed. 178; Adams v. Shirk, 55 C. C. A. 25, 117 Fed. 805; Cole v. Philadelphia & E. R. Co. 140 Fed. 946.

The transfer to the Nevada corporation was upon a valuable consideration, and consequently no trust resulted in favor of the California corporation.

Irvine Co. v. Bond, 74 Fed. 854.

The doctrine of resulting trusts has no possible application for many reasons: First, because when a deed declares a beneficial use to the grantee, it will prevent a trust resulting in favor of the grantor, although there was no valuable consideration to support the conveyance.

15 Am. & Eng. Enc. Law, 2d ed. p. 1125.

Secondly, when the conveyance recites a consideration, this is conclusive that the grantee is to take a beneficial estate. Ibid.

So there can be no resulting trust when a deed is executed in pursuance of a written agreement.

St. John v. Benedict, 6 Johns. Ch. 111.

It is perfectly obvious, therefore, that neither the California corporation nor the stockholders thereof have a right to compel a reconveyance of the property.

The dissolution or nondissolution of the California corporation is entirely immaterial.

The transfer to the Nevada corporation was an absolute one, without any understanding, express or implied, that the property should ever be reconveyed, and the case of Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307, has no application to such a transfer.

It matters not how closely related two corporations may be, nor what similarity there may be in names, incorporators, stockholders, officers, and purposes, they will be considered distinct so far as Federal jurisdiction is concerned.

Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 563, 43 L. ed. 1081, 1087, 19 Sup. Ct. Rep. 817; St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 559, 40 L. ed. 802, 807, 16 Sup. Ct. Rep. 621; Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 347, 40 L. ed. 444, 451, 16 Sup. Ct. Rep. 307; Nashua & L. R. Corp. v. Boston & L. R. Corp. 136 U. S. 356, 373, 374, 379, 34 L. ed. 363, 367, 368, 370, 10 Sup. Ct. Rep. 1004; Muller v. Dows, 94 U. S. 444, 445, 24 L. ed. 207, 208; Goodwin v. New York, N. H. & H. R. Co. 124 Fed. 364; Missouri P. R. Co. v. Meeh, 30 L.R.A. 250, 16 C. C. A. 510, 32 U. S. App. 691, 69 Fed. 755; Farnum v. Blackstone Canal Corp. 1 Sumn. 62, Fed. Cas. No.

4,675; *Racine & M. R. Co. v. Farmers' Loan & T. Co.* 49 Ill. 331, 95 Am. Dec. 595.

Mr. **Frederic D. McKenney** submitted the cause for appellee. Mr. **James F. Peck** was on the brief:

The circuit court properly disregarded the superficial aspect of complainant as a separate and distinct corporation. In determining the jurisdictional question it had the right to look through the web of the artificial corporate entity and find the real parties in interest.

Oriental Invest. Co. v. Barclay, 25 Tex. Civ. App. 558, 64 S. W. 88; *Venner v. Great Northern R. Co.* 209 U. S. 24, 52 L. ed. 666, 28 Sup. Ct. Rep. 328; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307.

There appears, upon consideration of the whole transaction, such a beneficial and exclusive interest of the California corporation in the subject-matter of this suit, as to make it appear beyond a doubt that the suit is not really and substantially between citizens of different states.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327-340, 40 L. ed. 444-449, 16 Sup. Ct. Rep. 307; *Waite v. Santa Cruz*, 184 U. S. 325, 46 L. ed. 567, 22 Sup. Ct. Rep. 327.

The removal was not with a bona fide intention of changing the corporate domicile.

Butler v. Farnsworth, 4 Wash. C. C. 103, Fed. Cas. No. 2,240; *Morris v. Gilmer*, 129 U. S. 328, 329, 32 L. ed. 694, 695, 9 Sup. Ct. Rep. 289; *Lehigh Min. & Mfg. Co. v. Kelly*, supra.

So far as Federal jurisdiction is concerned, and for jurisdictional purposes in a case like this, the citizenship of the California corporation of *Miller & Lux* determines the question of Federal jurisdiction in this case.

Louisville, N. A. & C. R. Co. v. Louisville Trust Co. 174 U. S. 552, 563, 43 L. ed. 1081, 1087, 19 Sup. Ct. Rep. 817; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 559, 40 L. ed. 802, 807, 16 Sup. Ct. Rep. 621; *Goodwin v. New York, N. H. & H. R. Co.* 124 Fed. 371; *Nashua & L. R. Corp. v. Boston & L. R. Corp.* 136 U. S. 356, 373, 34 L. ed. 363, 367, 10 Sup. Ct. Rep. 1004; *Smith v. New York, N. H. & H. R. Co.* 96 Fed. 507.

Mr. Justice **Harlan** delivered the opinion of the court:

This suit was brought in the circuit court of the United States for the southern district of California by "*Miller & Lux, Incorporated*," a corporation of Nevada, against the *East Side Canal & Irrigation Company*, a corporation of California, 53 L. ed.

The case is here upon a certificate under the act of Congress of March 3d, 1891, chap. 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488, relating to the jurisdiction of the circuit court as affected by the 5th section of the act of March 3d, 1875, chap. 137, 18 Stat. at L. 470, 472, U. S. Comp. Stat. 1901, pp. 508, 511. That section provides that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear at any time to the satisfaction of said circuit court that such suit "does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, *for the purpose of [297 creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

In stating the object and scope of that act this court in *Williams v. Nottawa*, 104 U. S. 209, 211, 26 L. ed. 719, 720, referred to the act of 1875 and said: "In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful to guard against the consequences of collusive transfers to make parties, and imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court as well as parties against frauds upon its jurisdiction; for, as was very properly said by Mr. Justice Miller, speaking for the court, in *Barney v. Baltimore*, 6 Wall. 280, 288, 18 L. ed. 825, 827, such transfers for such purposes are frauds upon the court, and nothing more."

In the answer of the defendant it is alleged that *Miller & Lux, Incorporated*, was organized as a corporation in Nevada, but to act only as an agent of "*Miller & Lux*," a corporation of California; but the California corporation was the owner of all the capital stock of *Miller & Lux, Incorporated*, which, as a corporation, had no existence except as a mere agency of *Miller & Lux*, the California corporation; that all the property held by the plaintiff was as such agent, in order that suits could be brought and prosecuted in the United States courts; and that the plaintiff does not transact

any business or do any act or thing other than such as may be necessary to carry out the purposes of the California corporation, "except to hold title to property for the purpose of prosecuting suits in the United States courts."

To these allegations the plaintiff made special replication, *evidence was taken as to their truth, and the cause was submitted upon the issue thus made. The court found the allegation in the answer to be true; that the complainant held the title to the lands described in the bill for the purpose only of prosecuting and commencing this action in the circuit court of the United States, and that the lands were conveyed to plaintiff for that purpose; and it appearing to the satisfaction of the court that the Nevada corporation had been collusively made a party plaintiff for the purpose of creating a case cognizable by the circuit court of the United States, and that the suit did not really and substantially involve a dispute or controversy within the jurisdiction of that court, the bill was dismissed.

It was established by the evidence and the court found as follows:

Henry Miller and Charles Lux were partners prior to and up to the death of Lux, one of the parties, which occurred March 15th, 1887.

In April, 1897, the heirs of the deceased partner and Miller, the surviving partner, wishing to have the partnership business liquidated and its assets distributed among those entitled thereto, made an agreement to form a corporation under the laws of California and transfer to it all the property of the partnership, each person to receive in lieu thereof capital stock proportioned to his interest in the partnership. Pursuant to that agreement the corporation of "Miller & Lux" was organized in California on the 5th day of May, 1897; to it was conveyed the property of the partnership, and the stock of the corporation was distributed as provided in the agreement.

On the 17th day of December, 1900, the California corporation of Miller & Lux commenced an action in the superior court of Merced county, California, against the present defendant, the East Side Canal & Irrigation Company, a California corporation. The object of that suit was to have the latter corporation perpetually enjoined from obstructing the natural flow of the waters of San Joaquin river and its branches, along and *bordering on which the California corporation of Miller & Lux claimed certain lands, as well as from interfering with the waters of that river above those lands and to their injury.

On the 12th day of June, 1905,—the above suit in the state court still being on the

docket,—the California corporation and the stockholders owning more than two thirds of its capital stock entered into an agreement that they would at once form a corporation under the laws of Nevada with an authorized capital of \$12,000,000,—all of such capital stock to be issued and be deemed fully paid up,—each director of the California corporation of Miller & Lux to be an incorporator of the Nevada corporation and to subscribe two shares of such capital stock, to be issued as fully paid-up stock of the new corporation.

That agreement stated that the laws of California were unsatisfactory and in many particulars uncertain and unsettled, "particularly as to dividends,—a matter of the most vital importance to us, and as to which litigation is now pending and undetermined." These difficulties, it was said, did not exist to the same extent under the laws of Nevada. Among the reasons assigned in the agreement for the formation of the Nevada corporation was the belief on the part of the stockholders of the California corporation, that their rights in litigated cases would be "most fully protected and conserved in the Federal courts, to which corporations formed in other states are entitled to resort."

The above agreement provided that, upon the formation of the Nevada corporation, all the property, real and personal, of the California corporation, should be transferred and conveyed to the Nevada Corporation, and that the capital stock of the latter corporation should be issued as fully paid-up stock to the California corporation; and that, after such transfer and conveyance were completed, and as soon as the law would permit, the California corporation should be dissolved by voluntary proceedings under the state Code of Civil Procedure of that state.

On the same day, June 12th, 1905, the parties to that agreement *signed and[300 acknowledged articles of incorporation for the proposed Nevada corporation of "Miller & Lux, Incorporated." All the capital stock of that corporation was issued to the California corporation. The directors of the California corporation became and are also the directors of the Nevada corporation. Each company had the same president, vice president, secretary, and treasurer, and offices at the same place. "Said corporation," it was found, "are the same in name, purposes, capitalization, directors, officers, office, and place of business."

On the 15th day of June, 1905, the California corporation of Miller & Lux directed the dismissal of the suit brought in the state court. And on the same day the present suit was brought in the circuit court of

the United States in the name of the Nevada corporation against the East Side Canal & Irrigation Company. The relief sought was substantially the same as that sought in the suit instituted in the state court.

Process in the suit brought in the circuit court by the Nevada corporation was served on June 17th, 1905, and *on the same day* the California corporation formally dismissed its suit in the state court.

The California corporation had not been dissolved nor had it ceased to exist when the present suit was brought by the Nevada corporation. It was then in existence, with all of its powers unmodified. And it does not appear that any steps had or have been taken to disincorporate the California corporation. Nor can it be said when, if ever, that corporation will be dissolved.

We are of opinion that the court below did not err in dismissing the suit. The question raised by the record is substantially the same as that determined in *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 327, 336 et seq., 40 L. ed. 444, 447, 16 Sup. Ct. Rep. 307. That was an action involving the title to certain lands in Virginia in the possession of citizens of that commonwealth, and of which lands a Virginia corporation claimed to be the owner. The individual stockholders and officers of the Virginia corporation organized a *corporation in Pennsylvania, to which the former corporation conveyed all its rights, title, and interest in the Virginia lands, without any valuable consideration. The stockholders in both corporations were identical. The admitted purpose of organizing the Pennsylvania corporation and conveying to it the lands there in question was to give the circuit court of the United States, sitting in Virginia, jurisdiction to determine the disputed controversy as to the lands. All this having been done, the Pennsylvania corporation instituted a suit in the Federal court in Virginia against the individual citizens of Virginia to recover the lands. When that suit was instituted, the Virginia corporation still existed, with the same stockholders it had at the time of the conveyance by it to the Pennsylvania corporation.

This court said that "the Virginia corporation still exists, with the same stockholders it had when the conveyance of March 1, 1893, was made; and that, as soon as this litigation is concluded, the Pennsylvania corporation, if it succeeds in obtaining judgment against the defendants, *can be required by the stockholders of the Virginia corporation*, being also its own stockholders, to reconvey the lands in controversy to the Virginia corporation without any consideration passing to the Pennsylvania corporation."

After referring to several cases, this court, among other things, also said: "In harmony with the principles announced in former cases, we hold that the circuit court properly dismissed this action. The conveyance to the Pennsylvania corporation was without any valuable consideration. It was a conveyance by one corporation to another corporation, the grantor representing certain stockholders, entitled collectively or as one body to do business under the name of the Virginia Coal & Iron Company, while the grantee represented *the same stockholders*, entitled collectively or as one body to do business under the name of the Lehigh Mining & Manufacturing Company. It is true that the technical legal title to the lands in controversy is, for the time, in the Pennsylvania *corporation. It is also true[302 that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal court,—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States unless the contrary appears from the record (*Grace v. American Cent. Ins. Co.* 109 U. S. 278, 283, 27 L. ed. 932, 934, 3 Sup. Ct. Rep. 207; *Börs v. Preston*, 111 U. S. 252, 255, 28 L. ed. 419, 420, 4 Sup. Ct. Rep. 407),—we cannot shut our eyes to the fact that there exists what should be deemed an equivalent to such an agreement; namely, the right and power of those who are stockholders of each corporation to *compel* the one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation. In other words, although the Virginia corporation, as such, holds no stock in the Pennsylvania corporation, the latter corporation holds the legal title, subject *at any time* to be divested of it by the action of the stockholders of the grantor corporation who are also its stockholders. The stockholders of the Virginia corporation,—the original promoters of the present scheme, and, presumably, when a question of the jurisdiction of a court of the United States is involved, citizens of Virginia,—in order to procure a determination of the controversy between that corporation and the defendant citizens of Virginia, in respect of the lands in that commonwealth which are here in dispute, assumed, as a body, the mask of a Pennsylvania corporation, for the purpose, and the purpose only, of invoking the jurisdiction of the circuit court of the United States, retaining the power, in their discretion, and after all danger of defeating the jurisdiction of the Federal court shall

have passed, to throw off that mask and reappear under the original form of a Virginia corporation,—their right in the meantime to participate in the management of the general affairs of the latter corporation not having been impaired by the conveyance to the Pennsylvania corporation. And all this may be done, if the position of the plaintiffs 303] be *correct, without any consideration passing between the two corporations.” Observing that the Pennsylvania corporation received the technical legal title for the purpose only of bringing a suit in the Federal court, the court proceeded: “As we have said, that corporation may be *required* by those who are stockholders of its grantor, and who are also its own stockholders, at any time, and *without receiving therefor any consideration whatever*, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts of the state in which the land lies. It should be regarded as a case of an improper and collusive making of parties for the purpose of creating a case cognizable in the circuit court. If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the circuit court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the circuit courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance.”

The present case is controlled by the one just cited. The two cases are alike in all material respects. Looking at the facts as they were when this suit was instituted in the circuit court, it must be taken that the transfer of the property of the California corporation to the Nevada corporation was merely formal,—only a device by which to have the rights asserted by the California corporation in a state court determined by the Federal court rather than by the state court. The agreement that all the property of the California corporation should be transferred to the Nevada corporation was attended by the condition that all the capital stock of the new corporation should be issued—and it was issued—to the California corporation, which remained in existence with full power, as the owner of such stock, to control the operations of the *Nevada corporation. If, before the institution of this suit, the California corporation had distributed among those entitled to it the stock of the Nevada corporation, issued to it as fully paid-up

stock, and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case. As the facts were, when this suit was brought, the California corporation could at any time, even after this suit was concluded, have required the Nevada corporation, without any new or valuable consideration, to surrender all its interest in the property which it had obtained from the California corporation for the purpose of acquiring a standing in the circuit court of the United States. In other words, the Nevada corporation had no real interest in the property. Its ownership was a sham, in that it could at any time after the bringing of this suit have been compelled by the California corporation to dismiss the suit and abandon all claim to the property in question. It took the title only as matter of form, in order that the California corporation, or the stockholders interested in it, might, under the name of the Nevada corporation, invoke the jurisdiction of the Federal court and avoid the determination of the rights of the parties in the courts of the state. *Barney v. Baltimore*, 6 Wall. 280, 288, 18 L. ed. 825, 827. The prosecution of the suit was really for the benefit of those who were interested in the California corporation.

We do not intend by what has been said to qualify the general rule, long established, that the jurisdiction of a circuit court, when based on diverse citizenship, cannot be questioned upon the ground *merely* that a party's motive in acquiring citizenship in the state in which he sues was to invoke the jurisdiction of a Federal court. But that rule is attended by the condition that the acquisition of such citizenship is real, with the purpose to establish a permanent domicile in the state of which he professes to be a citizen at the time of suit, and not fictitious or pretended. *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289. In that case the question was whether the plaintiff, who was residing with his adversary in Alabama, actually acquired such *a domicile in Tennessee as en- [305] titled him to bring suit in the Federal court, sitting in Alabama. This court said: “Upon the evidence in this record, we cannot resist the conviction that the plaintiff had no purpose to acquire a domicile or settled home in Tennessee, and that his sole object in removing to that state was to place himself in a situation to invoke the jurisdiction of the circuit court of the United States. He went to Tennessee without any present intention to remain there permanently or for an indefinite time, but with a present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his

new suit. He was, therefore, a mere sojourner in the former state when this suit was brought. He returned to Alabama almost immediately after giving his deposition. The case comes within the principle announced in *Butler v. Farnsworth*, 4 Wash. C. C. 101, 103, Fed. Cas. No. 2,240, where Mr. Justice Washington said: 'If the removal be for the purpose of committing a fraud upon the law, and to enable the party to avail himself of the jurisdiction of the Federal courts, and that fact be made out by his acts, the court must pronounce that his removal was not with a bona fide intention of changing his domicile, however frequent and public his declarations to the contrary may have been.' "

In the present case, although the Nevada corporation appeared, upon the face of the record, to be the owner of the rights which the California corporation had asserted in the state court, it was, when this suit was brought, only the representative of the California corporation and its stockholders. The latter corporation, holding all the stock and having the same directors and officers as the Nevada corporation, could control the suit brought by the Nevada corporation, and, in the event of a favorable decree, could have compelled it to surrender or abandon all its claims to the California corporation, which was still in existence when this suit was brought.

As the Nevada corporation was formed by the direction of the California corporation, its stockholders and officers, for the purpose only of having the matters in dispute between the California corporation and the East Side Canal & Irrigation Company determined in the Federal court rather than in the state court where they were pending and undetermined; as the Nevada corporation assumed to be the owner of the property rights which the California corporation had asserted against the Canal & Irrigation Company only that it might have a standing in the Federal court as a litigant in respect of those rights; and as the California corporation could have controlled the conduct of the suit brought by the Nevada corporation at any time after it was brought, and up to the date of the decree below, and could have required the Nevada corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the California corporation, without any new or valuable consideration,—we hold that the suit was properly dismissed under the 5th section of the act of 1875 as one in which the Nevada corporation was organized and collusively made plaintiff in the suit in the Federal court simply for the purpose of creating a case cognizable by that court.

Decree affirmed.

NORTH AMERICAN COLD STORAGE
COMPANY, Appt.,
v.

CITY OF CHICAGO et al.

(See S. C. Reporter's ed. 306-321.)

Courts — jurisdiction — Federal question.

1. An allegation in a bill that a municipal ordinance providing for the summary seizure and destruction of food in cold storage when unfit for human consumption violates U. S. Const. 14th Amend., because it provides neither for notice nor for an opportunity to be heard before such seizure and destruction, presents, although unfounded, a constitutional question within the original jurisdiction of the Federal circuit court.

[For other cases, see Courts, 489-494, in Digest Sup. Ct. 1908.]

Appeal — from circuit court — extent of review.

2. A decision on the merits may be had in the Federal Supreme Court on a direct appeal taken under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, in a case involving a question under the Federal Constitution, although the circuit court dismissed the case for want of jurisdiction, and has certified the question of jurisdiction alone to the Supreme Court for decision.

[For other cases, see Appeal and Error, 919, 4230-4236, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — notice and hearing.

3. Due process of law is not denied the owner or custodian of food in cold storage by a municipal ordinance under which such food, when unfit for human consumption, may summarily be seized, condemned, and destroyed by municipal officers without a preliminary hearing.

[For other cases, see Constitutional Law, 764-773, in Digest Sup. Ct. 1908.]

[No. 28.]

Argued November 13, 1908. Decided December 7, 1908.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing,

NOTE. — As to Federal question as conferring jurisdiction on United States courts—see notes to *Bailey v. Mosher*, 11 C. C. A. 308, and *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7.

On direct review in Federal Supreme Court of decisions of circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L.R.A. 657; *Chauvin v. Valiton*, 3 L.R.A. 194; and *Ulman v. Baltimore*, 11 L.R.A. 225.

On municipal power over nuisances affecting safety, health, and personal comfort—see note to *Harrington v. Providence*, 38 L.R.A. 305.

for want of jurisdiction, a suit to enjoin municipal officers from summarily seizing and destroying food in cold storage as unfit for human consumption. Modified by striking out the ground for dismissal as being for want of jurisdiction, and, as so modified, affirmed.

See same case below, 151 Fed. 120.

Statement by Mr. Justice Peckham:

The bill of complaint in this case was dismissed by the circuit court for want of jurisdiction, and a certificate of the circuit judge was given that the jurisdiction of the court was in issue, and the question of jurisdiction alone was certified to this court, under paragraph 2 of § 5 of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488). The appellant also appealed, and now asserts its right of appeal under paragraph 5 of the same section of the above act, on the ground that the case involves the construction or application of the Constitution of the United States, and hence may be brought directly to this court from the decision of the circuit court. 308] *The bill was filed against the city of Chicago and the various individual defendants in their official capacities,—commissioner of health of the city of Chicago, secretary of the department of health, chief food inspector of the department of health, and inspectors of that department, and policemen of the city,—for the purpose of obtaining an injunction under the circumstances set forth in the bill. It was therein alleged that the complainant was a cold storage company, having a cold storage plant in the city of Chicago; and that it received, for the purpose of keeping in cold storage, food products and goods as bailee for hire; that, on an average, it received \$20,000 worth of goods per day, and returned a like amount to its customers, daily, and that it had on an average in storage about two million dollars' worth of goods; that it received some 47 barrels of poultry on or about October 2, 1906, from a wholesale dealer, in due course of business, to be kept by it and returned to such dealer on demand; that the poultry was, when received, in good condition and wholesome for human food, and had been so maintained by it in cold storage from that time, and it would remain so, if undisturbed, for three months; that on the 2d of October, 1906, the individual defendants appeared at complainant's place of business and demanded of it that it forthwith deliver the 47 barrels of poultry for the purpose of being by them destroyed, the defendants alleging that the poultry had become putrid, decayed, poisonous, or infected in such a manner as to render it unsafe or

unwholesome for human food. The demand was made under § 1161 of the Revised Municipal Code of the City of Chicago for 1905, which reads as follows:

"Every person being the owner, lessee, or occupant of any room, stall, freight house, cold storage house, or other place, other than a private dwelling, where any meat, fish, poultry, game, vegetables, fruit, or other perishable article adapted or designed to be used for human food shall be stored or kept, whether temporarily or otherwise, and every person having charge of, or being interested or engaged, whether as principal *or[309 agent, in the care of or in respect to the custody or sale of any such article of food supply, shall put, preserve, and keep such article of food supply in a clean and wholesome condition, and shall not allow the same, nor any part thereof, to become putrid, decayed, poisoned, infected, or in any other manner rendered or made unsafe or unwholesome for human food; and it shall be the duty of the meat and food inspectors and other duly authorized employees of the health department of the city to enter any and all such premises above specified at any time of any day, and to forthwith *seize*, condemn, and destroy any such putrid, decayed, poisoned, and infected food, which any such inspector may find in and upon said premises."

The complainant refused to deliver up the poultry, on the ground that the section above quoted of the Municipal Code of Chicago, in so far as it allows the city or its agents to seize, condemn, or destroy food or other food products, was in conflict with that portion of the 14th Amendment which provides that no state shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

After the refusal of the complainant to deliver the poultry the defendants stated that they would not permit the complainant's business to be further conducted until it complied with the demand of the defendants and delivered up the poultry, nor would they permit any more goods to be received into the warehouse or taken from the same, and that they would arrest and imprison any person who attempted to do so, until complainant complied with their demand and delivered up the poultry. Since that time the complainant's business has been stopped and the complainant has been unable to deliver any goods from its plant or receive the same.

The bill averred that the attempt to seize, condemn, and destroy the poultry, without a judicial determination of the fact that the same was putrid, decayed, poisonous, or in-

fect, was illegal; and it asked that the defendants, and each of them, might be enjoined from taking or removing the poultry 310] from *the warehouse, or from destroying the same, and that they also be enjoined from preventing complainant delivering its goods and receiving from its customers, in due course of business, the goods committed to its care for storage.

In an amendment to the bill the complainant further stated that the defendants are now threatening to summarily destroy, from time to time, pursuant to the provisions of the above-mentioned section, any and all food products which may be deemed by them, or either of them, as being putrid, decayed, poisonous, or infected in such manner as to be unfit for human food, without any judicial determination of the fact that such food products are in such condition.

The defendants demurred to the bill on the ground, among others, that the court had no jurisdiction of the action. The injunction was not issued, but, upon argument of the case upon the demurrer, the bill was dismissed by the circuit court for want of jurisdiction, as already stated.

Mr. L. A. Stebbins argued the cause, and, with Mr. W. H. Sears, filed a brief for appellants:

That notice and an opportunity to be heard shall precede the taking of life, liberty, or property, is an ideal which is absolutely fundamental in every system of constitutional government.

R. v. University of Cambridge, 1 Strange, 565; Bradstreet v. Neptune Ins. Co. 3 Sumn. 600, Fed. Cas. No. 1,793.

The police power of the several states can only be exercised within the limits of the Constitution.

Barbier v. Connolly, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; Mugler v. Kansas, 123 U. S. 623, 659, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; Booth v. People, 186 Ill. 43, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798; McGehee, Due Process of Law, 305; Central R. Co. v. Murphey, 196 U. S. 194, 205, 49 L. ed. 444, 449, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; Reid v. Colorado, 187 U. S. 137, 149, 47 L. ed. 108, 115, 23 Sup. Ct. Rep. 92; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 688, 43 L. ed. 858, 861, 19 Sup. Ct. Rep. 565; Dobbins v. Los Angeles, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

Whatever doubt may exist as to the exact limits of due process of law, two things are always, everywhere, universally recognized as being absolutely indispensable to due process of law: (1) notice; (2) an opportunity to be heard.

McGehee, Due Process of Law, pp. 3, 4, 53 L. ed.

58, 73; Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629; Pennoy v. Neff, 95 U. S. 714, 731, 24 L. ed. 565, 572; Galpin v. Page, 18 Wall. 350, 366, 21 L. ed. 959, 963.

A few cases in point from the state courts are worthy of consideration.

King v. Hayes, 80 Me. 206, 13 Atl. 883; Edson v. Crangle, 62 Ohio St. 49, 56 N. E. 648; Varden v. Mount, 78 Ky. 86, 39 Am. Rep. 212; Hey Sing Ieck v. Anderson, 57 Cal. 251, 40 Am. Rep. 117; Lowry v. Rainwater, 70 Mo. 152, 35 Am. Rep. 420; Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783; Weil v. Ricord, 24 N. J. Eq. 169; Hutton v. Camden, 39 N. J. L. 132, 23 Am. Rep. 203; Fisher v. McGirr, 1 Gray, 1, 61 Am. Dec. 381.

None of the elements which were controlling in the case of Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, exist in the case at bar.

A distinction exists between the legal status of property which can only be used for an unlawful purpose, and which is actually found being used for such unlawful purpose, and that property which is in itself lawful,—which is not a nuisance *per se*.

McConnell v. McKillip, 71 Neb. 712, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 A. & E. Ann. Cas. 898.

Any act of the state, whether of its legislative, executive, or judicial department, or any subdivision of the state, created by the state, acting through its officers, and claiming to act in their capacity as officers, and with the pretense of lawful authority, which takes life, liberty, or property without due process of law, is within the provisions of the 14th Amendment, and raises a Federal question which confers jurisdiction upon the Federal court.

Raymond v. Chicago Edison Co. 207 U. S. 42, 52 L. ed. 90, 28 Sup. Ct. Rep. 14; Virginia v. Rives, 100 U. S. 339, 25 L. ed. 676; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; McGehee, Due Process of Law, p. 28; Yick Wo v. Hopkins, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064.

Although it is held in Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77, and similar cases, that it is within the police power of the several states to fix rates of compensation to be charged by public warehouses and common carriers, and that such fixing is a legislative, and not a judicial, function, yet, in the long line of cases which follow, of which Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, is typical, and in which it appears from testimony adduced in court, that a law, though fair and reasonable upon its face, in its general operation as to certain persons or classes of per-

sons is a deprivation of their property without due process of law, though they are, in their general scope, admittedly proper police regulations, it is held they are in conflict with the 14th Amendment, and such conflict raises a Federal question for the final determination of this court.

Mr. Emil C. Wetten argued the cause, and, with Messrs. George W. Miller and Edward J. Brundage, filed a brief for appellees:

For general definitions of the police power, see 22 Am. & Eng. Enc. Law, 2d ed. p. 915; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25-33, 24 L. ed. 989-992; *Leisy v. Hardin*, 135 U. S. 100-128, 34 L. ed. 128-139, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

The police power is inherent in the several states and is left with them under the Federal system of government, and may always be exercised by the state legislatures, and the Federal government cannot exercise any police power except where Congress has specifically excluded all state legislation; as, for example, the District of Columbia, where the police power of Congress is the same as that of the state legislatures within their respective jurisdictions; and being a right which the Federal government never had, it would be impossible to impair or abridge that right by the adoption of the 14th Amendment.

Parker & W. Public Health & Safety, p. 2; *Brannon*, 14th Amend. pp. 167, 175; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 664, 665, 31 L. ed. 205, 211, 212, 8 Sup. Ct. Rep. 273; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 667, 24 L. ed. 1036, 1038; *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S. 545, 554, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; *Powell v. Pennsylvania*, 127 U. S. 678, 683, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Patterson v. Kentucky*, 97 U. S. 501, 504, 24 L. ed. 1115, 1116.

The ordinance is a valid and proper exercise of police power.

Mugler v. Kansas, 123 U. S. 623, 661, 669, 31 L. ed. 205, 210, 213, 8 Sup. Ct. Rep. 273; *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Parker & W. Public Health & Safety*, p. 6; *Powell v. Pennsylvania*, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *Re Jacobs*, 98 N. Y. 115, 50 Am. Rep. 636; *Jacobson v. Massachusetts*, 197 U. S. 11, 27, 30, 49 L. ed. 643, 650, 651, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Gardner v. Michigan*, 199 U. S. 325, 332, 50 L. ed. 212, 216, 26 Sup. Ct. Rep. 106; *Chicago v. Netcher*, 183 Ill. 111, 48 L.R.A. 261, 75 Am. St. Rep. 93, 55 N. E. 707.

Summary destruction of unwholesome food products is proper.

Freund, Pol. Power, §§ 520, 521; *Powell v. Pennsylvania*, 127 U. S. 678, 685, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; *People ex rel. Kemmler v. Durston*, 119 N. Y. 578, 7 L.R.A. 715, 16 Am. St. Rep. 859, 24 N. E. 6; *Compagnie Française de Navigation à Vapeur v. State Bd. of Health*, 186 U. S. 380, 392, 46 L. ed. 1209, 1215, 22 Sup. Ct. Rep. 811.

A notice and hearing before the summary abatement of a nuisance is not necessary.

McGehee, Due Process of Law, p. 372; *People ex rel. Copcutt v. Board of Health*, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320; *Parker & W. Public Health & Safety*, § 175; *Salem v. Eastern R. Co.* 98 Mass. 443, 96 Am. Dec. 650; *Miller v. Horton*, 152 Mass. 543, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; *Stone v. Heath*, 179 Mass. 386, 60 N. E. 975; *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Lowe v. Conroy*, 120 Wis. 155, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942, 1 A. & E. Ann. Cas. 341; *Daniels v. Homer*, 139 N. C. 219, 3 L.R.A.(N.S.) 997, 51 S. E. 992; *Blue v. Beach*, 80 Am. St. Rep. 218, note; *Egan v. Health Department*, 20 Misc. 38, 45 N. Y. Supp. 325; *Pearson v. Zehr*, 138 Ill. 51, 32 Am. St. Rep. 113, 29 N. E. 854; *State v. Main*, 69 Conn. 136, 36 L.R.A. 623, 61 Am. St. Rep. 30, 37 Atl. 80; *Gaines v. Waters*, 64 Ark. 612, 44 S. W. 353; *Booth v. People*, 186 Ill. 48, 50 L.R.A. 762, 78 Am. St. Rep. 229, 57 N. E. 798.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

In this case the ordinance in question is to be regarded as in effect a statute of the state, adopted under a power granted it by the state legislature, and hence it is an act of the state within the 14th Amendment. *New Orleans Water Works Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31, 31 L. ed. 607, 612, 8 Sup. Ct. Rep. 741.

The circuit court held that the defendants, being sued in their official capacities, could not be held for acts or threats which they had no power or authority under the ordinance to make or perform; that, although it was alleged that the defendants acted under the provisions of the section of the Code already quoted, yet that under no possible construction of that ordinance could the defendants claim the right to the entire stoppage of the business of the complainant in storing admittedly wholesome articles of food, so that it would seem that these acts were mere trespasses, and plainly without

the sanction of the ordinance; as to these acts, therefore, the remedy was to be pursued in the state courts, there being no constitutional question involved necessary to give the court jurisdiction.

The court further held that the allegation that the intention to seize and destroy the poultry without any judicial determination as to the fact of its being unfit for food was in violation of the 14th Amendment could not be sustained; that such amendment did not impair the police power of the 314]*state, and that the ordinance was valid, and not in violation of that amendment. The demurrer was therefore sustained and the bill dismissed, as stated by the court, for want of jurisdiction.

We think there was jurisdiction, and that it was error for the court to dismiss the bill on that ground. The court seems to have proceeded upon the theory that, as the complainant's assertion of jurisdiction was based upon an alleged Federal question which was not well founded, there was no jurisdiction. In this we think that the court erred. The bill contained a plain averment that the ordinance in question violated the 14th Amendment, because it provided for no notice to the complainant or opportunity for a hearing before the seizure and destruction of the food. A constitutional question was thus presented to the court, over which it had jurisdiction, and it was bound to decide the same on its merits. If a question of jurisdiction alone were involved, the decree of dismissal would have to be reversed. The complainant, however, has, in addition to procuring the certificate of the court as to the reason for its action, also appealed from the decree of dismissal directly to this court under the 5th paragraph of § 5 of the act of 1891. Such appeal can be heard without resort to the certificate and may be decided on its merits. *Giles v. Harris*, 189 U. S. 475, 486, 47 L. ed. 909, 912, 23 Sup. Ct. Rep. 639. A constitutional question being involved, an appeal may be taken directly to this court from the circuit court.

Holding there was jurisdiction in the court below, we come to the merits of the case. The action of the defendants, which is admitted by the demurrer, in refusing to permit the complainant to carry on its ordinary business until it delivered the poultry, would seem to have been arbitrary and wholly indefensible. Counsel for the complainant, however, for the purpose of obtaining a decision in regard to the constitutional question as to the right to seize and destroy property without a prior hearing, states that he will lay no stress here upon that portion of the bill which alleges 315]the unlawful and forcible *taking pos-

session of complainant's business by the defendants. He states in his brief as follows:

"There is but one question in this case, and that question is, Is section 1161 of the Revised Municipal Code of Chicago in conflict with the due process of law provision of the 14th Amendment, is this: that it does not provide for notice and an opportunity to be heard before the destruction of the food products therein referred to? If there is no such conflict, the ordinance is valid for the purposes of Federal jurisdiction; the bill states no cause of action, and was properly dismissed, as there is no claim of any such diversity of citizenship as would confer jurisdiction upon the Federal court, and no such jurisdiction exists, except by reason of the claim that such ordinance is in conflict with the 14th Amendment."

The general power of the state to legislate upon the subject embraced in the above ordinance of the city of Chicago, counsel does not deny. See *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 318, 50 L. ed. 204, 209, 26 Sup. Ct. Rep. 100. Nor does he deny the right to seize and destroy unwholesome or putrid food, provided that notice and opportunity to be heard be given the owner or custodian of the property before it is destroyed. We are of opinion, however, that provision for a hearing before seizure and condemnation and destruction of food which is unwholesome and unfit for use is not necessary. The right to so seize is based upon the right and duty of the state to protect and guard, as far as possible, the lives and health of its inhabitants, and that it is proper to provide that food which is unfit for human consumption should be summarily seized and destroyed to prevent the danger which would arise from eating it. The right to so seize and destroy is, of course, based upon the fact that the food is not fit to be eaten. Food that is in such a condition, if kept for sale or in danger of being sold, is in itself a nuisance, and a nuisance of the most dangerous kind, involving, as it does, the health, if not the lives, of persons who may eat it. A determination on the part of the seizing officers that food is in an unfit condition to be eaten is not a decision which concludes *the owner. The *ex parte* find-[316 ing of the health officers as to the fact is not in any way binding upon those who own or claim the right to sell the food. If a party cannot get his hearing in advance of the seizure and destruction, he has the right to have it afterward, which right may be claimed upon the trial in an action brought for the destruction of his property; and in that action those who destroyed it can only successfully defend if the jury shall find

the fact of unwholesomeness, as claimed by them. The often-cited case of *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499, substantially holds this. By the 2d section of an act of the legislature of the state of New York of 1880 it was provided that any "net . . . for capturing fish which was floated upon the water or found or maintained in any of the waters of the state," in violation of the statutes of the state for the protection of fish, was a public nuisance, and could be abated and summarily destroyed, and that no action for damages should lie or be maintained against any person for or on account of seizing or destroying such nets. Nets of the kind mentioned in that section were taken and destroyed by the defendant, and the owner commenced action against him to recover damages for such destruction. That portion of the section which provided that no action for damages should lie was applicable only to a case where the seizure or destruction had been of a nature amounting to a violation of the statute, and of course did not preclude an action against the person making a seizure if not made of a net which was illegally maintained. The seizure and destruction were justified by the defendant in the action, and such justification was allowed in the state courts (119 N. Y. 226, 7 L.R.A. 134, 16 Am. St. Rep. 813, 23 N. E. 878) and in this court. Mr. Justice Brown, in delivering the opinion of this court, said:

"Nor is a person whose property is seized under the act in question without his legal remedy. If in fact his property has been used in violation of the act, he has no just reason to complain; if not, he may replevy his nets from the officer seizing them, or, if they have been destroyed, may have his action for their value. In such cases the burden 317] would be upon the *defendant to prove a justification under the statute. As was said by the supreme court of New Jersey, in a similar case (*American Print Works v. Lawrence*, 21 N. J. L. 248, 259): 'The party is not, in point of fact, deprived of a trial by jury. . . .' Indeed, it is scarcely possible that any actual injustice could be done in the practical administration of the act."

The statute in the above case had not provided for any hearing of the question of violation of its provisions, and this court held that the owner of the nets would not be bound by the determination of the officers who destroyed them, but might question the fact by an action in a judicial proceeding in a court of justice. The statute was held valid, although it did not provide for notice or hearing. And so, in *People ex rel. Copeutt v. Board of Health*, 140 N. Y. 1, 23 L.R.A. 481, 37 Am. St. Rep. 522, 35 N. E. 320, the question arose in a proceeding

by certiorari, affirming the proceedings of the board of health of the city of Yonkers, by which certain dams upon the Nepperhan river were determined to be nuisances and ordered to be removed. The court held that the acts under which the dams were removed did not give a hearing in express terms nor could the right to a hearing be implied from any language used in them, but that they were valid without such provision, because they did not make the determination of the board of health final and conclusive on the owners of the premises wherein the nuisances were allowed to exist; that before such a final and conclusive determination could be made, resulting in the destruction of property, the imposition of penalties and criminal punishments, the parties proceeded against must have a hearing, not as a matter of favor, but as a matter of right, and the right to a hearing must be found in the acts; that if the decisions of these boards were final and conclusive, even after a hearing, the citizen would, in many cases, hold his property subject to the judgments of men holding ephemeral positions in municipal bodies and boards of health, frequently uneducated, and generally unfitted to discharge grave judicial functions. It was said that boards of health under the acts referred to could not, as to any existing state of facts, by their *determination make that a [318 nuisance which was not in fact a nuisance; that they had no jurisdiction to make any order or ordinance abating an alleged nuisance unless there were in fact a nuisance; that it was the actual existence of a nuisance which gave them jurisdiction to act. There being no provision for a hearing, the acts were not void nevertheless, but the owner had the right to bring his action at common law against all the persons engaged in the abatement of the nuisance to recover his damages, and thus he would have due process of law; and if he could show that the alleged nuisance did not in fact exist, he will recover judgment, notwithstanding the ordinance of the board of health under which the destruction took place.

The same principle has been decided by the supreme judicial court of Massachusetts. The case of *Salem v. Eastern R. Co.* 98 Mass. 431, 96 Am. Dec. 650, was an action brought to recover moneys spent by the city to drain certain dams and ponds declared by the board of health to be a nuisance. The court held that, in a suit to recover such expenses incurred in removing a nuisance, when prosecuted against a party on the ground that he caused the same, but who was not heard, and had no opportunity to be heard upon the questions before the board of health, such party is not concluded in the findings or adjudications of that

board, and may contest all the facts upon which his liability is sought to be established.

Miller v. Horton, 152 Mass. 540, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100, is in principle like the case before us. It was an action brought for killing the plaintiff's horse. The defendants admitted the killing, but justified the act under an order of the board of health, which declared that the horse had the glanders, and directed it to be killed. The court held that the decision of the board of health was not conclusive as to whether or not the horse was diseased, and said that: "Of course there cannot be a trial by jury before killing an animal supposed to have a contagious disease, and we assume that the legislature may authorize its destruction in such emergencies without a hearing beforehand. *But it does not follow that it can throw the loss on the owner without a hearing. If he cannot be heard beforehand he may be heard afterward. The statute may provide for paying him in case it should appear that his property was not what the legislature had declared to be a nuisance, and may give him his hearing in that way. If it does not do so, the statute may leave those who act under it to proceed at their peril, and the owner gets his hearing in an action against them."

And in *Stone v. Heath*, 179 Mass. 385, 60 N. E. 975, the court held that, under the statute, it had no power to restrain the board of health from abating nuisances and from instituting proceedings against plaintiff on account of his failure to abate them, as provided for in the statute, because the board of health had adjudged that a nuisance existed and had ordered it to be abated by the plaintiff, yet still the question "whether there was a nuisance, or whether, if there was one, it was caused or maintained by the parties charged therewith, may be litigated by such parties in proceedings instituted against them to recover the expenses of the abatement, or may be litigated by the parties whose property has been injured or destroyed in proceedings instituted by them to recover for such loss or damage, and may also be litigated by parties charged with causing or maintaining the nuisance in proceedings instituted against them for neglect or failure to comply with the orders of the board of health directing them to abate the same." In that way they had a hearing and could recover or defend in case there was no nuisance.

See also *Lowe v. Conroy*, 120 Wis. 151, 66 L.R.A. 907, 102 Am. St. Rep. 983, 97 N. W. 942; *Pearson v. Zehr*, 138 Ill. 48, 32 Am. St. Rep. 113, 29 N. E. 854; *State v. Main*, 69 Conn. 123, 36 L.R.A. 623, 61 Am. St. 53 L. ed.

Rep. 30, 37 Atl. 80; *Gaines v. Waters*, 64 Ark. 609, 612, 44 S. W. 353, where the same principle is announced.

Complainant, however, contends that there was no emergency requiring speedy action for the destruction of the poultry in order to protect the public health from danger resulting from consumption of such poultry. It is said that the food was in cold storage, and that it would continue in the same condition *it then was for three months, if properly stored, and that therefore the defendants had ample time in which to give notice to complainant or the owner and have a hearing of the question as to the condition of the poultry; and, as the ordinance provided for no hearing, it was void. But we think this is not required. The power of the legislature to enact laws in relation to the public health being conceded, as it must be, it is to a great extent within legislative discretion as to whether any hearing need be given before the destruction of unwholesome food which is unfit for human consumption. If a hearing were to be always necessary, even under the circumstances of this case, the question at once arises as to what is to be done with the food in the meantime. Is it to remain with the cold storage company, and, if so, under what security that it will not be removed? To be sure that it will not be removed during the time necessary for the hearing, which might frequently be indefinitely prolonged, some guard would probably have to be placed over the subject-matter of investigation, which would involve expense, and might not even then prove effectual. What is the emergency which would render a hearing unnecessary? We think when the question is one regarding the destruction of food which is not fit for human use the emergency must be one which would fairly appeal to the reasonable discretion of the legislature as to the necessity for a prior hearing, and in that case its decision would not be a subject for review by the courts. As the owner of the food or its custodian is amply protected against the party seizing the food, who must, in a subsequent action against him, show as a fact that it was within the statute, we think that due process of law is not denied the owner or custodian by the destruction of the food alleged to be unwholesome and unfit for human food without a preliminary hearing. The cases cited by the complainant do not run counter to those we have above referred to.

Even if it be a fact that some value may remain for certain purposes in food that is unfit for human consumption, the right to destroy it is not, on that account, taken away. The *small value that might remain in said food is a mere incident, and furnishes

no defense to its destruction when it is plainly kept to be sold at some time as food. *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306-322, 50 L. ed. 204-211, 26 Sup. Ct. Rep. 100; *Gardner v. Michigan*, 199 U. S. 325, 331, 50 L. ed. 212, 216, 26 Sup. Ct. Rep. 106.

The decree of the court below is modified by striking out the ground for dismissal of the bill as being for want of jurisdiction, and, as modified, is affirmed.

Mr. Justice Brewer dissents.

HANNAH FITCHIE, Barry Fitchie, Hannah Fitchie and Barry Fitchie, Executors under the will of Eliza Fitchie, Deceased; Eliza French, John Galbraith, William Galbraith, Samuel Galbraith, Martha Cully, Margaret Jane Rome, and Hugh Galbraith, Apts.,

v.

CECIL BROWN and William O. Smith, Executors under the will of George Galbraith, Deceased, and the Hawaiian Trust Company, Limited.

(See S. C. Reporter's ed. 321-335.)

Appeal — hearing — who may complain.

1. Counsel for the executors has no right to appear and be heard against the decree below in an action involving the validity and construction of a testamentary trust where his clients have not appealed.

[For other cases, see Appeal and Error, 4013-4047, in Digest Sup. Ct. 1908.]

Perpetuities — duration of trust — lives in being.

2. The rule against perpetuities, where the common law prevails, is not violated by a will creating a trust for "as long a period as is legally possible," to terminate when the law requires it "under the statute," to receive the income and pay annuities therefrom to certain named annuitants and their heirs, and, on the termination of the trust, to distribute the trust fund equally among those then entitled to the annuities, since the testator clearly must have intended to limit the duration of the trust to twenty-one years after the death of the last survivor of the annuitants named in the will, when distribution is to be made.

[For other cases, see Perpetuities, 1-7, in Digest Sup. Ct. 1908.]

Perpetuities — corporation as life in being.

3. A corporation or joint stock company to which an annuity is bequeathed will not be deemed a life in being where so to regard it would cause a trust created by the will to violate the rule against perpetuities.

Perpetuities — number of lives in being.

4. A trust does not violate the common-

law rule against perpetuities because the selected lives in being by which the duration of the trust is limited exceed forty in number.

Trusts — distribution — surplus.

5. The surplus income after paying annuities, must accumulate as part of the trust estate until the time for distribution arrives, when it must be distributed to those entitled to the main fund, where the trust provides that the trustee is to devote sufficient of the income toward paying the annuities, and, on the termination of the trust, is to distribute the trust fund to those entitled to the annuities.

Trusts — incapacity of trustee — substitution.

6. The validity of a trust is not affected by the incapacity of the trustee, since, if he cannot act, the court will appoint a new trustee to carry out the provisions of the trust.

[For other cases, see Trusts, 94, 95, in Digest Sup. Ct. 1908.]

[No. 47.]

Argued October 29, 30, 1908. Decided December 7, 1908.

APPEAL from the Supreme Court of the Territory of Hawaii to review a decree rendered in an agreed case, sustaining the validity of a testamentary trust. Affirmed.

See same case below, 18 Haw. 52.

Statement by Mr. Justice Peckham:

The parties to this proceeding agreed upon a case, without action, containing the facts upon which a controversy had arisen between them, and submitted the same to the supreme court of the territory of Hawaii, conformably to the laws of that territory.

The court heard the case and made a decree therein, from which those named above as plaintiffs in the submission have appealed to this court, but the defendants executors have not appealed.

From the agreed statement of facts contained in the submission it appears that one George Galbraith, who died at Honolulu on the 5th of November, 1904, while domiciled in the territory of Hawaii, left a will, which has been duly admitted to probate in Hawaii, disposing of an estate of about \$121,000 in personal property and \$128,000 in real estate in Hawaii, and a small amount of real estate in Ireland.

*The will gave some pecuniary legacies to a number of people, relatives and friends, and then provided that—

"The balance, residue, or remainder of my estate is, to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute.

NOTE.—On the rule against perpetuities—see note to *Re Lawrence*, 11 L.R.A. 85.

As to removal of trustee or appointment of new trustee—see note to *May v. May*, 42 L. ed. U. S. 179.

"I hereby nominate and appoint the Hawaiian Trust Company, Limited, of Honolulu, territory of Hawaii, as trustee of the aforesaid balance, residue, or remainder of my estate, and they are to devote sufficient of the annual income derived from the same toward paying the following annuities, which are to be free and clear of all taxes, unto the following persons mentioned, namely" [here follow the names of the annuitants and the amounts which they are to receive yearly].

"All of the foregoing for life, and then to their heirs, save and excepted the last three persons; namely, Josie Fink, Emma Douglass, and Matilda Bailey, who are to receive only their annuities, and, at their death, all their interests to cease.

"On the final ending and distribution of the trust, the trust fund to be divided equally amongst those persons entitled at that time to the aforementioned annuities."

On the same day the testator made a codicil, in which he made some changes of the annuities, substituting for the annuity given to the seven children of Hugh Galbraith, of \$2,520 annually, an annuity to the same children of \$2,100 yearly for life, and then to their heirs.

The testator also bequeathed by the codicil an annuity to the Kona Orphanage of Kona of \$100 yearly, "under the same conditions as the other annuitants mentioned, save and accepted, Hugh Galbraith, Josie Fink, Emma Douglass, and Matilda Bailey."

Upon the above facts several questions arose and were submitted to the court below, among them one which relates to the validity of the trust and another to the disposition of the surplus income remaining after the payments to the annuitants mentioned in the will.

324] *The supreme court of Hawaii ordered a decree to be entered, which declared that the will of George Galbraith established a valid trust, and that the Hawaiian Trust Company, Limited, a corporation, the trustee named in the will, was legally authorized to administer the trust; that under the trust it was the duty of the trustee to pay out of the income of the trust property the annuities payable by the provisions of the will to the four persons named therein for their respective lives, and for the payment of the other annuities payable by the will to the other annuitants therein named for and during their respective lives and thereafter to pay the same to their heirs respectively until the end of twenty-one years after the death of the last survivor of all the said annuitants, and during the same period of time to pay to the Kona Orphanage the annuity directed in the will, and, at the end of said twenty-one

years, to divide the trust fund and its accumulated and unapplied income as required by the direction in that behalf contained in the will.

Mr. Aldis B. Browne argued the cause, and, with Messrs. Alexander Britton, W. L. Stanley, and Henry Holmes, filed a brief for appellants:

The words "for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute," do not in themselves prevent the corpus from vesting absolutely for twenty-one years after lives in being, nor fix such a period during which the payment of annuities must go on.

Shelley v. Shelley, L. R. 6 Eq. 540; Re Johnston, L. R. 26 Ch. Div. 538; Sackville-West v. Homesdale, L. R. 4 H. L. 543; Harrington v. Harrington, L. R. 5 H. L. 105; Hill v. Hill [1902] 1 Ch. 537, 807; Re Moore [1901] 1 Ch. 936; Re Exmouth, L. R. 23 Ch. Div. 158; Scarsdale v. Curzon, 1 Johns. & H. 40; Davies v. Davies, L. R. 36 Ch. Div. 380; Tollemache v. Coventry, 2 Clark & F. 611; Pownall v. Graham, 33 Beav. 242.

The object of the courts is to ascertain not the intention simply, but the expressed intention, of the testator,—the meaning which the words of the will, properly interpreted, convey.

Hawkins, Wills, p. 1; Scale v. Rawlins [1892] A. C. 345.

The trust for division of the capital among those persons entitled to the annuities at that time is void for perpetuity; clearly for uncertainty.

Re Moore, supra; Gray, Rule against Perpetuities, 2d ed. § 219.

The extinction of forty-odd lives is more than can be made out by reasonable evidence or without difficulty; or it may be almost, if not quite, impracticable to ascertain when forty-odd lives became extinguished.

Thellusson v. Woodford, 4 Ves. Jr. 286; Gray, Rule against Perpetuities, § 218.

The intention of the testator was that no person should be entitled to touch the capital of the trust fund for so long a period as it was legally possible to tie it up, whatever the period might be; and he did not anticipate that the direction for payment of these annual sums carried with it any rights in the capital of the trust fund. It is quite legal for a trust of corpus and a trust of income to exist quite independently of each other.

Cadell v. Palmer, 21 English Ruling Cases, 140, note, 1 Clark & F. 372.

The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not like a rule of con-

struction, a test more or less artificial, to determine intention. Its object is to defeat intention. Therefore, every provision in a will is to be construed as if the rule did not exist; and then, to the provisions, so construed, the rule is to be remorselessly applied.

Gray, Rule against Perpetuities, 2d ed. 629, note 1; *Hcasman v. Pearse*, L. R. 7 Ch. 283.

When some of the trusts in a will are legal and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and other portions rejected, or if manifest injustice would result from such construction to the beneficiaries or some of them, then all the trusts must be construed together and must fall.

Tilden v. Green, 130 N. Y. 50, 14 L.R.A. 40, 27 Am. St. Rep. 487, 28 N. E. 880.

The provision as to the division of the trust fund at the final ending of the trust measures the time when the payment of the annuities is to cease. It is difficult to see how these two provisions of the will can be separated without ignoring the words of the will.

Whether or not an annuity is perpetual is considered in *Re Morgan* [1893] 3 Ch. 222; *Blight v. Hartnoll*, L. R. 19 Ch. Div. 294.

The court has authority to set apart a portion of the corpus sufficient to produce the annuities with certainty, and to hand over the balance at once to the heirs-at-law and next of kin.

Harbin v. Masterman [1896] 1 Ch. 351; *Evans v. Walker*, L. R. 3 Ch. Div. 211; *Bent v. Cullen*, L. R. 6 Ch. 235.

The heirs of the annuitants will differ according to the nature of the property; thus, the law of the domicile will apply in the case of the distribution of all movable property, wherever situate (2 Wharton, Conf. L. 3d ed. p. 1290); and to the law of the state in which the land is situated we must look for the rules which govern its descent.

De Vaughn v. Hutchinson, 165 U. S. 566, 570, 41 L. ed. 827, 829, 17 Sup. Ct. Rep. 461.

In the case of all of the annuitants the court has jurisdiction to set apart or appropriate sufficient of the estate to answer such annuities.

Harbin v. Masterman, supra.

In case the court decides that the "heirs" are entitled to perpetual annuities, they will be entitled to have appropriated and paid to them on the death of the life an-

nuitants such a sum as will be sufficient to produce their respective annuities.

Bent v. Cullen, supra.

Mr. Clarence H. Olson argued the cause, and, with Messrs. William O. Smith and A. Lewis, Jr., filed a brief for Galbraith's Executors.

Mr. John C. Gray argued the cause, and, with Mr. Roland Gray, filed a brief for the Hawaiian Trust Company:

The lives of the annuitants were all lives in being at the testator's death. That is so, although some of them are described as the children of certain persons.

2 Jarman, Wills, 6th Am. ed. *1010; *Scott v. Harwood*, 5 Madd. Ch. 332.

The time set for the distribution is not too remote, because the testator has expressly said it shall not be too remote; he has said it shall be legally possible. It is a necessary qualification of the time for distribution that it shall not be too remote. Dates which are too remote are expressly excluded by the testator.

Pownall v. Graham, 33 Beav. 242; Gray, Rule against Perpetuities, § 219.

A gift "as far as the rules of law and equity will permit" is not bad for uncertainty, and the period to be taken is to be determined from the consideration of the will.

Shelley v. Shelley, L. R. 6 Eq. 540; *Re Johnston*, L. R. 26 Ch. Div. 546; Gray, Rule against Perpetuities, §§ 363-367; *Harrington v. Harrington*, L. R. 3 Ch. 564, L. R. 5 H. L. 87; *Hill v. Hill* [1902] 1 Ch. 813.

The number of lives to be taken, in applying the rule against perpetuities, must be an ascertainable number; that is, as was said in the leading case of *Thellusson v. Woodford*, 11 Ves. Jr. 134, the number of lives chosen must not be more than will admit of making out, by reasonable evidence, at what time the survivor ceases to exist. Provided the termination of the lives can be determined by reasonable evidence, their number is immaterial. In our case there are forty-one lives. In *Cadell v. Palmer*, 1 Clark & F. 372, there were twenty-eight lives. In *Humberston v. Humberston*, 1 P. Wms. 332, cited in *Thellusson v. Woodford*, 11 Ves. Jr. 135, there were about fifty life estates.

Surplus income shall be accumulated, and distributed as part of the trust fund when the time for distribution has arrived.

Genery v. Fitzgerald, Jacob, 468; *Re Dumble*, L. R. 23 Ch. Div. 365; *Hurford v. Haines*, 67 Mtl. 240, 9 Atl. 540; *McKee's Appeal*, 96 Pa. 284; *Cochrane v. Schell*, 140 N. Y. 537, 35 N. E. 971.

A construction should be adopted which

will make realty and personalty go together, where the testator has treated them as one fund.

Abbott v. Essex Co. 18 How. 202, 216, 15 L. ed. 352, 356.

The rule that the intermediate income of future gifts of personalty or mixed funds will be accumulated is a consequence of the rule that courts will prefer a construction which prevents a partial intestacy.

Given v. Hilton, 95 U. S. 591, 594, 24 L. ed. 458, 459; *Kenaday v. Sinnott*, 179 U. S. 606, 616, 45 L. ed. 339, 344, 21 Sup. Ct. Rep. 233.

As fast as the income is received, it becomes as much a part of the trust fund as the principal.

Minot v. Tappan, 127 Mass. 337; *Re Travis* [1900] 2 Ch. 548.

Any lack of authority in this trust company to act as trustee would have no effect on the validity of this trust. Another trustee would be appointed by the court having jurisdiction for that purpose in Hawaii. The heirs or next of kin would get no interest in the trust fund.

Vidal v. Philadelphia, 2 How. 127, 188, 11 L. ed. 205, 230.

No private person has a right to object to a corporation's taking or holding any property on the ground that its charter does not authorize it to do so.

Vidal v. Philadelphia, 2 How. 127, 11 L. ed. 205; *Union Nat. Bank v. Matthews*, 98 U. S. 621, 25 L. ed. 188; *Fritts v. Palmer*, 132 U. S. 282, 293, 33 L. ed. 317, 321, 10 Sup. Ct. Rep. 93.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

In the view we take of the case there are but two questions necessary to be noticed, and they involve the validity of the trust and the disposition of the surplus income. 328]The appellants,*who are the heirs of testator, insist, first, that the provision in the will for final distribution, ordering the trust fund to be divided equally among those persons entitled at that time to the annuities mentioned, is invalid, because there is no direction in the will as to when it is to take place, and therefore effect cannot be given to it; that the only direction in the will as to the duration of the trust is contained in the words "the residue . . . to be placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it under the statute." Unless there is contained in those words a direction as to the duration of the trust, or, in other words, a direction as to the period at which that part of the trust which consists of the pay-

ment of annuities is to cease, and that part which consists of the distribution of the capital is to take place, then, it is contended, the duration of the trust has not been sufficiently declared by the testator, and the trust is one which the court cannot carry out; second, that if the above words do constitute a direction as to the duration of the trust, yet still the testator has not selected the lives in being which are to be taken as a limitation of the trust; third, that even if the testator had selected the lives, consisting of all the annuitants mentioned, they are more than forty in number, and the trust is void, because it would then tend to a perpetuity, as the extinction of more than forty lives is more than can be made out by reasonable evidence or without difficulty, it being quite impracticable to ascertain when the last of more than forty lives would be extinguished.

The counsel for the executors of the testator, appellees herein, was permitted in this court to file a brief and was heard orally on the argument before us, although no appeal from the decree had been taken by the executors, this court stating, however, that it would thereafter decide whether counsel for executors had any right to be heard to contend against the decree of the court below.

Counsel, in fact, did argue against some parts of the decree, *contending that the[329 trust was valid in so far as it provided for the payment of the annuities specified, but that the provision for final distribution was void, and that the annuities succeeding to and other than the life annuities were perpetual, and that there was an intestacy as to that not required to satisfy all the annuities.

We are of opinion that counsel for the executors had no right to appear and be heard against the decree, no appeal having been taken from it by his clients.

The trustee contends that the whole trust is valid, and that the surplus income over the amount necessary for the payment of the annuities mentioned must be accumulated up to the time of the general distribution under the trust, as provided for in the will, and that such surplus shall then be distributed as part of the trust fund to the persons then entitled to that fund.

Our first inquiry is, Was this trust valid as a whole? It is conceded by all that the common law is applicable, and that there is no statute in Hawaii governing the subject, except the statute making the common law applicable there, and that the utmost extent of a trust at common law is limited by lives in being at its creation and for twenty-one years thereafter; that the lives must be selected by the testator in his will; that they must be ascertained lives, *i. e.*, lives that can be distinguished; and the fact of the

death of the last survivor must be capable of being made out by reasonable evidence (*Thellusson v. Woodford*, 4 Ves. Jr. 227, 11 Ves. Jr. 134, 146; *Re Moore* [1901] 1 Ch. 936), and the selected lives need not be those having an interest in the property. Moore's Case is an example of a void limitation on the ground of uncertainty. The limitation was measured by twenty-one years from the death of the last survivor of all persons living at the death of the testatrix.

A perusal of the will shows that the testator did not, in so many words, name the persons whose lives the trustee contends he selected for the limitation of the trust.

330] *However, if the scheme of the will, discoverable from its provisions, be such that a plain implication arises from those provisions that a certain class or number of lives mentioned, or referred to, in the will, were selected by the testator for a limitation of the trust, such implied selection is sufficient. It is the intention of the testator that is to be sought, and such intention is not always found to have been directly, and in so many words, expressed in the will. An intention which is implied from language actually used and from facts actually appearing in the will is to be carried out, provided it does not violate the law. An intention so implied is as good as an intention more plainly and in direct terms expressed. The question is, therefore, whether the testator, by an implication arising from the language used in the will and the facts therein appearing, selected those lives by which the trust is to be limited.

Looking at the will, it is seen that a trust is created for three purposes: The first, to pay certain annuitants out of the income of the fund; the second, to hold the fund until the time for distribution arrives; and the third, to distribute it to those people who may then be entitled to it, as provided by the terms of the will.

The whole trust, the testator has provided, shall continue as long as is legally possible, and it is not to be confined to any particular subdivision of the trust. The direction to hold and distribute is as imperative as the direction to pay annuitants until distribution is made. When the testator created the trust in the language already quoted he must have intended it should be measured by some lives then in being, and for not more than twenty-one years thereafter; because that is the longest time a trust of that kind is legally possible, and he provided it should last as long as that. There are no other lives that can reasonably be said to have been within the intention of the testator when he was making this provision. It is said that, being ignorant of the

legal length of time a trust could last, he therefore provided that it should *last[331 as long as legally possible; and thus he could not have had an intention to select any particular life or lives in limiting the length of the trust.

There is force in the argument, but we are disposed to think that the position taken by the trustee is the correct one, and, indeed, is the only one compatible with the intention of the testator, to be gathered from the will. That intention could not have been to create annuities to last forever, as is contended, because it is plain from the provisions of the will that the testator intended to have the gift over of the whole estate created by the will divided at some future time among those who would be entitled to it at the time of such distribution. A perpetual annuity would prevent some part of the gift over from taking effect. There is not only the provision for continuing the trust as long as is legally possible, but there is also a provision, as part of the trust, for holding the fund and distributing it according to the terms of the will. Distribution, therefore, is certainly part of the scheme of the will, and distribution of all of the fund created by the trust,—not a part of it. This distribution could not take place if the payment of the annuities provided for in the will were to continue forever.

As he was making provision for the annuitants mentioned in the will and for the payment to the heirs of such of those annuitants as died, it seems plain that the trust for the payment of the annuities should continue no longer than up to the time provided in the will for the distribution of the whole estate; and that distribution—we think the testator intended to be twenty-one years after the death of the last survivor of the annuitants named in the will, for that period was as long as the trust could last under the terms of the will.

Upon all these considerations, the inference, we think, is very strong that the lives selected were the lives of the annuitants. A reading of the will fails to suggest any other set of lives that the testator could reasonably be supposed to have intended. The inference that he intended these lives is almost conclusive. That he intended to dispose of his whole estate, *and not to die[332 intestate as to any part of it, is plain from the language of the will. Either these lives must be regarded as intended by the testator or there is an intestacy as to a considerable part of the estate. The testator certainly did not mean that, and there is, in addition, a strong presumption against it. Counsel for the heirs do not argue that testator did not intend to make testamentary disposition of his whole estate, but that

the disposition which they contend he did make was invalid. The answer to the question of what disposition he did make is easier to be given when aided by the presumption that he intended a valid rather than invalid disposition, there being from the language of the will one construction of his intention that would make the will valid, although there might be another possible, and at the same time unlikely, construction that would render it invalid. This selection prevents the trust from being bad for uncertainty or remoteness.

The whole of the language of the will must be considered, and while it says the trust is to continue as long as it is legally possible, it must also be remembered that a distribution of the whole estate is to be made, and therefore the continuation of the trust must also be limited by the direction to distribute; or, in other words, the trust is to continue as long as is legally possible and as shall be consistent with making the distribution as directed by the will. This distribution must be made at a time which is not too remote,—that is, a time within which the trust would be valid,—for the testator provided that the trust should only last that long. Payments of the most of the annuities are to be continued to the heirs of the annuitants, but we think these payments are to stop with the death of the last survivor of the annuitants named in the list and twenty-one years thereafter. The distribution of the entire corpus of the fund remaining with the trustee is then to be made as provided for in the will.

The use of the words "under the statute" in the will, providing for the termination of 333] the trust when the law requires *it under the statute, is not material. It must be assumed that the testator was not positive as to the time provided by law for the duration of a trust, or whether it was limited by any particular statute. It is enough to know that his desire was to have the trust continue as long as was legally possible, and consistent with distribution as directed, and that the estate was to be then distributed, and hence the trust to pay the annuities was to cease when it would no longer be consistent with the provision for distribution. As the testator has mentioned annuitants to whom payments are to be made, it is most reasonable to infer from that fact that their lives and the life of the survivor of them were the lives he had in view, and therefore they are to be regarded as selected by him. The fact that in the meantime, when an annuitant died, payment was to be made to his heirs, does not affect the limitation to the survivor of the annuitants. His death then terminates the class, and 53 L. ed.

twenty-one years from that time distribution is to be made.

As the question whether a valid trust has been created depends upon the construction to be given to the language of this particular will, reported cases in regard to the language used in other wills (unless similar to this in their facts) are not of great benefit in the solution of the question as to the intention of the testator in the will before us. The case of *Pownall v. Graham*, 33 Beav. 242 (Gray, Rule against Perpetuities, § 219), seems, however, to be as nearly in point as any to be found. There the question was as to what lives were to be taken as measuring the limitation of the trust, as none had been directly selected in so many words by the testator; but it was thought, upon looking over the entire will, that the testator intended a certain class of lives mentioned in it as the limitation of the trust, and the court accordingly so decided. Counsel for the heirs have criticized the application of that case, but we think unsuccessfully.

Some light is also to be found in a certain class of English cases, known as the Heirloom Cases, where bequests of personal *property were made to go as heirlooms[334 along with certain real property, "as far as the rules of law and equity will permit." These cases are to be found in Gray on Rule against Perpetuities, notes to §§ 363-367. They are cited for the purpose of showing that a limitation in a gift, "as far as the rules of law and equity will permit," is not bad for uncertainty, and that the period of limitation to be taken is to be determined from a consideration of the whole will. They strengthen the proposition that it is not necessary to find in the will, in so many words, the selection of lives, but that such selection is good if, from a consideration of the whole will, that selection can be ascertained.

Counsel for the heirs contend that there is as much reason for including the Kona Orphanage among the lives of the annuitants as a limitation of the trust as there is to say that the limitation includes only the individual annuitants. The orphanage is a corporation or joint stock company, and could not be included in or constitute a life in being within the rule of which we are speaking. To include it would render the trust void, and the testator intended a valid trust.

We see no reason for holding that the number of annuitants, which, it is said, exceeds forty, is too large for a valid limitation of the trust. There are cases cited from the English reports showing that even a larger number than that has been held not to exceed a valid limitation, and in *Hum-*

berston v. Humberston, 1 P. Wms. 332, which is cited in *Thellusson v. Woodford*, 11 Ves. Jr. 112, 135, it would seem there were about fifty life estates.

We therefore sustain the validity of the trust in this case, and the question remaining is as to the disposition of the surplus income arising during the payment of the annuities. The will shows that the testator supposed there would be such surplus. Should it be accumulated or paid to the heirs of testator? We think the surplus, after paying annuities, must accumulate as part of the trust estate until the time arrives for the distribution of that estate, and 335] that such accumulation *must then be distributed as a part thereof to those who will then have the right to take the estate as provided for in the will. The accumulation is to be treated as a surplus arising from both real and personal estate, and the person or persons entitled to receive the main fund are to take the surplus as if it arose entirely from personalty. Some of the cases upon this subject are gathered in the brief of counsel for the trustee and it is not necessary to cite them here. Holding the trust to be valid, it is not now necessary to determine to whom the distribution is to be made when the time for distribution shall arrive.

The trust company is entitled to take the property and execute the trust. We do not understand that this is now controverted by counsel for any of the parties. In any event, it does not affect the validity of the trust. If the trustee named could not act, the court would appoint a trustee to carry out the provisions of the trust. *Vidal v. Philadelphia*, 2 How. 127, 191, 11 L. ed. 205, 231; *Re McGraw*, 111 N. Y. 66, 104, 2 L.R.A. 387, 19 N. E. 233.

The judgment of the Supreme Court of Hawaii is affirmed.

EVA A. INGERSOLL, as Administratrix of the Estate of Robert G. Ingersoll, Deceased, Petitioner,

v.

JOSEPH A. CORAM, Henry A. Root, and Charles H. Palmer, Trustee.

(See S. C. Reporter's ed. 335-370.)

Courts — proper district for suit — waiver.

1. The objection that a suit in a Federal circuit court between citizens of different states is not brought in the proper district is waived by demurring and answering without raising that question.

[For other cases, see *Courts*, 938-941a, in *Digest Sup. Ct. 1908.*]

Courts — conflict of jurisdiction — Federal and state courts.

2. The jurisdiction of a Federal circuit court of a controversy between citizens of different states, presented by a bill which

seeks to declare and foreclose an attorney's lien upon certain interests in the distributive shares of the property of a decedent within the district, is not defeated because the settlement of the estate is pending in a state probate court, where no interference with that court is sought or decreed, and rights between the parties arising from their transactions and contracts are adjudged and are decreed to be redressed only when the probate court shall have finished its functions.

[For other cases, see *Courts*, VI. g, 2, in *Digest Sup. Ct. 1908.*]

Courts — Federal jurisdiction — suit by assignee.

3. A suit to declare and enforce a lien on certain interests in distributive shares of the property of a decedent in the hands of an ancillary administrator is not within the provision of U. S. Rev. Stat. § 629, U. S. Comp. Stat. 1901, p. 503, governing Federal jurisdiction of suits by assignees of choses in action, because plaintiff's right is derived from an heir whose citizenship is the same as that of such administrator, where the plaintiff, who sues as administratrix, and who is a citizen of a different state from the defendant administrator, is suing primarily on the obligation of such heir to her intestate, to secure which a lien was given upon such heir's distributive share.

[For other cases, see *Courts*, 817-830, in *Digest Sup. Ct. 1908.*]

Judgment — res judicata — parties.

4. A judgment against an ancillary administrator in a suit by him to declare and enforce a lien on certain interests in the distributive shares of the property of a decedent is not a bar to a suit founded on the same cause of action, brought by an ancil-

NOTE.—On proper district for suit in Federal court—see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

On waiver of right as to district in which suit may be brought—see note to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192.

As to conflict of jurisdiction between Federal and state courts—see notes to *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 356, and *J. I. Case Plow Works v. Finks*, 26 C. C. A. 50.

On pendency of action in state or Federal court as ground for abatement of action in other—see notes to *Wilson v. Milliken*, 42 L.R.A. 449; *Bunker Hill & S. Min. & Concentrating Co. v. Shoshone Min. Co.* 47 C. C. A. 205; and *Barnsdall v. Waltemeyer*, 73 C. C. A. 521.

As to the exercise by courts of powers which bring them into collision—see notes to *Carson v. Dunham*, 3 L.R.A. 203, and *Tefft v. Sternberg*, 5 L.R.A. 221.

On suits by assignees in Federal courts—see notes to *Goldsmith v. Holmes*, 1 L.R.A. 817; *Republic Iron Min. Co. v. Jones*, 2 L.R.A. 746; and *American Freehold Land & Mortg. Co. v. Thomas*, 12 L.R.A. 681.

As to the lien of an attorney for compensation—see note to *Texas v. White*, 19 L. ed. U. S. 992.

lary administrator of the estate in another jurisdiction.

[For other cases, see Judgment, 814-819, in Digest Sup. Ct. 1908.]

Attorneys — contract for compensation — performance.

5. The condition in a contract to pay an attorney in a will contest a stipulated fee "in case the will is defeated and our clients get their shares" is satisfied where the contest and the attorney's services result in a compromise agreement by which the will, which, as propounded, disinherited such clients, was so qualified in probate that they received a larger proportion of the estate than if the testator had died intestate.

[For other cases, see Attorneys, III. a, in Digest Sup. Ct. 1908.]

Attorneys — lien for compensation.

6. An agreement to pay a stipulated fee for legal services to be rendered in a will contest, contingent upon success, which agreement, by way of exception in favor of one of the signers, stipulated against any other liability on his part than to pay such fee "out of the funds secured from the estate," gives the attorney, in case his efforts are successful, an equitable lien on such funds for his fee.

[For other cases, see Attorneys, III. c, in Digest Sup. Ct. 1908.]

[No. 8.]

Argued March 11, 12, 1908. Decided December 7, 1908.

ON WRIT of certiorari to the United States Circuit Court of Appeals for the First Circuit to review a decree which reversed a decree of the Circuit Court for the District of Massachusetts in favor of petitioner in a suit to declare and enforce an attorney's lien upon certain distributive shares in the property of a decedent within the district. Reversed. Decree of the Circuit Court, with certain modifications, affirmed.

See same case below, 78 C. C. A. 303, 148 Fed. 169.

Statement by Mr. Justice McKenna:

The petitioner, as administratrix of the estate of Robert G. Ingersoll, deceased, sued the respondents and certain other persons, in the circuit court of the United States 337] for the district *of Massachusetts, to subject certain interests in the estate of Andrew J. Davis to a lien which is alleged to have accrued to her intestate by the agreement which is set out in the opinion, and by the laws of Montana, in which state the services were rendered.

Andrew J. Davis, a man of great wealth, a citizen of Montana, died, leaving property in that state and in Massachusetts. By a will, which was offered for probate in Montana, all of his property was left to his brother, John A. Davis. Certain other of his next of kin, five in number (referred to in the bill as the "five heirs"), associated to contest the probate of the will.

Henry A. Root, one of the respondents, and a nephew of Andrew J. Davis, agreed with the four other contestants to conduct the litigation and to procure evidence and counsel at his own expense, receiving therefor an assignment of a part of the prospective distributive shares of the others. Joseph H. Coram, another respondent, also acquired an interest in the prospective shares of some of the contestants. Robert G. Ingersoll, the petitioner's intestate, was engaged as counsel to conduct the litigation, and Root and Coram entered into the agreement with him, which will hereafter be set out.

Upon the trial of the contest the jury disagreed. Pending the preparation for the second trial an agreement of compromise was made, by which Ingersoll's clients received a larger portion of the estate than though Davis had died intestate. It is alleged that this was the result of Ingersoll's services as counsel. "By reason," it is alleged, "and in consideration of the prosecution of said contests, and the force, effect, and stress thereof, as against the proponent of such alleged will, in preventing the admission thereof to probate, and in consideration of the determination of said controversy and litigation, and for no other consideration or reason," was the compromise effected. It is hence further alleged that the "will was defeated in so far as it could affect the rights, shares, or interest in and to said estate of said five heirs mentioned in *said agreement and promise made[338 and delivered by said Root and Coram to said Robert G. Ingersoll, for as much as they were entitled to only 350 eleven hundredths of said estate as such heirs at law of Andrew J. Davis, deceased, and got absolute right and title to 515½ eleven hundredths thereof, through the prosecution of said contests and decree determining the same." Two hundred and fifty eleven hundredths, it is alleged, were allotted directly to said five heirs and 265½ eleven hundredths, for their use and benefit, to Charles H. Palmer (a respondent here) and Andrew J. Davis, Jr., trustees. A copy of the decree was annexed to the bill and made part of it. And it is alleged that, by reason of said agreement and the fulfilment thereof and the "provisions of the laws and statutes of Montana," which are set out, an attorney's lien accrued in favor of said Ingersoll and his legal representatives, "and is existing and is in force and effect upon the portions, parcels, and interests of, in, and to the funds and other property of said Andrew J. Davis, deceased, so acquired for said five heirs." That Root and Coram have conveyed away the real estate vested in them by the decree determining the said will contests, and that the distributions under said decree "have practically exhausted the funds

and property of said estate in the state of Montana, and that, by reason of the employment of Ingersoll and the services rendered by him, and by the promises of payment, an equitable lien exists on the funds and effects acquired by said heirs, situate in Boston, Massachusetts," and that such funds and effects should not be distributed or carried away "in default of payments of said indebtedness owing by Root and Coram to the estate and legal representatives of Robert G. Ingersoll, deceased, but that said funds and effects situate in Boston, Massachusetts, should be and remain subject to said indebtedness, and to be resorted to for the payment thereof."

It is alleged that John H. Leyson is the duly appointed, qualified, and acting administrator of the estate of Andrew J. Davis, deceased, situate in Massachusetts, and has custody of the funds and effects acquired [339] by Root and his associates, and *upon which the said lien exists in favor of the estate and legal representatives of Ingersoll, and that, if such funds and effects should be distributed, the lien will be defeated.

The death of Ingersoll in the state of New York is alleged, and the appointment of Eva A. Ingersoll, administratrix, by the surrogate's court of the county of Westchester, of that state, and her qualification. And it is alleged that she was subsequently appointed administratrix of his estate by the probate court of the county of Suffolk, commonwealth of Massachusetts, situate in that commonwealth, and that she duly qualified as such. It is alleged that the estate of Andrew J. Davis, situate in Boston, and in the hands of said John H. Leyson as administrator, consists of money, convertible stocks and bonds of the value of \$450,000, after paying expenses of administration, of which funds and effects Coram and other parties for whom Ingersoll prosecuted said will contest are entitled, by virtue of the decree of the district court of the state of Montana, directly and through Charles H. Palmer and Andrew J. Davis, Jr., to 515½ eleven hundredths, "acquired as part of the fruits of the labors of said Robert G. Ingersoll in the prosecution of said will contests." That Root, Coram, and their associates have petitioned the probate court of Suffolk county to order distribution of said shares of said funds and effects to them. That all of said 515½ eleven hundredths, except the interest owned by Sarah Maria Cummings and the interest owned by Ellen S. Cornue, are subject to the lien of Ingersoll. It is alleged that the interests of Elizabeth S. Ladd and Mary L. Dunbar have been transferred to Root and Coram.

A conspiracy and purpose of Coram and Root to defeat the lien of Ingersoll are al-

leged, and that distribution of the estate in Massachusetts is sought as a means thereto; further, that if the funds and effects be removed from Massachusetts or distributed to Root and Coram before the representatives of said Ingersoll have an opportunity to enforce their lien, the same will be placed beyond their reach and the payment or *the indebtedness secured thereby de-[340]feated; that the funds and effects remaining in Montana will be required and used to pay indebtedness and expenses of administration there; and that Root and Coram have no tangible property other than their shares and interest in the estate of Davis.

It is further alleged that petitioner brought suit in the district court of the state of Montana in her name, as administratrix of Robert G. Ingersoll, to enforce payment of said claim existing in favor of the estate and legal representatives of Ingersoll. That Root and the other defendants therein appeared and demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action, but did not specify or raise the objection that she was not qualified to prosecute said suit, although she alleged her appointment as administratrix by the surrogate's court of New York. That, upon her urging the pendency of said suit against the petition for distribution filed by Root and Coram and their associates, it was objected that said suit had not been brought by an administrator of Ingersoll appointed in Montana. The court sustained the objection. That thereupon John S. Harris was appointed administrator in Montana, and substituted in said suit for petitioner. The cause coming on to be heard in the district court of Montana, Root objected to the introduction of any evidence, on the ground that the complaint therein did not state facts sufficient to constitute a cause of action. The motion was sustained, and, without further proceedings, the court granted a nonsuit and dismissed the complaint on the alleged ground that it did not state facts sufficient to constitute a cause of action; in consequence no trial thereof has been had, nor has the claim and lien of Ingersoll even been adjudicated, nor is it barred by any statute of limitation.

The bill prays an injunction against Leyson to restrain him from delivering, and against respondents to restrain them from receiving, said funds and effects, and for the appointment of a receiver, discovery of Coram's interest, and judgment for *the[341] same, and that it be declared a lien on such interest. Judgment is prayed against Root for \$95,000, with interest, and that the sum be declared a lien on his shares and inter-

ests. What else is prayed need not be noticed.

There were demurrers to the bill that went to the parties, the jurisdiction of the court, to the merits, and that the judgment of the district court of Montana constituted a bar. The grounds of demurrer to jurisdiction were expressed in the demurrer filed by Root and Coram and Herbert P. Cummings, executor of the last will and testament of Sarah Maria Cummings, one of the five heirs, as follows:

"2. These defendants also demur to the bill of complaint upon the further ground that this court has not jurisdiction of this action, because it appears from the said bill that this action is brought to secure from this court a writ of injunction staying proceedings now pending in the probate court in and for the county of Suffolk and commonwealth of Massachusetts, to distribute the funds and effects of the estate of Andrew J. Davis, deceased, situate in the state of Massachusetts, among the persons entitled thereto, or to otherwise dispose of said funds and effects, and this court is forbidden by § 720 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 581) from granting a writ of injunction to stay proceedings in any court of a state."

The demurrer of Leyson was more general, stating that the court "had no jurisdiction to grant the relief prayed for in the bill of complaint or any part thereof." And Andrew J. Davis particularized this by the specification that to enjoin the disposition of property in the hands of Leyson as administrator "would be an interference with the proceedings of the probate court of Suffolk county, having jurisdiction of the matter, and would be unauthorized and illegal."

The demurrers were overruled except as against certain parties, and except so far as the bill claimed a statutory lien. The court said: "No statutory lien can be maintained, and that portion of the bill must be regarded as ineffectual; and, as it is specially demurred to, it must be stricken out." 342]127 *Fed. 418. The bill was amended in compliance with the order of the court, making Charles H. Ladd, individually and as administrator of the estate of Elizabeth S. Ladd, a party. The bill, however, was subsequently ordered to be dismissed as to him, Mary Louise Dunbar (one of the five heirs), and Herbert R. Cummings, executor. 132 Fed. 168. They seem, however, to have been regarded as parties until the final disposition of the case, for they joined Coram, Root, and Palmer in an answer. Leyson filed a separate answer. In the answers some of the allegations of the bill were denied and others admitted. The answers also pleaded in bar of the suit the proceedings

and judgment in the action brought in the district court of Butte county, state of Montana. Proofs were taken, the allegations of the bill were found to be true, and a decree entered for petitioner. 136 Fed. 689. Root, Coram, and Palmer took an appeal to the circuit court of appeals, the other respondents declining to join them, which court reversed the decision by a divided court. 78 C. C. A. 303, 148 Fed. 169. This certiorari was then granted.

Messrs. Hannis Taylor and E. N. Harwood argued the cause, and, with Messrs. Hollis R. Bailey and John H. Hazelton, filed a brief for petitioner:

The administrator appointed in Montana had no title to the chose in action.

Wilkins v. Ellett, 9 Wall. 740, 19 L. ed. 586; Wilkins v. Ellett, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641; Harper v. Butler, 2 Pet. 239, 7 L. ed. 410; Wyman v. Halstead (Wyman v. United States) 109 U. S. 654, 27 L. ed. 1068, 3 Sup. Ct. Rep. 417; Thorne v. Watkins, 2 Ves. Sr. 36; Eccls v. Holder, 12 Fed. 668; May v. Logan County, 30 Fed. 250; Van Bokkelen v. Cook, 5 Sawy. 591, Fed. Cas. No. 16,831; Rand v. Hubbard, 4 Met. 252; Pinney v. McGregory, 102 Mass. 186; Petersen v. Chemical Bank, 32 N. Y. 21, 88 Am. Dec. 298; St. John v. Hodges, 9 Baxt. 334; Re Cape May & D. B. Nav. Co. 51 N. J. L. 82, 16 Atl. 191; Gove v. Gove, 64 N. H. 503, 15 Atl. 121; State Tax on Foreign-held Bonds, 15 Wall. 300, 21 L. ed. 179.

There is no privity of administrators appointed in different states either "in law or in estate."

Aspden v. Nixon, 4 How. 467, 497, 11 L. ed. 1059, 1073; Stacy v. Thrasher, 6 How. 44, 12 L. ed. 337; Johnson v. Powers, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525; Carpenter v. Strange, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; Merrill v. New England Mut. L. Ins. Co. 103 Mass. 245, 4 Am. Rep. 548; Low v. Bartlett, 8 Allen, 262; Ela v. Edwards, 13 Allen, 48, 90 Am. Dec. 174; Taylor v. Barron, 35 N. H. 484; Brown v. Fletcher, 146 Mich. 401, 15 L.R.A. (N.S.) 632, 123 Am. St. Rep. 233, 109 N. W. 686; St. John v. Hodges and Pinney v. McGregory, supra.

There is an equitable lien existing in favor of the complainant by virtue of the contract, promises, pledges, and other facts shown in the bill and established by admissions and proofs.

Turwin v. Gibson, 3 Atk. 719; Barnesley v. Powell, 1 Ambl. 102; Welsh v. Hole, 1 Dougl. K. B. 238; Ormerod v. Tate, 1 East, 464; Randle v. Fuller, 6 T. R. 456; Read v. Dupper, 6 T. R. 361; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; McDonald v.

Napier, 14 Ga. 110; Weed Sewing Mach. Co. v. Boutelle, 56 Vt. 570, 48 Am. Rep. 821; Renick v. Ludington, 16 W. Va. 378; Sexton v. Pike, 13 Ark. 193; Carter v. Davis, 8 Fla. 183; Rooney v. Second Ave. R. Co. 18 N. Y. 371; Warfield v. Campbell, 38 Ala. 527, 82 Am. Dec. 724; Ex parte Lehman, 59 Ala. 631; Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387; Wylie v. Cox, 15 How. 415, 14 L. ed. 753, 5 Rose's Notes (U. S.) 336; Stanton v. Embrey, 93 U. S. 556, 23 L. ed. 985; McPherson v. Cox, 96 U. S. 404, 24 L. ed. 746; Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; Goad v. Hart, 128 Cal. 197, 60 Pac. 761, 964; Maddaugh v. Wilson, 151 U. S. 333, 38 L. ed. 183, 14 Sup. Ct. Rep. 356; Cowdrey v. Galveston, H. & H. R. Co. 93 U. S. 352, 23 L. ed. 950; Semmes v. Whitney, 50 Fed. 666; Mahone v. Southern Teleg. Co. 33 Fed. 702; Frink v. McComb, 60 Fed. 486; Tuttle v. Claflin, 31 C. C. A. 419, 59 U. S. App. 602, 88 Fed. 122; Needles v. Smith, 32 C. C. A. 226, 58 U. S. App. 276, 87 Fed. 316; Foster v. Danforth, 59 Fed. 750; Weeks v. Wayne Circuit Judges, 73 Mich. 256, 41 N. W. 269; Carpenter v. Myers, 90 Mich. 209, 51 N. W. 206; Justice v. Justice, 115 Ind. 201, 16 N. E. 615; Stratton v. Hussey, 62 Me. 286.

The language used in the contract with Colonel Ingersoll "should receive a fair and reasonable interpretation, so as to attain the objects for which the instrument is designed, and the purpose to which it is applied."

Lawrence v. McCalmont, 2 How. 449, 17 L. ed. 334; Nash v. Towne, 5 Wall. 689, 18 L. ed. 527; Wylie v. Cox; McPherson v. Cox; Walker v. Brown; and Maddaugh v. Wilson,—supra; Mackall v. Willoughby, 167 U. S. 681, 42 L. ed. 323, 17 Sup. Ct. Rep. 954; Noonan v. Bradley, 9 Wall. 405, 19 L. ed. 761; Ballard v. Carr, 48 Cal. 74; Howard v. Throckmorton, 48 Cal. 482; Thurber v. Meves, 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536; Chester v. Jumel, 125 N. Y. 237, 26 N. E. 297, 2 Silv. Sup. Ct. 159, 5 N. Y. Supp. 809; Justice v. Justice and Goad v. Hart, supra; Gliddon v. McKinstry, 25 Ala. 246.

The will was defeated.

Century Dict. "Defeat;" 2 Co. Litt. Hargrave's ed. 236b, § 384; "Defeasance;" Comyn's Dig. "Defeasance;" Bouvier's Law Dict. "Defeasance;" Simmons v. West Virginia Ins. Co. 8 W. Va. 486.

If there had been any possible ground of dissatisfaction on the part of Colonel Ingersoll's clients as to the proceedings by which the will was defeated and their shares secured, it was waived. But there was none.

Swain v. Seamens, 9 Wall. 254, 19 L. ed. 554; Scott v. Jackson, 89 Cal. 258, 26 Pac. 898.

The right of Colonel Ingersoll's clients to share in the distribution of the estate of Andrew J. Davis, deceased, had to be established, if established at all, according to the law of his domicil.

Armstrong v. Lear, 8 Pet. 52, 8 L. ed. 863.

Their rights were established beyond all question according to the law of the domicil by the stipulations, proceedings, and decree determining the will contests, as affirmed by the highest court of the state.

Re Davis, 27 Mont. 237, 70 Pac. 721.

The rights so established will be given effect wherever said Andrew left estate.

Ennis v. Smith, 14 How. 400, 14 L. ed. 472; Armstrong v. Lear, supra; Wilkins v. Ellett, 9 Wall. 740, 19 L. ed. 586; Shannon v. White, 109 Mass. 146.

The decree determining the will contests prosecuted by Colonel Ingersoll, and mentioned in the contract with him, superseded and took the place of the will, and itself became the basis of administration, and controlling as to the devolution of the property of said estate; and further declared that said five heirs are, in effect, distributees of the estate.

Re Davis, supra.

Colonel Ingersoll's clients got their shares.

Ibid.; Goad v. Hart; Mackall v. Willoughby; and Gliddon v. McKinstry,—supra.

In the courts of chancery, executors and administrators are considered as trustees. And when an administrator or trustee is made party to a suit touching the trust estate, he represents the interests of each *cestui que trustent*, of whose interests he is presumed to have full knowledge.

Green v. Creighton (Kendall v. Creighton) 23 How. 90, 16 L. ed. 419; Wilkins v. Ellett, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641; Concoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 24 L. ed. 190; Richter v. Jerome, 123 U. S. 233, 31 L. ed. 132, 8 Sup. Ct. Rep. 106; Semmes v. Whitney, 50 Fed. 666.

It is, moreover, unnecessary to make the assignor of a thing party to a suit against the assignee touching the thing assigned.

Robertson v. Carson, 19 Wall. 94, 22 L. ed. 178; South Fork Canal Co. v. Gordon, 6 Wall. 561, 18 L. ed. 894; West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424; Fitch v. Creighton, 24 How. 159, 16 L. ed. 596.

It is not necessary to join in an action persons who have assigned, and disclaim any right to, the property or interests to which the action relates.

Fitch v. Creighton; Robertson v. Carson; and South Fork Canal Co. v. Gordon,—supra.

A court of equity has power to foreclose a lien on the interests of Coram and Root in

said funds and effects, although they are in the custody of an administrator.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; *Hook v. Payne*, 14 Wall. 252, 20 L. ed. 887; *Turwin v. Gibson*, 3 Atk. 719; *Green v. Creighton*, supra; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Wylie v. Cox*, 15 How. 415, 14 L. ed. 753; *Semmes v. Whitney*, supra; *Palmer v. Whitney*, 166 Mass. 306, 44 N. E. 229; *Davis v. Newton*, 6 Met. 537; *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. 11.

The circuit court had power to enjoin, as provided in its foreclosure decree in the case at bar, the delivery of the funds on which complainant's lien rests, to defendants.

Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *French v. Hay* (*French v. Stewart*) 22 Wall. 250, 22 L. ed. 857; *Phelps v. McDonald*, 99 U. S. 308, 25 L. ed. 476; *Hart v. Sansom*, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 586; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; *McDaniel v. Traylor*, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.* 198 U. S. 188, 49 L. ed. 1008, 25 Sup. Ct. Rep. 629.

The injunction clauses of the decree are framed strictly within the rules of law laid down in decisions of this court; and do not, in the slightest degree, interfere with the administration of said estate anywhere. *Ibid.*

The Federal courts have no original probate jurisdiction.

Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906; *Garzot v. Rios de Rubio*, 209 U. S. 283, 52 L. ed. 794, 28 Sup. Ct. Rep. 548.

A Federal court, exercising its equity jurisdiction in a proper case, may adjudicate, establish, protect, and enforce any equitable right in property in the hands of an administrator, where it may be done without taking possession of the estate, or interfering with the ordinary probate administration thereof.

Byers v. McAuley and Wylie v. Cox, supra.

Whatever equity jurisdiction has lately been vested by statute in the probate courts of Massachusetts must be exercised independently of their ordinary probate jurisdiction.

Sherman v. American Cong. Asso. 51 C. C. A. 329, 113 Fed. 609; *Bennett v. Kimball*, 175 Mass. 199, 55 N. E. 893; *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560.

The case at bar has in view the establishment of a lien on certain shares of funds and effects, which, although now in the hands of an administrator of an estate already settled, with the exception of possibly a few

minor details, as shown without dispute, will be distributed to the parties holden for the debt secured by that lien. The administrator is a necessary party for the purpose of the suit and to protect the lien on the shares in his hands subject thereto, which he will have for distribution to the parties holden for the debt secured by the lien. The lien can only be established and protected by a court of equity jurisdiction.

Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; *Fletcher v. Morey*, 2 Story, 555, Fed. Cas. No. 4,864; *Pinch v. Anthony*, 8 Allen, 536; *Hovey v. Elliott*, 118 N. Y. 124, 23 N. E. 475.

No probate court, as such, could adjudicate the question of debt and the existence of the lien involved in the case at bar.

Ferris v. Higley, 20 Wall. 375, 22 L. ed. 383.

If the probate court of Suffolk county, Massachusetts, is invested with any equity jurisdiction, it must be exercised separately from its probate jurisdiction, and is concurrent with that of other equity courts of Massachusetts, state and Federal.

Bennett v. Kimball and Green v. Gaskill, supra; *Sherman v. American Cong. Asso.* 51 C. C. A. 332, 113 Fed. 612.

Moreover, all equitable remedies provided by state laws to be administered by state courts possessing equity jurisdiction, for the protection and enforcement of an equitable right, interest, or lien in or upon property in the hands of an administrator, will be likewise administered by the Federal circuit court in that state, in a proper case belonging to the chancery jurisdiction. But no abridgment of the equity jurisdiction of the state courts by state law would restrict or impair the chancery jurisdiction of the Federal court sitting in that state.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; *Green v. Creighton* (*Kendall v. Creighton*) 23 How. 90, 16 L. ed. 419; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Bardon v. Land & River Improv. Co.* 157 U. S. 327, 39 L. ed. 719, 15 Sup. Ct. Rep. 650; *Rich v. Braxton*, 158 U. S. 405, 39 L. ed. 1032, 15 Sup. Ct. Rep. 1006; *Smyth v. Ames*, 169 U. S. 466, 516, 42 L. ed. 819, 838, 18 Sup. Ct. Rep. 418; *Byers v. McAuley*, supra.

A citizen of another state may establish a debt against the estate.

Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377.

In like manner, a distributee, citizen of another state, may establish his right to a share in the estate, and enforce such adjudication against the administrator personally, or his sureties (*Payne v. Hook*, supra)

or against any other parties subject to liability (*Borer v. Chapman*, 119 U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342), or in any other way which does not disturb the possession of the property by the state court.

Byers v. McAuley, 149 U. S. 620, 37 L. ed. 873, 13 Sup. Ct. Rep. 906.

The only qualification in the application of this principle is, that the courts of the United States, in the exercise of their jurisdiction over the parties, cannot seize or control property while in the custody of a court of the state.

Byers v. McAuley, 149 U. S. 617, 618, 37 L. ed. 872, 13 Sup. Ct. Rep. 906.

A controversy as to the existence of a debt and lien on property to secure it, or other equitable right in property in the hands of an administrator or executor, may be adjudicated and determined by a court of equity without seizing or taking actual possession of the property on which the lien rests.

Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; *McComb v. Frink*, 149 U. S. 629, 37 L. ed. 876, 13 Sup. Ct. Rep. 993; *Canfield v. Canfield*, 55 C. C. A. 169, 118 Fed. 1; *Richardson v. Green*, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423; *Van Bokkelen v. Cook*, 5 Sawy. 587, Fed. Cas. No. 16,831; *Snyder v. McComb*, 39 Fed. 292. See also *Semmes v. Whitney*, 50 Fed. 666; *Davis v. Newton*, 6 Met. 537; *Moses v. Murgatroyd*, 1 Johns. Ch. 119, 7 Am. Dec. 478; *Pierce v. Robinson*, 13 Cal. 116.

The courts are constantly adjudicating and establishing such rights without taking actual custody of funds or other personal property which is subject to the lien or other equitable right.

Hovey v. Elliott, supra; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Turwin v. Gibson*, 3 Atk. 719; *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439; *Moses v. Murgatroyd*; *Pierce v. Robinson*; and *Davis v. Newton*,—supra; *Marriot v. Marriot*, 1 Strange, 666, Gilbert, Eq. Rep. 203; *Semmes v. Whitney* and *Wylie v. Coxe*, supra; *Walker v. Brown*, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453.

The equity jurisdiction of the Federal circuit court, sitting in any state, is as extensive, speaking generally, as that of any court of such state. For besides the general chancery jurisdiction of the Federal court,—co-extensive with that of the English chancery,—if there be state law giving to its equity courts additional equitable remedies, the Federal court will also administer them in a proper case, lying within chancery cognizance.

Bardon v. Land & River Improv. Co.; *Gormley v. Clark*; *Holland v. Challen*; *Rich v. Braxton*; and *Smyth v. Ames*,—supra;

Cates v. Allen, 149 U. S. 431, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977.

The equity jurisdiction of the supreme judicial court of Massachusetts is entirely sufficient for the purposes of the relief sought by complainant and granted in the decree in the case at bar.

Ingersoll v. Coram, 127 Fed. 422; 1 Pom. Eq. Jur. 3d ed. p. 511, § 294; *Davis v. Newton*, supra; *Palmer v. Whitney*, 166 Mass. 306, 44 N. E. 229; *Maynard v. Cleaves*, 149 Mass. 307, 21 N. E. 376; *Forbes v. Lothrop*, 137 Mass. 523; *Snyder v. Smith*, 185 Mass. 58, 69 N. E. 1089; *Lenz v. Prescott*, 144 Mass. 515, 11 N. E. 928; *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. 11; *Re Angle*, 148 Cal. 102, 82 Pac. 668; *Saunders v. Strobel*, 64 S. C. 489, 42 S. E. 429; *Earle v. Grove*, 92 Mich. 285, 52 N. W. 615; *Lawson v. Virgin*, 21 Ga. 356; *Sayre v. Flournoy*, 3 Ga. 541; *Selman v. Milliken*, 28 Ga. 366; *Bennick v. Bennick*, 62 N. C. (Phill. Eq.) 45; *Napier v. Howard*, 3 Ga. 193; *Greer v. Simrall*, 22 Ky. L. Rep. 1037, 59 S. W. 759; *Cassady v. Grimmelman*, 108 Iowa, 695, 77 N. W. 1067; *Oppenheimer v. Collins*, 115 Wis. 283, 60 L.R.A. 406, 91 N. W. 690.

A Massachusetts court of equity would, as we have shown, apply the remedies which have been applied in the case at bar, to protect and enforce complainant's equitable right in the funds in the hands of the administrator, although they be in probate administration. So may the Federal circuit court, sitting in Massachusetts, apply the same equitable remedies to a case cognizable in chancery, even though it be an enlarged remedy given by statute.

Clark v. Smith, 13 Pet. 195, 203, 204, 10 L. ed. 123, 127; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Gormley v. Clark*, 134 U. S. 338, 33 L. ed. 909, 10 Sup. Ct. Rep. 554; *Holland v. Challen*, 110 U. S. 15, 28 L. ed. 52, 3 Sup. Ct. Rep. 495; *Bardon v. Land & River Improv. Co.*; *Rich v. Braxton*; *Smyth v. Ames*; and *Richardson v. Green*,—supra.

There is, moreover, direct statutory authority given to the United States circuit court to enforce any legal or equitable lien upon real or personal property within the district.

McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369.

The equity jurisdiction of the United States circuit court, for cases cognizable therein, is as complete and effective as that of any equity court in the land.

Harvey v. Richards, 1 Mason, 381, Fed. Cas. No. 6,184.

A court of equity will use the writ of injunction, and decree injunction provisions, to protect and enforce a lien on funds or

other property which might be put beyond the reach of the lien holder.

Pom. Eq. Jur. § 1339; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Milnor v. Metz, 16 Pet. 221, 10 L. ed. 943; Dulaney v. Scudder, 36 C. C. A. 52, 94 Fed. 6; 3 Pom. Eq. Jur. §§ 1339, 1340; Phelps v. McDonald, 99 U. S. 298, 308, 25 L. ed. 473, 476; McKinney v. Curtiss, 60 Mich. 611, 27 N. W. 691; Sherman v. American Stove Co. 85 Mich. 169, 48 N. W. 537; Alexander Smith & Sons Carpet Co. v. Skinner, 91 Hun, 641, 36 N. Y. Supp. 1000; Lewis v. Dodge, 17 How. Pr. 229; Keller v. Payne, 22 Abb. N. C. 352, note, 1 N. Y. Supp. 148; Hendricks v. Morrill, 3 Silv. Sup. Ct. 21, 6 N. Y. Supp. 254; Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Williams v. Ingersoll, 89 N. Y. 508; Hovey v. Elliott, 118 N. Y. 124, 23 N. E. 475.

The United States circuit court, by statute, has jurisdiction to foreclose the lien, even if it had not personal jurisdiction over the defendants.

McDaniel v. Traylor, 196 U. S. 417, 49 L. ed. 535, 25 Sup. Ct. Rep. 369.

With the parties before the court in person, having appeared, answered, and submitted their claims to the court for adjudication without objection as to the district in which the suit was brought, the court had jurisdiction *in personam* for all purposes, and for all relief which the cause and facts warrant.

Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706; French v. Hay (French v. Stewart) 22 Wall. 250, 22 L. ed. 857; Watts v. Waddle, 6 Pet. 391, 8 L. ed. 438; Phelps v. McDonald, 99 U. S. 308, 25 L. ed. 476; Cole v. Cunningham, *supra*; Lewis v. Darling, 16 How. 1, 14 L. ed. 819.

The circuit court has jurisdiction to foreclose a lien on personal property in the hands of a third person, and to protect the equitable rights of the lienor, as owner of a beneficial interest in the property, entitled to the enjoyment of the specific fruits.

Hauselt v. Harrison and Phelps v. McDonald, *supra*.

The circuit court, in a case where the citizenship of parties entitles the complainant to come into that court, has jurisdiction in equity to ascertain, determine, and enforce the right of an heir, devisee, or legatee, in estate property in the hands of an administrator (Payne v. Hook, 7 Wall. 425, 19 L. ed. 260), and may construe a will, or declare a trust created by a writing which falls short of a will, and determine and enforce the rights of an heir, devisee, legatee, or *cestui que trustent*, in the estate property in the hands of an administrator, in the course of probate administration (Byers v. 53 L. ed.

McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906); or may enforce the right of an assignee of a distributive share or part thereof in the hands of an administrator or executor (*per* Mr. Justice Washington, in Mayer v. Foulkrod, 4 Wash. C. C. 349, Fed. Cas. No. 9,341); or declare a will admitted to probate by a state court void, and determine and enforce the rights of an heir where, by the state law, its courts of equity have jurisdiction to determine the validity of the will (Gaines v. Fuentes, *supra*; Richardson v. Green, 9 C. C. A. 565, 15 U. S. App. 488, 61 Fed. 423). The circuit court has jurisdiction to correct frauds or mistakes of an administrator with respect to disposition of estate property, though his acts have been sanctioned by order of the state probate court; and has jurisdiction to compel executors and administrators to account and distribute the assets in their hands.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Dodd v. Ghiselin, 27 Fed. 405; Sullivan v. Andoe, 4 Hughes, 290, 6 Fed. 641.

And there can be no doubt that an administrator invested with the apparent right to receive or recover by suit, property or money, may be compelled to deliver or pay it over to someone who established a better right, or that what was so recovered was held in trust for someone not claiming under the will or under the administrator.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439.

The United States circuit court has jurisdiction to foreclose an attorney's equitable lien on funds in the hands of an administrator in the court of probate administration.

Wylie v. Coxe, 15 How. 415, 14 L. ed. 753; Semmes v. Whitney, 50 Fed. 666.

The executor or administrator of either person entitled to share in the trust fund could sue Leyson in the United States circuit court, and have his share determined, if his citizenship and that of Leyson's permitted.

Mayer v. Foulkrod, *supra*.

When a court of equity takes jurisdiction by reason of the equitable right or interest involved, it will adjudicate and determine all matters necessary to grant complete relief, notwithstanding it relates to property in the hands of an administrator.

Payne v. Hook, *supra*.

The present suit is not to enforce the contents of a promissory note or other chose in action, against Leyson. It is to enforce a lien on funds in Leyson's hands. But if complainant were suing citizens of other states to enforce the contents of a chose in action, the title to which had devolved upon her by operation of law, as by appointment

as administratrix, she could prosecute such suit in the Federal court even if her intestate could not have prosecuted a suit "in such court to recover the said contents."

Mayer v. Foulkrod, *supra*; Chappedelaine v. Dechenaux, 4 Cranch, 306, 308, 2 L. ed. 629, 630; Sere v. Pitot, 6 Cranch, 333, 3 L. ed. 240; Bushnell v. Kennedy, 9 Wall. 387, 19 L. ed. 736; Childress v. Emory, 8 Wheat. 643, 3 L. ed. 705; Rice v. Houston, 13 Wall. 66, 20 L. ed. 484; New Orleans v. Gaines (New Orleans v. Whitney) 138 U. S. 595, 34 L. ed. 1102, 11 Sup. Ct. Rep. 428; Glass v. Coneordia Parish, 176 U. S. 207, 44 L. ed. 436, 20 Sup. Ct. Rep. 346; Mayer v. Foulkrod, *supra*.

An attorney's equitable lien to secure his compensation for contesting a will on behalf of an heir has been foreclosed on the share of each heir in a fund arising from came to him by reason of defeating the will.

Justice v. Justice, 115 Ind. 201, 16 N. E. 615.

A court of equity will determine the share of each heir in a fund arising from the sale of estate property made under order of the county court, because the county court has only a summary jurisdiction given by the statute, and has no authority to grant relief as a court of equity.

Shaw v. Shaw, 4 Cranch, C. C. 715, Fed. Cas. No. 12,724.

The equity court will not only determine the share of each heir in such fund, but will charge each share with its proper equitable burden which arose or accrued by act of the owner thereof in favor of other parties to the action, entitled to such relief.

Ibid.

The court of equity will adjudicate, adjust, and determine all rights and interests of the parties properly before it, in or to such estate property, however complicated the same may be, and notwithstanding the fund or property is under the jurisdiction of the county court for certain administrative purposes prescribed by statute.

Ibid.

The court of equity will grant injunction against the custodians to stay the money and bonds in their hands until the further order of the court.

Ibid.

A court of equity has jurisdiction to, and will, determine, and cause to be distributed, the share of a single heir or distributee of estate property, in an administrator's hands. In order to do that the court may, and will, when necessary, require accounting by the administrator; and will also ascertain and apply foreign law governing the succession.

Harvey v. Richards, 1 Mason, 381, Fed. Cas. No. 6,184.

And the court will determine the legitimacy of the claim of heirship.

Harvey v. Richards, 2 Gall. 555, Fed. Cas. No. 6,183; Canfield v. Canfield, 118 Fed. 1, 55 C. C. A. 169; Sullivan v. Andoe, 4 Hughes, 290, 6 Fed. 641.

Those things will be done by a court of equity while the probate administration of the estate is in progress, and regardless of what may have been done or sanctioned by the probate court.

Sullivan v. Andoe, *supra*; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Hook v. Payne, 14 Wall. 252, 20 L. ed. 887.

An executor and administrator is the trustee and proper representative of all persons interested in the personal estate; . . . consequently, when he is made a party to the bill filed by a distributee to sell the personal property of an estate and divide its proceeds, the other distributees are not necessary parties.

Alston v. Cohen, 1 Woods, 487, Fed. Cas. No. 265; Green v. Creighton (Kendall v. Creighton) 23 How. 90, 16 L. ed. 419; Payne v. Hook and Hook v. Payne, *supra*; Wormley v. Wormley, 8 Wheat. 422, 5 L. ed. 651; Harvey v. Richards, *supra*; West v. Randall, 2 Mason, 181, Fed. Cas. No. 17,424; Van Bokkelen v. Cook, 5 Sawy. 587, Fed. Cas. No. 16,831.

Courts of equity have jurisdiction to search out from among the personal assets of an estate, in the hands of an administrator for probate administration, that which belongs to a trust, determine the amount of it, and take the trust property away from the administrator, creditors, and succession, and deliver it to the *cestui que trustent*.

McComb v. Frink, 149 U. S. 629, 37 L. ed. 876, 13 Sup. Ct. Rep. 993; Walker v. Walker (Walker v. Beal) 9 Wall. 743, 19 L. ed. 814; Moses v. Murgatroyd, 1 Johns. Ch. 119, 7 Am. Dec. 478; Pierce v. Robinson, 13 Cal. 116.

An equity court has jurisdiction to, and in a proper case will, determine what share of an unsettled and undistributed estate in the hands of an administrator an individual heir or distributee is entitled to, in order to subject that share to the debt of the heir or distributee; and to that end the equity court will restrain by injunction the administrator or executor from delivering such share to the heir or distributee.

Ricketson v. Merrill, 148 Mass. 76, 19 N. E. 11; Earle v. Grove, 92 Mich. 285, 52 N. W. 615; McKinney v. Curtiss, 60 Mich. 611, 27 N. W. 691; Napier v. Howard, 3 Ga. 193; Lawson v. Virgin, 21 Ga. 356; Selman v. Milliken, 28 Ga. 366; Bennick v. Bennick, 62 N. C. (Phill. Eq.) 45; Greer v. Simrall,

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22 Ky. L. Rep. 1037, 59 S. W. 759; Cassady v. Grimmelman, 108 Iowa, 695, 77 N. W. 1067; Oppenheimer v. Collins, 115 Wis. 283, 60 L.R.A. 406, 91 N. W. 690.

A court of equity will also determine the share of an heir or distributee in property of an unsettled estate in the hands of an administrator, in order to enforce the right of an assignee of the share, or part of the share, of such distributee, in the estate property.

Green v. Creighton, *supra*; Mayer v. Foulkrod, 4 Wash. C. C. 349, Fed. Cas. No. 9,341; Davis v. Newton, 6 Met. 537; Lenz v. Prescott, 144 Mass. 515, 11 N. E. 923; Re Angle, 148 Cal. 102, 82 Pac. 668; Saunders v. Strobel, 64 S. C. 489, 42 S. E. 429.

The court, exercising its equity jurisdiction to enforce an attorney's equitable lien, will not only determine the share of an heir in estate property, acquired for him by contesting a will, which stood in the way of his right to share in the estate (Justice v. Justice, 115 Ind. 201, 16 N. E. 615), but will, by injunction, protect and enforce the attorney's equitable lien (Wylie v. Cox, 15 How. 415, 14 L. ed. 753; Key v. Bank of United States, 1 Hayw. & H. 74, Fed. Cas. No. 7,746). And an administrator will be enjoined from delivering estate property to others where it is necessary to protect an attorney's equitable lien, or other equitable right or interest, in or upon funds or other property in his hands.

Wylie v. Cox; Lenz v. Prescott; Ricketson v. Merrill; Earle v. Grove; McKinney v. Curtiss; Lawson v. Virgin; and Selman v. Milliken,—*supra*.

Where a claim for services rendered by an attorney may be defeated by an assignment of the fund on which such claim is an equitable lien, the court will enjoin the payment of the claim, without the consent of the complainant.

Key v. Bank of United States, *supra*.

The paramount efficacy of the decree in the case at bar—more important than any other part of the relief—is the establishment of the equitable right of complainant to have her lien satisfied out of the portion of said money and bonds owned by Coram and Root, in this case, where they and the administrator and all parties interested in the portion of the estate decreed to Colonel Ingersoll's clients are present before the circuit court in person, except Cornue, who is also represented by the administrator. Complainant's right is thereby established on as solid footing as the right of Coram and Root, in the money and bonds in question. Her right, thus established, will have the same protection as theirs, and must be given effect whenever and wherever the shares of Root and Coram are to be passed over to them or

their legal representatives or assigns. That is sufficient with respect to such affairs.

Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Phelps v. McDonald, 99 U. S. 298, 308, 25 L. ed. 473, 476; French v. Hay (French v. Stewart) 22 Wall. 250, 22 L. ed. 857; Wylie v. Cox, *supra*; Mcdaugh v. Wilson, 151 U. S. 333, 38 L. ed. 183, 14 Sup. Ct. Rep. 356; Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405; Canfield v. Canfield, 55 C. C. A. 169, 118 Fed. 1; Dulaney v. Scudder, 36 C. C. A. 52, 94 Fed. 6; Mahone v. Southern Teleg. Co. 33 Fed. 702; Frink v. McComb, 60 Fed. 486; Semmes v. Whitney, 50 Fed. 666; Davis v. Newton and Ricketson v. Merrill, *supra*; Hovey v. Elliott, 118 N. Y. 124, 23 N. E. 475; Rooney v. Second Ave. R. Co. 18 N. Y. 368; Earle v. Grove, 92 Mich. 285, 52 N. W. 615; McKinney v. Curtiss, 60 Mich. 611, 27 N. W. 691; Justice v. Justice, 115 Ind. 201, 16 N. E. 615; Stratton v. Hussey, 62 Me. 286; Renick v. Ludington, 16 W. Va. 378; Pierce v. Robinson, 13 Cal. 116; Moses v. Murgatroyd, 1 Johns. Ch. 119, 7 Am. Dec. 478; Welsh v. Hole, 1 Dougl. K. B. 238; Ormerod v. Tate, 1 East, 464; Read v. Dupper, 6 T. R. 361; Turwin v. Gibson, 3 Atk. 719.

The English chancery jurisdiction, as exercised when our state and national governments were formed, had a direct and controlling effect upon the administration and disposition of estate property. This is shown in the part it took in the construction of wills, enforcing payment of legacies and distributive shares of estates to heirs of an intestate, and in other ways protecting their interests as well as that of the creditors.

Fonbl. Eq. 1835 Am. ed. pp. 524, 525; 1 Spence, Eq. Jur. 579, 582.

Mr. Louis D. Brandeis argued the cause, and, with Mr. William H. Dunbar, filed a brief for respondents:

An equitable lien is not created by a promise to pay from a specified fund, unaccompanied by some sort of assignment.

Wright v. Ellison, 1 Wall. 16, 17 L. ed. 555; Christmas v. Russell (Christmas v. Gaines) 14 Wall. 69, 20 L. ed. 762; Trist v. Child (Burke v. Child) 21 Wall. 441, 22 L. ed. 623; Dillon v. Barnard, 21 Wall. 430, 22 L. ed. 673; Removal Cases, 100 U. S. 457, 25 L. ed. 593; Ex parte Tremont Nail Co. Fed. Cas. No. 14,168; Re Butler, 44 C. C. A. 584, 105 Fed. 549; Strang v. Richmond, P. & C. R. Co. 41 C. C. A. 474, 101 Fed. 511; Columbus, S. & H. R. Co.'s Appeal, 109 Fed. 197; Cushing v. Chapman, 115 Fed. 237; Boyle v. Boyle, 116 Fed. 764; Bradley's Case,

Ridgeway, t. Hardw. 194; Newell v. West, 149 Mass. 520, 21 N. E. 954; Rogers v. Hossack, 18 Wend. 319; Williams v. Ingersoll, 89 N. Y. 508; Cameron v. Boeger, 200 Ill. 84, 93 Am. St. Rep. 165, 65 N. E. 690; Silent Friend Min. Co. v. Abbot, 7 Colo. App. 73, 42 Pac. 318; Story v. Hull, 143 Ill. 506, 32 N. E. 265; Ford v. Garner, 15 Ind. 298; Seymour v. Aultman, 109 Iowa, 297, 80 N. W. 401; Phillips v. Hogue, 63 Neb. 192, 88 N. W. 180; Thomas v. New York & G. L. R. Co. 139 N. Y. 163, 34 N. E. 877; Christmas v. Griswold, 8 Ohio St. 558; Commercial Nat. Bank v. Portland, 37 Or. 33, 54 Pac. 814, 60 Pac. 563; Eib v. Martin, 5 Leigh, 132; Hicks v. Roanoke Brick Co. 94 Va. 741, 27 S. E. 596; Hossack v. Graham, 20 Wash. 184, 55 Pac. 36.

None of the acts set out in the bill of complaint, done after Colonel Ingersoll's death, created a lien.

Christmas v. Russell and Re Butler, supra; Re Lucan, L. R. 45 Ch. Div. 470; Addison v. Enoch, 48 App. Div. 111, 62 N. Y. Supp. 613, affirmed in 168 N. Y. 658, 61 N. E. 1127.

The authorities cited by the petitioner do not support the contention that an equitable lien exists. Examination of those cases shows that they do not support this proposition, but belong to one or another of several classes of wholly distinct cases.

Cases in which a court directs payment of counsel fees from a fund in its possession:

Cowdrey v. Galveston, H. & H. R. Co. 93 U. S. 352, 23 L. ed. 950; Central R. & Bkg. Co. v. Pettus, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387; Meddaugh v. Wilson, 151 U. S. 333, 359, 38 L. ed. 183, 191, 14 Sup. Ct. Rep. 356; Frink v. McComb, 60 Fed. 486; United States v. Boyd, 79 Fed. 858; Burden Cent. Sugar Ref. Co. v. Ferris Sugar Mfg. Co. 31 C. C. A. 233, 58 U. S. App. 166, 87 Fed. 810; Tuttle v. Clafin, 31 C. C. A. 419, 59 U. S. App. 602, 88 Fed. 122; Elk Fork Oil & Gas Co. v. Foster, 39 C. C. A. 615, 99 Fed. 495; Andrews v. Morse, 12 Conn. 444, 31 Am. Dec. 752; Abend v. Endowment Fund Commission, 174 Ill. 96, 50 N. E. 1052; Justice v. Justice, 115 Ind. 201, 16 N. E. 615; Weeks v. Wayne Circuit Judges, 73 Mich. 256, 41 N. W. 269; McKelvy's Appeal, 108 Pa. 615; Potter v. Ajax Min. Co. 19 Utah, 421, 57 Pac. 270; Gregory v. Pike, 15 C. C. A. 33, 21 U. S. App. 658, 33 U. S. App. 76, 67 Fed. 843; Louisville, E. & St. L. R. Co. v. Wilson, 138 U. S. 501, 34 L. ed. 1023, 11 Sup. Ct. Rep. 405.

Cases of statutory liens:

Semmes v. Whitney, 50 Fed. 666.

Cases of equitable lien created by assignment or transfer:

De Chambrun v. Cox, 9 C. C. A. 86, 20 U.

S. App. 347, 60 Fed. 471, Chester v. Jumel, 125 N. Y. 237, 26 N. E. 297; Dowell v. Cardwell, 4 Sawy. 217, Fed. Cas. No. 4,039; Commercial Bank v. Rufe, 92 Fed. 789; Holmes v. Evans, 129 N. Y. 140, 29 N. E. 233; Lanigan v. Bradley & C. Co. 50 N. J. Eq. 201, 24 Atl. 505.

The will of Andrew J. Davis, unaffected by any decree carrying out the compromise agreement, was admitted to probate in Massachusetts, and remains the only authority by which to determine the disposition to be made of the estate of the deceased in Massachusetts. The decree of the court in Montana, giving effect to the compromise agreements, was not filed with the will, but only at a subsequent hearing; the decree actually filed with the will was entitled to no effect and has received none. The court in Montana cannot direct how the estate in Massachusetts shall be disposed of. Whatever the administrator in Massachusetts does as to the estate there, under the direction or by authority of the probate court, or of the laws of the state, is binding, and he cannot be held to account in Montana for the property so disposed of.

Boston v. Boylston, 2 Mass. 384; Clark v. Blackington, 110 Mass. 369; Cowden v. Jacobson, 165 Mass. 240, 43 N. E. 98; Holcomb v. Phelps, 16 Conn. 127.

If the will had been admitted to probate in Montana, and had not been admitted to probate in Massachusetts, the property in the latter state would have been distributed as intestate property, and persons claiming under the will could not have recovered the property so distributable.

Walton v. Hall, 66 Vt. 455, 29 Atl. 803.

Upon a distribution according to the will, all the property in Massachusetts would go to John A. Davis, the residuary legatee. John A. Davis died in 1893. No administrator of his estate has been appointed in Massachusetts. No administrator appointed elsewhere could act as to his estate in Massachusetts. His next of kin did not acquire any direct right to his property, entitling them to collect it. The personal property of a decedent vests in the executor or administrator, and not in the next of kin.

Lawrence v. Wright, 23 Pick. 128.

If a legatee dies before receiving his legacy, the next of kin cannot recover it. The legacy belongs to the legal representatives of the deceased legatee.

Clapp v. Stoughton, 10 Pick. 463.

Even if there are no debts, and but a single person entitled as next of kin, such person cannot dispose of any of the property, and, therefore, cannot give a valid receipt for it. The right of the next of kin is absolutely limited to requiring an adminis-

trator to collect and account for the property.

Pritchard v. Norwood, 155 Mass. 539, 30 N. E. 80; *Flynn v. Flynn*, 183 Mass. 365, 67 N. E. 314.

These principles are elementary in the law of administration of decedents' estates, and are universally recognized.

Duchesse d'Auxy v. Soutter, 35 Fed. 809; *Gardner v. Gantt*, 19 Ala. 666; *Dugger v. Tayloe*, 60 Ala. 504; *Costephens v. Dean*, 69 Ala. 385; *Hickox v. Frank*, 102 Ill. 660; *Alexander v. Stewart*, 8 Gill & J. 226; *Downing v. Porter*, 9 Mass. 386; *Taylor v. Brooks*, 20 N. C. 273 (4 Dev. & B. L. 139); *Bradford v. Felder*, 2 M'Cord, Eq. 168; *Kaminer v. Hope*, 9 S. C. 253; *Strickland v. Bridges*, 21 S. C. 21; *Stills v. Harmon*, 7 Cush. 406.

The appellant has founded her case upon rights assumed to have been acquired by the defendants to share directly in the fund in Massachusetts. She cannot now ask relief upon the basis of an indirect right in the defendants to receive from the next of kin of John A. Davis what the latter may get, either from an administrator of John A. Davis's estate, appointed in Massachusetts, or from a distribution by the Montana court in case the fund is transmitted. There are no allegations in the bill to support such a claim, and her right to relief must be determined by the case she has stated.

Eyre v. Potter, 15 How. 42, 14 L. ed. 592; *Grosholz v. Newman*, 21 Wall. 481, 22 L. ed. 471; *Andrews v. Farnham*, 10 N. J. Eq. 91; *Stucky v. Stucky*, 30 N. J. Eq. 546.

The doctrine that personal property has a situs only at the domicil of the owner is a rule of convenience that never applied to the question of situs for purposes of administration, and that, for all purposes, is limited in its scope. The actual situs of tangible personal property is recognized wherever it becomes practically important.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 22, 35 L. ed. 613, 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876.

The same is true of intangible personal property. Even for purposes of taxation, debts due by residents to nonresidents may be recognized as property of the creditor within the jurisdiction where the debtor is found.

State Assessors v. Comptoir National d'Escompte, 191 U. S. 388, 48 L. ed. 232, 24 Sup. Ct. Rep. 109.

This does not rest upon the ground that, if notes have been given, the physical presence of the notes determines the situs of the debt; for the physical presence in one state of notes made by citizens of another state, payable to the citizen of a third state, 53 L. ed.

does not warrant taxation where the notes are found.

Buck v. Beach, 206 U. S. 392, 51 L. ed. 1106, 27 Sup. Ct. Rep. 712.

For all practical purposes the presence of the debtor within a state establishes the existence of property of the creditor within that state.

By garnishment process such a debt may be seized at the domicil of the debtor, and applied to the satisfaction of the claim of a nonresident creditor; such seizure must be recognized and given effect in other jurisdictions.

Chicago, R. I. & P. R. Co. v. Sturm, 174 U. S. 710, 43 L. ed. 1144, 19 Sup. Ct. Rep. 797.

Upon the death of the creditor, the situs of the debt for purposes of dealing with it as property is recognized as at the domicil of the debtor, precisely as if the debt were a chattel.

Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277.

It has never been seriously doubted that, for purposes of founding administration, a debt constitutes assets of the deceased at the domicil of the debtor.

Wyman v. Halstead (*Wyman v. United States*) 109 U. S. 654, 656, 27 L. ed. 1068, 1069, 3 Sup. Ct. Rep. 417; *Cunnius v. Reading School Dist.* 198 U. S. 458, 467, 49 L. ed. 1125, 1129, 25 Sup. Ct. Rep. 721, 3 A. & E. Ann. Cas. 1121; *New England Mut. L. Ins. Co. v. Woodworth*, 111 U. S. 138, 28 L. ed. 379, 4 Sup. Ct. Rep. 364; *Murphy v. Creighton*, 45 Iowa, 179; *Moore v. Jordan*, 36 Kan. 271, 59 Am. Rep. 550, 13 Pac. 337; *McIlvoy v. Alsop*, 45 Miss. 365; *Re Ames*, 52 Mo. 290; *Church v. Church*, 78 Vt. 360, 63 Atl. 228; *Walton v. Hall*, 66 Vt. 455, 29 Atl. 803.

The ancillary administrator does not derive his power over assets within the jurisdiction of his appointment from any act on the part of the principal administrator. His authority is derived from the power which appoints him,—the state within whose jurisdiction the property which he is to administer is situated. Indeed, the appointment of an ancillary administrator may precede the appointment of a principal administrator or executor.

Bowdoin v. Holland, 10 Cush. 17.

By virtue of his appointment, an ancillary administrator acquires power to deal with the assets within his jurisdiction.

Payment of a debt to him by a person at the time within the jurisdiction of the ancillary appointment is valid.

Wilkins v. Ellett, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641; *New England Mut. L. Ins. Co. v. Woodworth*, supra.

An ancillary administrator may bring suit

against persons within his jurisdiction, to collect simple contract debts due the deceased, without requiring or receiving any assignment or authority from the principal administrator.

New England Mut. L. Ins. Co. v. Woodworth, *supra*; Equitable Life Assur. Soc. v. Brown, 187 U. S. 308, 47 L. ed. 190, 23 Sup. Ct. Rep. 123; Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; Pinney v. McGregory, 102 Mass. 186; Sulz v. Mutual Reserve Fund Life Asso. 145 N. Y. 563, 28 L.R.A. 379, 40 N. E. 242; Fox v. Carr, 16 Hun, 434; Traflet v. Empire L. Ins. Co. 64 N. J. L. 387, 46 Atl. 204.

So far as property in a foreign jurisdiction is concerned, the domiciliary administrator has no right nor title that can conflict with the title of the ancillary administrator.

Bowdoin v. Holland, 10 Cush. 18.

The presence in New York of the letter of August 17, 1891, is immaterial.

Blackstone v. Miller, 188 U. S. 189, 206, 47 L. ed. 439, 445, 23 Sup. Ct. Rep. 277; Buck v. Beach, 206 U. S. 392, 403, 51 L. ed. 1106, 1112, 27 Sup. Ct. Rep. 712; New England Mut. L. Ins. Co. v. Woodworth, 111 U. S. 138, 145, 28 L. ed. 379, 381, 4 Sup. Ct. Rep. 364.

The authorized act of an ancillary administrator as to property of the intestate within his jurisdiction is binding everywhere.

If an ancillary administrator, in the course of his administration, and in accordance with the local law, sells property of the estate situated within the jurisdiction, the title of the purchaser is not open to attack elsewhere.

Holcomb v. Phelps, 16 Conn. 127; Wells v. Wells, 35 Miss. 638; Walton v. Hall, *supra*.

If a debtor within the jurisdiction of an ancillary administrator's appointment pays to him a debt due the estate, such payment is a valid discharge from all liability there or elsewhere.

Slocum v. Sanford, 2 Conn. 533; Stevens v. Gaylord, 11 Mass. 256.

If an ancillary administrator, under the authority of his appointment, brings suit upon a claim in favor of the estate, and against a person within the jurisdiction, and recovers judgment, that judgment is a merger of the claim, and no suit can thereafter be brought upon the same claim in that jurisdiction or elsewhere; and the ancillary administrator can, in his own name, sue to enforce the judgment in any other jurisdiction without the necessity of taking out administration there.

Biddle v. Wilkins, 1 Pet. 686, 693, 7 L. 220

ed. 315, 318; Wilkins v. Ellett, *supra*; Tal-
mage v. Chapel, 16 Mass. 71.

An administrator *de bonis non* takes the title of the deceased in succession to the preceding administrator.

United States, use of Wilson v. Walker, 109 U. S. 258, 261, 27 L. ed. 927, 928, 3 Sup. Ct. Rep. 277; Waterman v. Dockray, 78 Me. 139, 3 Atl. 49.

There is no privity of estate between him and his predecessor, but whatever the predecessor has lawfully done as to that property which passes to the administrator *de bonis non* is binding on the latter.

Bell v. Speight, 11 Humph. 451; Eckert v. Triplett, 48 Ind. 174, 17 Am. Rep. 735; Benson v. Rice, 2 Nott & M'C. 577.

If a claim has become barred by the statute of limitation against an original administrator, the administrator *de bonis non* is equally barred.

Wych v. East India Co. 3 P. Wms. 309; Heard v. Meader, 1 Me. 156.

In the case of succeeding trustees, there is the same absence of privity in any legal sense; but the holding and administration of property by trustees would become impossible if, whenever a new trustee was appointed, the acts of his predecessor in the lawful administration of his trust could be ripped up.

The rule is the same in the case of successive receivers. A receiver appointed in supplementary proceedings, who brings suit, is barred by the result of a former suit, brought by a former receiver.

Verplanck v. Van Buren, 76 N. Y. 247.

In the case of ancillary receivers an act done by one is binding, so far as it affects property within his jurisdiction, upon the principal and all other ancillary receivers of the same estate.

Reynolds v. Stockton, 140 U. S. 254, 272, 35 L. ed. 464, 470, 11 Sup. Ct. Rep. 773.

Every administrator acts in a purely representative capacity as trustee or agent for the creditors and next of kin as to matters within his jurisdiction.

Yonley v. Lavender, 21 Wall. 276, 280, 22 L. ed. 536, 538; Tate v. Norton, 94 U. S. 746, 752, 24 L. ed. 222, 224; Cowen v. Adams, 24 C. C. A. 198, 47 U. S. App. 439, 78 Fed. 544; Blood v. Kane, 130 N. Y. 514, 15 L.R.A. 490, 29 N. E. 994.

Whatever the agent or trustee does within the scope of his authority is binding upon his principal or *cestui que trust*.

Meeks v. Olpherts, 100 U. S. 564, 25 L. ed. 735.

If a suit is brought against the administrator, the judgment recovered cannot, so far as the property within that jurisdiction is concerned, be attacked by the creditors or next of kin.

Pickens v. Yarborough, 30 Ala. 408; *Morris v. Murphey*, 95 Ga. 307, 51 Am. St. Rep. 81, 22 S. E. 635; *Fraser v. Charleston*, 19 S. C. 384.

A suit brought by an ancillary administrator is subject to the same principle as an act done touching tangible property.

Reynolds v. Stockton, *supra*.

A judgment in favor of an administrator on a cause of action belonging to the estate indisputably produces a merger; thereafter there can be no recovery except in an action on the judgment.

Biddle v. Wilkins, 1 Pet. 686, 7 L. ed. 315.

A cause of action may be merged as effectually and in the same sense legally by a judgment for the defendant as by a judgment for the plaintiff.

Sweet v. Brackley, 53 Me. 346; *Weeks v. Harriman*, 65 N. H. 91, 4 L.R.A. 744, 23 Am. St. Rep. 21, 18 Atl. 87.

If, by the laws of Montana, an administrator appointed in New York had been able to sue without ancillary appointment, as is the law in some states, and the plaintiff had herself prosecuted the suit to the end without the intervention of Harris, it is clear that she could not afterwards have sued on the same cause of action in New York. The judgment would have been binding upon her as principal administratrix.

Lawrence v. Nelson, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440.

If an administrator, having the right to do so, has brought suit, the result of that suit must be final.

Reynolds v. Stockton, *supra*; *Sulz v. Mutual Reserve Fund Life Assn.* 145 N. Y. 563, 28 L.R.A. 379, 40 N. E. 242; *Merrill v. New England Mut. L. Ins. Co.* 103 Mass. 245, 4 Am. Rep. 548; *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337; *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 522; *Carpenter v. Strange*, 141 U. S. 87, 35 L. ed. 640, 11 Sup. Ct. Rep. 960; *Taylor v. Barron*, 35 N. H. 484; *Brown v. Fletcher*, 146 Mich. 401, 15 L.R.A.(N.S.) 632, 123 Am. St. Rep. 233, 109 N. W. 686; *Cherry v. Speight*, 28 Tex. 503; *Carrigan v. Semple*, 72 Tex. 306, 12 S. W. 178; *Schouler, Exrs. & Admsrs.* 3d ed. § 178; *Black, Judgm.* 2d ed. § 922.

So far as the compromise agreement was the contract of the next of kin, it cannot be enforced in this suit without joining them as parties. The right of the widow and next of kin was only a chose in action.

Hayward v. Hayward, 20 Pick. 517; *Wheeler v. Bowen*, 20 Pick. 563; *Strong v. Smith*, 1 Met. 476; *Mechanics' Sav. Bank v. Waite*, 15 Mass. 234, 22 N. E. 915.

The right assigned could be enforced only
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through the assignors. The assignment did not undertake to transfer the whole interest of the widow and next of kin. The assignee could not, therefore, require a separate payment, but must take satisfaction through the assignors.

Mandeville v. Welch, 5 Wheat. 277, 288, 289, 5 L. ed. 87, 90, 91.

The assignment being only of a part of the chose in action, the only rights acquired were dependent on the contract. There was no completed transfer.

Re Lucan, L. R. 45 Ch. Div. 470.

The determination of the rights under the contract, and the agreement of payment in favor of the assignees of part of the amount, requires, on the most liberal views of equity pleading, the presence of the assignors.

Hovey v. Elliott, 118 N. Y. 124, 23 N. E. 475.

The circuit court had no authority to interfere with the administration of the estate by the probate court for Suffolk county.

Yonley v. Lavender, 21 Wall. 276, 22 L. ed. 536; *Borer v. Chapman*, 119 U. S. 587, 600, 30 L. ed. 532, 537, 7 Sup. Ct. Rep. 342; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

The circuit court in adjudicating Root's interest in the property, exceeded its jurisdiction.

Byers v. McAuley, *supra*; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 173, 20 L. ed. 179; *Broderick's Will* (*Kieley v. McGlynn*) 21 Wall. 503, 22 L. ed. 509; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727; *Corbin v. Black Hawk County*, 105 U. S. 659, 26 L. ed. 1136.

The orders of the circuit court as to the distribution of the property were an interference with the jurisdiction of the probate court.

Whitney v. Wilder, 4 C. C. A. 510, 13 U. S. App. 180, 54 Fed. 554; *Evans v. Gorman*, 115 Fed. 399; *Chicago Trust & Sav. Bank v. Bentz*, 59 Fed. 645; *Foster v. Bank of Abingdon*, 68 Fed. 723; *Watson v. Jones*, 13 Wall. 679, 20 L. ed. 666; *Hale v. Coffin*, 57 C. C. A. 528, 120 Fed. 470; *Sherman v. American Cong. Assn.* 51 C. C. A. 329, 113 Fed. 609.

The decree seeks to give the order of the court extraterritorial effect.

Emery v. Batchelder, 132 Mass. 452; *Vaughan v. Northrup*, 15 Pet. 1, 5, 10 L. ed. 639, 640.

The court cannot entertain such a suit unless there is a *res* of which it can take jurisdiction,

Robertson v. Carson, 19 Wall. 94, 22 L. ed. 178; McBurney v. Carson, 99 U. S. 567, 25 L. ed. 378; Goodman v. Niblack, 102 U. S. 556, 26 L. ed. 229; New York L. Ins. Co. v. Bangs, 103 U. S. 435, 26 L. ed. 580; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 33 L. ed. 178, 9 Sup. Ct. Rep. 781; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Greeley v. Lowe, 155 U. S. 58, 39 L. ed. 69, 15 Sup. Ct. Rep. 24; Dick v. Foraker, 155 U. S. 404, 39 L. ed. 201, 15 Sup. Ct. Rep. 124; Compton v. Jesup, 167 U. S. 1, 42 L. ed. 55, 17 Sup. Ct. Rep. 795; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Jellenik v. Huron Copper Min. Co. 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559; McDaniel v. Traylor, 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369; Citizens' Sav. & T. Co. v. Illinois C. R. Co. 205 U. S. 46, 51 L. ed. 703, 27 Sup. Ct. Rep. 425.

There was no *res* within the jurisdiction upon which the decree of the court could be enforced.

Byers v. McAuley, 149 U. S. 608, 615, 37 L. ed. 867, 871, 13 Sup. Ct. Rep. 906; Hess v. Reynolds, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; Kennedy v. Creswell, 101 U. S. 641, 25 L. ed. 1075; Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Yonley v. Lavender and Borer v. Chapman, *supra*; Rio Grande R. Co. v. Gomila (Rio Grande R. Co. v. Vinet) 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; Heidritter v. Elizabeth Oil-Cloth Co. 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182; McDaniel v. Traylor, *supra*; Brendel v. Charch, 82 Fed. 262.

Every state has the right to prescribe how property found within its borders at the death of the owner shall be disposed of. Transmission of property after death is a privilege accorded by the law of the state where the property is. As such it may be taxed (Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 Sup. Ct. Rep. 277); and for the same reason such transmission is wholly within the control of the legislature (Mager v. Grima, 8 How. 493, 12 L. ed. 1170).

The right of an individual under the laws of a state governing the devolution of property is a right the enforcement of which cannot, according to the decisions of this court, be limited to state tribunals. But the rules which shall determine such rights, and the method in which such rights shall be enforceable, are wholly within the control of the state legislature.

Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 227, 47 L. ed. 147, 154, 23 Sup. Ct. Rep. 52.

The state, in like manner, determines the

nature of the proceedings which shall be had for the settlement of the estate, and their effect.

Farrell v. O'Brien, *supra*; Tilt v. Kelsey, 207 U. S. 43, 56, 52 L. ed. 95, 101, 28 Sup. Ct. Rep. 1.

In conformity with these principles, a state may make such provision as to the disposition of property of deceased nonresidents found within its jurisdiction as it thinks fit, and may impose a tax upon the transmission of the property, although the state of the decedent's domicile collects a like tax on the same property. This tax is justified on the ground of the supreme power of the state over the privilege of transmitting property upon death.

Blackstone v. Miller, *supra*.

Since a state has this supreme power, whatever provisions it makes are controlling, and must be complied with in whatever court the questions may arise. The circuit court of the United States is bound to administer the same law as a state court in dealing with property in course of administration in Massachusetts.

Moreover, a state may confer upon a special tribunal exclusive power of administration. Probate of wills is very generally in the exclusive jurisdiction of state probate courts, and when such is the case, a Federal court has no jurisdiction of a proceeding for probate.

Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 110, 50 L. ed. 101, 111, 25 Sup. Ct. Rep. 727.

So, too, while a Federal court may, when the necessary diversity of citizenship exists, take jurisdiction of and determine a controversy between individuals as to the share to which one is entitled, it cannot assume jurisdiction to administer the estate when, by the state law, that administration is confided to the probate court.

Byers v. McAuley, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

A nonresident has a right, of which a state cannot deprive him, to have his controversies decided in a Federal court; but the only subject-matter of the suit in the Federal court must be the right of the nonresident to receive from the executor or administrator his share.

Payne v. Hook, 7 Wall. 425, 19 L. ed. 260; Hook v. Payne, 14 Wall. 252, 20 L. ed. 887; Byers v. McAuley, *supra*.

To determine the jurisdiction of the parties, the court must arrange the parties according to their actual interests. It is a claim of Root against Leyson that is to be enforced, and, in the establishment of that claim, although the purpose of establishing it may be inimical to Root, his interest is identical with the plaintiff's and therefore

he must be classed, for purposes of determining the jurisdiction, as a plaintiff.

Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; *Evers v. Watson*, 156 U. S. 527, 532, 39 L. ed. 520, 522, 15 Sup. Ct. Rep. 430.

The necessity of establishing a claim at law before resorting to equity for its enforcement has always been strictly maintained by this court. Unless there is an actual existing lien or express trust as to property, a creditor desiring the assistance of a court of equity must first reduce his claim to judgment.

Cates v. Allen, 149 U. S. 451, 37 L. ed. 804, 13 Sup. Ct. Rep. 883, 977; *Hollins v. Brierfield Coal & I. Co.* 150 U. S. 371, 37 L. ed. 1113, 14 Sup. Ct. Rep. 127.

The circuit court is excluded from any exercise of jurisdiction which disturbs the possession of the property by the probate court, or the free exercise by the probate court of its jurisdiction over the property, and this limitation excludes jurisdiction of the case at bar.

Controversies in which a title is asserted adverse to the title of the deceased do not involve any question as to this limitation of jurisdiction.

Erwin v. Lowry, 7 How. 172, 12 L. ed. 655; *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007; *Wiswall v. Sampson*, 14 How. 52, 14 L. ed. 322; *Peale v. Phipps*, 14 How. 368, 376, 14 L. ed. 459, 462; *Wylie v. Coxe*, 15 How. 415, 14 L. ed. 753; *Walker v. Walker* (*Walker v. Beal*) 9 Wall. 743, 19 L. ed. 814; *McComb v. Frink*, 149 U. S. 629, 37 L. ed. 876, 13 Sup. Ct. Rep. 993; *Walker v. Brown*, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; *Snyder v. McComb*, 39 Fed. 292; *Semmes v. Whitney*, 50 Fed. 666.

The limitation prevents any exercise of jurisdiction by other courts, inconsistent with the possession of property by the probate court, or with its exercise of exclusive jurisdiction in matters of probate administration.

Suydam v. Broadnax, 14 Pet. 67, 10 L. ed. 357; *Williams v. Benedict*, 8 How. 107, 12 L. ed. 1007; *Union Bank v. Vaiden*, 16 How. 503, 15 L. ed. 472; *Green v. Creighton* (*Kendall v. Creighton*) 23 How. 90, 16 L. ed. 419; *Payne v. Hook and Hook v. Payne*, supra; *Yonley v. Lavender*, 21 Wall. 276, 22 L. ed. 536; *Broderick's Will* (*Kieley v. McGlynn*) 21 Wall. 503, 22 L. ed. 599; *Gaines v. Fuentes*, 92 U. S. 10, 23 L. ed. 524; *Kittredge v. Race*, 92 U. S. 116, 23 L. ed. 488; *Tate v. Norton*, 94 U. S. 746, 24 L. ed. 222; *Kennedy v. Creswell*, 101 U. S. 641, 25 L. ed. 1075; *Ellis v. Davis*, 109 U. S. 485, 27 L. ed. 1006, 3 Sup. Ct. Rep. 327; *Hess v. Reynolds*, 113 U. S. 73, 28 L. ed. 927, 5 Sup. Ct. Rep. 377; *Borer v. Chapman*, 119 53 L. ed.

U. S. 587, 30 L. ed. 532, 7 Sup. Ct. Rep. 342; *Simmons v. Saul*, 138 U. S. 439, 34 L. ed. 1054, 11 Sup. Ct. Rep. 369; *Clark v. Bever*, 139 U. S. 96, 35 L. ed. 88, 11 Sup. Ct. Rep. 468; *Lawrence v. Nelson*, 143 U. S. 215, 36 L. ed. 130, 12 Sup. Ct. Rep. 440; *Hayes v. Pratt*, 147 U. S. 557, 37 L. ed. 279, 13 Sup. Ct. Rep. 503; *Byers v. McAuley*, supra; *Security Trust Co. v. Black River Nat. Bank*, 187 U. S. 211, 47 L. ed. 147, 23 Sup. Ct. Rep. 52; *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727.

The determination of a claim on behalf of a creditor against the estate is not excluded by the jurisdiction of the probate court.

The right of a nonresident to establish his claim in a Federal court does not imply a right to satisfy his claim from the assets of the estate, except in the regular course of administration, pursuant to the state law.

Williams v. Benedict; *Yonley v. Lavender*; *Kittredge v. Race*; *Hess v. Reynolds*; *Security Trust Co. v. Black River Nat. Bank*; *Borer v. Chapman*; *Lawrence v. Nelson*; *Tate v. Norton*; and *Kennedy v. Creswell*,—supra.

As to any matter of probate administration not determinable under the law of the state by a proceeding *inter partes*, the jurisdiction of the probate court is exclusive.

Broderick's Will; *Ellis v. Davis*; and *Farrell v. O'Brien*,—supra.

Whether the remedy in a given case is by a proceeding *inter partes* or by a probate proceeding depends upon the law of the state.

Ellis v. Davis and Farrell v. O'Brien, supra; *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260; *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906.

Under the law of Massachusetts there can be no proceeding *inter partes* to recover a distributive share until the probate court has ordered distribution.

Haskins v. Hawkes, 108 Mass. 379; *Pritchard v. Norwood*, 155 Mass. 539, 30 N. E. 80; *Cathaway v. Bowles*, 136 Mass. 54; *Fletcher v. Fletcher*, 191 Mass. 211, 77 N. E. 758.

The probate court of Suffolk county has not, as ancillary to its possession of the property, final jurisdiction to ascertain, declare, enforce, and foreclose a lien on a share in the fund.

Bennett v. Kimball, 175 Mass. 199, 55 N. E. 893; *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560; *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

A question of jurisdiction occurs. It was

discussed somewhat in the original briefs of counsel, but questions were submitted to them as appropriate to elicit further discussion.†. We find it, however, more convenient and more conducive to brevity, in passing on the question of jurisdiction, to 355]be somewhat *general. The petitioner (and her intestate) were citizens of New York. The defendants in the suit below, nine in number, were citizens of Massachusetts. Coram was a citizen of Massachusetts. Root and Andrew J. Davis, trustee, were citizens of Montana. Leyson was also a citizen of Montana. It is hence contended that, while there was diversity of citizenship when the suit was brought, there was no jurisdiction against Root and Andrew J. Davis, they not being inhabitants of the district. The suit against them, it is further contended, was without jurisdiction also, because it was not brought either in the district of the residence of the plaintiff or the defendant. And this, it was said, was recognized by the bill, which prayed an order for the absent defendants to appear and plead in accordance with § 738 of the Revised Statutes, now act of March 3, 1875 (18 Stat. at L. 470, 472, chap. 137, U. S. Comp. Stat. 1901, pp. 508, 513). That act provides for notice to absent defendants in any suit "to enforce any legal or equitable lien . . . or cloud upon the title to real or personal property within the district." And it is urged that the circuit judge said that the proceeding could only be sustained under that act.

The objection that Massachusetts was not the district of the residence of either Root or Davis was not made to the bill. The objection to the jurisdiction made by the demurrers was to the jurisdiction of the circuit court to interfere with or stay proceedings in a probate court of the commonwealth of Massachusetts. It makes no difference how the parties were served or brought in. Being in, all objections to the bill should have been made. The bill prayed a personal judgment against Root as well as a lien upon his share, and those represented by Coram, in the hands of Leyson as

administrator of Davis, deceased, and that Leyson be restrained from paying them and Root and Coram from receiving or carrying them away. And general relief was also prayed. In other words, the whole case arising from Ingersoll's service and the remedies for that service was presented. And to this case the defendants were summoned to answer. They did answer as to the jurisdiction of the court as to subject-matter, as to the relation of the *courts of the [356 United States to the courts of Massachusetts. They did not answer as to the jurisdiction of the court as to parties, as to the rights of the parties to be sued in the district of their residence. The latter objection may be waived, and is waived by not being made. *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706.

To decide what jurisdiction the circuit court exercised we must consider the decree. It found all of the allegations of the bill to be true, and that there was due and owing to the plaintiff (petitioner here), on the contract executed by Coram and Root, the sum of \$95,000, with interest, amounting in all to the sum of \$138,010.83. It adjudged Root to be personally indebted and liable for that sum, and awarded execution against him, and for any balance that should be due if the property upon which the lien was declared, as presently mentioned, should not satisfy such indebtedness; that Coram was personally obligated and liable for the payment of said indebtedness upon the full amount which he had received, or should receive, from the shares of the estate of Andrew J. Davis, deceased, acquired for the five heirs mentioned in said agreement, or either of them, under or pursuant to the decree of the district court of the state of Montana. It was also found and decreed that there was in the state of Massachusetts, in the hands of John H. Leyson, as administrator of Andrew J. Davis, deceased, \$337,862, and 137 bonds of the United States, and 170 bonds of the Butte & Boston Consolidated Mining Company, of which money and bonds and the increase thereof, the said five heirs of Andrew J. Davis, de-

†1. Has the circuit court jurisdiction to ascertain and declare a lien upon property in the possession of the administrator appointed by the probate court for the county of Suffolk and state of Massachusetts?

2. Has the circuit court jurisdiction to enforce by foreclosure a lien upon property so situated?

3. Has the circuit court jurisdiction to determine the shares of Root and Coram in the property so situated?

4. Has the circuit court jurisdiction, upon the pending bill, either in its present form or as it might be amended, to direct that Leyson, Root, Coram, or either of them,

should hold any property coming into their hands by order of distribution of the probate court, upon the trust to satisfy the claim of the complainant?

5. To what extent, if any, is the jurisdiction of the circuit court limited or affected by the fact that the property from which payment is sought is in the hands of an administrator appointed by the probate court of Suffolk county?

6. Has the probate court of Suffolk county, as ancillary to its possession of the property, jurisdiction in equity to ascertain, declare, enforce, and foreclose a lien upon it?

ceased, and their legal representatives and successors in interest, were entitled to receive 515½ eleven hundredths under and pursuant to the decree of the district court of the state of Montana; and of which money and bonds and the increase thereof Coram and Root were entitled to have and receive 415½ eleven hundredths parts on distribution of such money and bonds by the proper court having jurisdiction thereof in the administration and distribution of the estate of Andrew J. Davis, deceased. Up-357]on such 415½ eleven hundredths *parts petitioner was decreed to have a lien "subject to all proper and lawful administration," as a part of the estate of Andrew J. Davis, deceased, "pursuant to the orders and decrees or judgments of the probate court of Suffolk county, Massachusetts, now having probate jurisdiction thereof, or any court which may hereafter have probate jurisdiction . . . to administer the same as part of the estate of said Andrew J. Davis, deceased, in the due and lawful course of administration thereof." A lien is decreed upon said money and bonds, and foreclosed, subject to the terms of the decree, wheresoever said money and bonds may be taken or removed, whether within or without the state of Massachusetts, and in the custody of whomsoever the same may come, "subject only to the proper and lawful probate and administration . . . pursuant to the orders, judgments, or decrees of the probate court of Suffolk county, in the state of Massachusetts, now having probate jurisdiction thereon . . . to administer the same as a part of the estate of Andrew J. Davis, deceased, in the due and lawful course of administration thereof." And it was decreed that, as soon as the probate administration is finished and distribution is ordered by the probate court having jurisdiction, that Leyson, as administrator, or his successor in custody thereof, should set apart and bring into court the said 415½ eleven hundredths of said money and bonds, to be applied to the satisfaction of the lien of complainant. It was decreed that each and all of the injunctive and restraining terms and commands of the interlocutory injunction order be made perpetual, and Leyson was enjoined and restrained, as administrator, from removing out of Massachusetts 415½ eleven hundredths parts of the money and bonds in his possession, "unless and until the proper court within the state of Massachusetts, having probate jurisdiction of such money and bonds, by its final order, judgment, or decree, directs such John H. Leyson, as such administrator, to remove such 415½ eleven hundredths of such money and bonds out of the state of Massachusetts."

*We have made this epitome of the[358 main provisions of the decree to show how careful the court was to require the observance of its direction expressed in its opinion that the decree should declare that nothing in it was intended to contravene, or should contravene, "any action of any probate tribunal in Massachusetts with reference to distribution, or to any order or judgment remitting to the courts of the domicile."

The decree therefore deals exclusively with the parties. It adjudges what contract they made, the extent of their obligation, and how that contract was secured. The remedies awarded are executed through the parties, and through Leyson only as he holds property to be delivered to the parties. No action of the probate court of Suffolk county is attempted to be restrained or limited or trenching upon, nor the property in its possession disturbed. And yet it is urged that the suit that sought this purpose and a decree that executes this purpose transcend the jurisdiction of a circuit court of the United States.

The proposition has been discussed at length by counsel, many cases cited and arguments advanced based upon the respective functions of courts of equity and probate.

The respondents especially rely upon the pendency of proceedings in the probate court of Suffolk county, and, as a corollary, that the property was in the possession of the probate court and under its jurisdiction, and, therefore, not within the jurisdiction of the circuit court. Respondents express and illustrate the latter conclusion in various ways. Their fundamental postulate, however, is that the circuit court has not power to disturb the possession of the property by the probate court or do any act which may interfere with the free exercise of jurisdiction by the probate court. This postulate is argued at length and many cases are cited. Besides, a statute of Massachusetts is relied upon which provides that, upon the settlement of an estate, and after the payment of all debts for which the same is liable in that commonwealth, the residue of the personal estate may be distributed and disposed *of in the manner provided-[359 ed by the will of a deceased, if he left any, or according to the laws of the state or country of which he was an inhabitant, "*or, in the discretion of the court, it may be transmitted to the executor or administrator, if any, in the state or country where the deceased had his domicile, to be there disposed of according to the laws thereof.*" (Italics ours.)

We think, however, a lengthy discussion is not necessary. The controversy presented by the bill was one between citizens of different states, and there was that ground of jurisdiction in the circuit court, being a

court of the United States. One object of the bill, among others, was to declare and foreclose a lien upon property within the district, and there was that ground of jurisdiction, and we do not think that jurisdiction thus established and supported was taken away by the mere fact that the settlement of the estate of Davis was pending in the probate court of Suffolk county. No interference with that court was sought or decreed, as we have seen. Rights between the parties, arising from their transactions and contracts, were only adjudged and only decreed to be redressed when the probate court should have finished its functions. Indeed, it may even be that the circuit court was too restrictive in the exercise of its power, for it may be disputed whether it is within the power of a state court to order property upon which there is a lien sent out of a district and thereby defeat the jurisdiction of a court of the United States to enforce such lien in cases where they have jurisdiction under the act of March 3, 1875. This question, however, does not arise, nor any question depending upon it; and the line of cases of which *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182, is an example does not apply, nor do the cases cited by respondents, but the case falls within the principles announced in *Payne v. Hook*, 7 Wall. 425, 19 L. ed. 260, and *Byers v. McAuley*, 149 U. S. 608, 37 L. ed. 867, 13 Sup. Ct. Rep. 906, and cases there cited.

The power of the court of equity to subject the share of a person under a lien, "and yet in the hands of an executor," 360]* to the payment of his debts, has been decided in Massachusetts. *Ricketson v. Merrill*, 148 Mass. 76, 19 N. E. 11. The same in principle is *Davis v. Newton*, 6 Met. 537, where it was held that the distributive share of an insolvent debtor in the hands of an administrator passed to his assignee, and that the administrator could not withhold it from the assignee.

In *Lenz v. Prescott*, 144 Mass. 505, 11 N. E. 923, it was decided that the probate court does not take cognizance of assignments of their interests, made by legatees or distributees, but deals only with those primarily entitled to the legacies or distributive shares; and many cases were cited. The court therefore sustained a bill in equity to ascertain the validity and construction of an assignment of an interest in an estate. See also *Green v. Gaskill*, 175 Mass. 265, 56 N. E. 560, where the probate jurisdiction of the probate court and its equity jurisdiction in relation to other courts is explained, and it is decided that administrators and executors have a right to have their accounts adjusted and the

amounts due to or from them determined in the probate court, on its probate side, and in the usual probate proceedings; but, when the amount for which they are liable is so determined, may, by a bill in equity, be compelled to pay to those entitled their share of the property of the deceased. And this being the power of the courts of equity of the state, a like power certainly may be exercised by the Federal courts.

It is further objected that there is no property of the respondents in Massachusetts. The argument which is urged to support the objection is difficult to state. It seems to draw a distinction, under the laws of Massachusetts, between the will of Andrew J. Davis and the decree of the Montana court admitting the will to probate. "The probate court," respondents say, "might and did accept the decree of the Montana court as proof that the will ought to be allowed. It could not and did not accept the decree as establishing that the property in Massachusetts should be disposed of otherwise than as the will provided." And from a consideration of the laws of Massachusetts, respondents conclude that (we quote the language of counsel), "no part of the property in Massachusetts can therefore in any sense be said to belong to the defendants in the suit. All of it must by law either be paid over according to the will, or be transmitted to Montana, to be distributed as the court may direct." We cannot refrain from saying that it is hard to believe that respondents would like to be taken at the full sense of their words, and we are quite sure that the probate court of Suffolk county will regard not the will as propounded for probate, but the will as qualified by the decree, as determining the rights of the parties. At any rate, it is only upon the shares which that court will distribute that the decree of the circuit court will operate.

Again, it is charged that the right of the petitioner's intestate was derived from Root, and as he, it is further contended, could not have sued to establish his right to a share in the funds of the administrator, the latter and he being citizens of Montana, that the petitioner was equally disqualified to establish and recover Root's share of the property. The argument is that she is seeking to enforce a right of Root against the administrator, arising on an equitable assignment by Root to her intestate, and she is therefore, it is said, suing to recover as assignee of a chose in action upon which the assignor could not sue, because his citizenship is the same as that of the administrator in Massachusetts. Rev. Stat. § 629, U. S. Comp. Stat. 1901, p. 503. There are several answers to the contention. It is certainly

very disputable if an interest in a distributive share of an estate is within the statute. Again, she is suing primarily on the obligation of Root to her intestate, to secure which a lien was given on Root's distributive share; and besides, again, she sues as administratrix, and she is a citizen of a different state from Leyson. *Sere v. Pitot*, 6 Cranch, 333, 3 L. ed. 240; *Chappedelaine v. Dechenaux*, 4 Cranch, 308, 2 L. ed. 630; *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. ed. 736; *Susquehanna & W. Valley R. & Coal Co. v. Blatchford*, 11 Wall. 172, 20 L. ed. 179; *Rice v. Houston*, 13 Wall. 66, 20 L. ed. 484.

Respondents assert the identity of the action in Montana *with the present suit, and upon that identity they urge that such action constitutes *res judicata*. Petitioner denies the identity of the actions, and urges besides that there is no such privity between the parties as to make the Montana action *res judicata* of the pending case. In support of the latter contention petitioner urges that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, and that therefore a judgment against one is not a bar to a suit by the other. And this was the ruling of the circuit court. The circuit court of appeals took the contrary view, and rested its judgment upon the conclusive effect of the Montana action.

We shall assume that there is identity of subject-matter between the Montana action and that at bar, but the question remains, Was there identity of parties? An extended discussion of the question is made unnecessary by the case of *Brown v. Fletcher*, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702. In that case a suit in equity against Fletcher, brought in his lifetime, was revived after his death, and a decree obtained. Fletcher resided in Michigan, where he died leaving a will, which was duly probated in the probate court of Wayne county in that state, in which the decree of the Massachusetts court was filed as evidence of a claim against the estate. Its effect as such was denied, and the case was brought here by writ of error. Replying to the contention of plaintiff in error, that the Michigan executor and the administrator with the will annexed of Fletcher's estate in Massachusetts were in such privity that the decree was conclusive evidence of it in the proceedings in Michigan, this court held that the decree was not binding upon the Michigan executor or the estate in his possession, citing *Vaughan v. Northup*, 15 Pet. 1, 10 L. ed. 639; *Aspden v. Nixon*, 4 How. 467, 11 L. ed. 1059; *Stacy v. Thrasher*, 6 How. 44, 12 L. ed. 337. The latter case was quoted from as follows: "Where adminis-

trations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the *other, to affect[363] assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator. See *Story, Conf. L.* § 522; *Brodie v. Bickley*, 2 Rawle, 431." *McLean v. Meek*, 18 How. 16, 15 L. ed. 277; *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525, were also cited, and it was said that the "doctrine was enforced in Massachusetts. *Low v. Bartlett*, 8 Allen, 259."

Respondents insist that this doctrine has no application to the Montana judgment, and urge that the latter was a bar of the pending suit (1) because it was a judgment on the merits, and (2) because such a judgment "against an ancillary administrator in the suit brought by him is conclusive as to that cause of action against the domiciliary or any other ancillary administrator." And this is said to follow from the proposition which respondents advance, that "the authorized act of an ancillary administrator as to property of the intestate within his jurisdiction is binding everywhere;" and it is hence concluded that a suit brought by an ancillary administrator is subject to the same principle as an act done touching tangible property. That the argument by which this conclusion is supported has strength is established by the fact that the circuit court of appeals yielded to it, and it is said to be sanctioned by *Biddle v. Wilkins*, 1 Pet. 686, 7 L. ed. 315; *Wilkins v. Ellett*, 108 U. S. 256, 27 L. ed. 718, 2 Sup. Ct. Rep. 641; *Talmage v. Chapel*, 16 Mass. 71. But as these cases preceded *Brown v. Fletcher*, they must be regarded as consistent with it. Besides, in that case, *Johnson v. Powers*, 139 U. S. 156, 35 L. ed. 112, 11 Sup. Ct. Rep. 525, was cited as establishing, on the authority of *Aspden v. Nixon* and *Stacy v. Thrasher*, supra, *Low v. Bartlett*, 8 Allen, 259, the doctrine that a judgment recovered against the administrator of a deceased person in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. That there is a certain amount of artificiality in the doctrine was pointed out in *Stacy v. Thrasher*, and that it leads to the inconvenience *and burdensome re-[364] suit of retrying controversies and repeating litigations. The doctrine, however, was vindicated as a necessary consequence of the different sources from which the different ad-

ministrators received their powers, and the absence of privity between them, and that the imputations against it were not greater than could be made against other "logical conclusions upon admitted legal principles." It is not necessary, therefore, to review in detail the argument of respondents. Its fundamental concept is that the authorized act of an administrator as to property of the intestate within his jurisdiction is binding everywhere, and it is said that a suit brought by an administrator is subject to the same principle. The generality of the conclusion, however, counsel immediately limits by the concession that it does not include a suit brought against an administrator, whether he successfully or unsuccessfully defends it. In other words, the principle is true only of an action brought by an ancillary administrator to enforce a claim in behalf of the estate, and judgment goes against him. But counsel even limits this again, and says it would not be binding "in the sense of creating a personal liability for costs, if costs be awarded, or otherwise, but it is binding in the sense that the cause of action has been effectively disposed of." That is, as counsel explains, merged in the judgment. We do not think that the doctrine announced in *Brown v. Fletcher*, supra, admits of these distinctions, and surely the estoppel of a judgment must be mutual. The argument of respondents contends for the contrary; it makes a judgment against an ancillary administrator binding against other administrators, but not binding for them. We think, therefore, that the Montana judgment is not a bar to the pending suit.

On the merits there are two propositions: (1) Did the complainant establish the existence of a debt due from Coram and Root to Ingersoll? (2) Did she establish the existence of a lien? On neither of these propositions did the court of appeals pass; the circuit court decided them in favor of complainant.

365] *We need not recite the evidence. The circuit court found, and, we think, rightly found, that the agreement sued on was performed. In other words, that the will of Davis was defeated, and that the contestants got their shares through the services of Ingersoll. The form in which the defeat was expressed is unimportant. The will as propounded was defeated. As propounded it cut them off from inheritance. As qualified in probate, by compromise more property was received than would have come to them by inheritance. And the evidence leaves no doubt that it was brought about, to quote the bill, "by the force, effect, and stress" of the contest and by the services which it is admitted Ingersoll rendered, and from

the belief that the will as propounded would not receive probate and would only receive probate when so qualified as to recognize the rights of the contestants as heirs of the estate. That it did not do so was its defect, and to make it do so was the purpose for which they employed Ingersoll and which his services achieved. There was performance, therefore, of his contract.

The next question is, Does the evidence establish the existence of the lien? An affirmative answer must be given. It is manifest that payment to Ingersoll was dependent upon success, but it is equally manifest that he relied upon more than the personal responsibility of the parties. The so-called five heirs, Elizabeth S. Ladd, Ellen M. Cornue, M. Louise Dunbar, Ellen Cornue, and Henry A. Root, entered into an agreement in which it was recited that controversies had arisen in regard to the will, and that Root had rendered services and expended money in behalf thereof, and had undertaken "to procure evidence, counsel, and such other needs" as were necessary for opposing the will and obtaining for the others their "respective rights and shares" of the estate, and in consideration thereof there was assigned to Root and one Gideon Wells one-third part of each of their interests to reimburse Root for the moneys he had expended or should expend or the liabilities which he might incur on account thereof. And it was agreed *that the[366 assignment was to be in full for past or future liabilities. Root, on his part, agreed to employ counsel and to do all things necessary to secure the interests of the other parties.

It is alleged in the complaint and admitted by the answer that Coram acquired the remaining interests of Elizabeth Ladd and Mary L. Dunbar, and that the interests so acquired were dependent upon the prosecution of the objections to and contests of the validity of the will until the shares of the five heirs should be secured to them by a grant from the proponent of the will or by the decree of the district court of Montana. This being the situation, Ingersoll wrote to Root as follows:

May 1st, 1891.

My dear Root:—

Do not know whether I can get the money, but feel sure I can raise \$25,000—have already secured \$13,000.

"Now, there is another thing: I suppose it is best for you and I to have a specific and definite understanding in regard to my fee. Of course, if you should lose the case you could not pay. We can raise money enough to pay expenses and of course I shall want expenses, but the real question

is as to what I am to have in case of success and how that is to be secured,—i. e., what papers are necessary, etc.

Let me hear from you.

Yours, R. G. Ingersoll.

To which Coram and Root replied as follows:

Butte City, Mont., August 17, 1891.

R. G. Ingersoll, Esq.,

Butte City, Montana.

Sir:—

We agree that for your services in the contest of Maria Cummings and Henry A. Root against the probate of the alleged will of A. J. Davis, deceased, rendered and to be rendered, that your fee, in case the will is defeated and our clients get their shares, shall be one hundred (100,000) thousand dollars, and that your expenses and disbursements shall be paid in any event.

367] *There is to be no personal obligation against J. A. Coram, in the event that the interests represented by Henry A. Root are unsuccessful, and in no event is the said J. A. Coram obligated except to pay such fee out of the funds secured from the estate of A. J. Davis, deceased, by Maria Cummings, Lizzie S. Ladd, M. Louise Dunbar, and Mrs. Ellen S. Cornue and Henry A. Root.

Henry A. Root,
J. A. Coram.

It is evident, therefore, that Ingersoll asked for security in a definite and written form. We do not think it can be said that he sought only a promise to pay. That followed from his employment, and, besides, Coram stipulated against personal liability, but did obligate himself to pay "out of the funds secured from the estate." And this is the test of the agreement. It is the exception that establishes that, as to Root, there was a personal and property obligation; as to Coram, a property obligation. It is confirmed by excerpts from the letters of Root, set out in the complaint and introduced in evidence. In those letters he expresses a desire "that Mrs. Ingersoll should realize out of the Davis estate as much as possible," and would "bend every effort" to that end. And, explaining the agreement, he said that Ingersoll "was to receive \$100,000 for moneys collected from the Davis estate for his services," and assured Mrs. Ingersoll that he would do everything in his power to see that she received "as much from that fund" (referring to the estate in Boston).

The sufficiency of the agreement of August 17, 1891, to create a lien, seems not to have been seriously questioned in the circuit court upon the argument of the de-

murrer. However, the court said that "upon all settled rules with reference to the construction of such instruments we cannot doubt that this one of August 17, 1891, created a lien on the funds therein referred to in behalf of Mr. Ingersoll." On the final hearing the effect of the instrument was contested, and the court adhered to its ruling, saying: "Whether or not the particular *agreement creates a lien is a[368 matter of construction. In this case the fact that there was no primary personal responsibility on J. A. Coram specially serves to stamp the agreement in issue as declaring a purpose to create a lien. Therefore, on the whole, we hold that, on this final hearing on bill, answer, and proofs, the bill must be sustained." The conclusion of the court is sustained by authority. In *Wylie v. Cox*, 15 How. 415, 14 L. ed. 753, a contract was made with an attorney for the prosecution of a claim against Mexico to pay him a contingent fee of 5 per cent out of the fund awarded. It was held that the agreement constituted a lien upon the fund. In *Re Paschal (Texas v. White)* 10 Wall. 483, 19 L. ed. 992, in the letter retaining Paschal, it was said that his compensation would depend upon the action of a future legislature, "unless a recovery is had in the suit, in which event I shall feel authorized to let you retain it out of the amount received." It was held that, in accordance with the prevailing rule in this country, Paschal had a lien on the fund in his hands for disbursement and professional fees. The case was cited in *McPherson v. Cox*, 96 U. S. 404, 417, 24 L. ed. 746, 750, and the doctrine repeated. See also *Central R. & Bkg. Co. v. Pettus*, 113 U. S. 116, 28 L. ed. 915, 5 Sup. Ct. Rep. 387; *Louisville, E. & St. L. R. Co. v. Wilson*, 138 U. S. 501, 507, 34 L. ed. 1023, 1025, 11 Sup. Ct. Rep. 405. In *Walker v. Brown*, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453, it was held that every express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligations, creates an equitable lien on the property so indicated. This was an application of the doctrine of *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439, and *Ketchum v. St. Louis*, 101 U. S. 306, 25 L. ed. 999. These cases are not opposed by *Trist v. Child (Burke v. Child)* 21 Wall. 441, 22 L. ed. 623, and *Wright v. Ellison*, 1 Wall. 16, 17 L. ed. 555. In the latter case it is said that it is indispensable to the lien thus created that there should be a distinct appropriation of the fund by the debtor, and

an agreement that the creditor should be paid out of it. These conditions are satisfied in the case at bar.

The other contentions of respondents asserted a defect of parties *and error in the decree as to the amount of interest adjudged to Root and Coram in the property. In the first contention we do not concur.

The second contention is justified. We do not think, however, that it is necessary to enter into all of its details, with some of which, we may say, we do not agree. We think that the circuit court rightly, as we have already pointed out, adjudged that the five heirs were entitled, by virtue of the final decree in Montana, to $515\frac{1}{2}$ eleven hundredths of the estate in Massachusetts, and in adopting, as we think it did, in making division among them according to intestacy, that is, in proportion to the shares they would have taken in case Davis had died intestate. Those shares the bill alleged and the answers admitted would have been as follows: Sarah M. Cummings and Elizabeth S. Ladd, one eleventh each; Henry A. Root, Ellen S. Cornue, and Mary Louise Dunbar, one twenty-second each,—in all, 350 eleven hundredths of the estate. But there was error in adjudging the interest remaining in Sarah Maria Cummings and Ellen S. Cornue, after the assignment of one third of their interest to Root, to be respectively $62\frac{2}{3}$ eleven hundredths and $33\frac{1}{3}$ eleven hundredths. The bill shows that they were entitled respectively to 100 eleven hundredths and 50 eleven hundredths of the amount they, as two of the five heirs, would have been entitled to if Davis had died intestate; that is, those shares of 350 eleven hundredths. But the amount was increased by the decree in Montana to $515\frac{1}{2}$ eleven hundredths and their shares thereof necessarily increased. In other words, as they were entitled respectively to two sevenths and one seventh of the first amount, they are entitled respectively to two sevenths and one seventh of the second amount, to wit, $147\frac{1}{14}$ eleven hundredths, and $73\frac{1}{14}$ eleven hundredths, one third of which amounts was assigned to Root. There were left in them respectively, therefore, $98\frac{1}{21}$ eleven hundredths and $49\frac{2}{21}$ eleven hundredths. To Root, as we have seen, they assigned one third of their shares, and there was also assigned to him one third of the 370]shares* of Elizabeth S. Ladd and Mary Louise Dunbar, making, with the one seventh to which he is entitled in his own right, $220\frac{13}{14}$ eleven hundredths. Coram is entitled as assignee to the other two thirds of the shares of Ladd and Dunbar, to wit, $147\frac{1}{14}$ eleven hundredths, making the total in him and Root of $368\frac{3}{14}$ eleven hundredths instead of $415\frac{1}{2}$ eleven hundredths,

as stated in the decree. The decree must be modified accordingly.

The decree of the Circuit Court of Appeals is reversed and that of the Circuit Court is modified as above indicated, and 'as modified, affirmed.

Mr. Justice Holmes and Mr. Justice Moody dissent.

UNITED STATES, Plff. in Err.,

v.

F. W. KEITEL, Arie Keitel, Frank P. Fay, et al.

(See S. C. Reporter's ed. 370-399.)

Appeal — in criminal case — review on behalf of government.

1. Jurisdiction of the Federal Supreme Court of a writ of error sued out under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), to review a judgment of a Federal district court quashing an indictment for a conspiracy illegally to acquire coal lands from the United States, because of the opinion that the Federal statute did not prohibit the acts complained of, cannot be successfully challenged on the theory that the indictment, and not the statute, was construed.

[For other cases, see Appeal and Error, 314-316, in Digest Sup. Ct. 1908.]

Appeal — in criminal case — review on behalf of government.

2. Interpretation as well as construction of the statute, conceding an abstract distinction between these two terms, is comprehended by the provision of the act of March 2, 1907, authorizing a writ of error on behalf of the government from the Federal Supreme Court to review a judgment of a district or circuit court, quashing an indictment, when based upon the construction of the statute upon which the indictment is founded.

[For other cases, see Appeal and Error, 314-316, in Digest Sup. Ct. 1908.]

Mines — entry for disqualified principal.

3. The prohibition against more than one entry of coal lands by the same person, which is made by U. S. Rev. Stat. § 2350, U. S. Comp. Stat. 1901, p. 1441, prohibits a qualified person from entering such lands apparently for himself, but in fact as the agent for a person who is himself disqualified because he has already purchased the full quantity permitted by law.

[For other cases, see Mines, 18-18b, in Digest Sup. Ct. 1908.]

Conspiracy — to defraud United States.

4. A conspiracy to obtain title to coal lands of the United States, in clear violation of the prohibition of the coal-land laws against making more than one entry,

NOTE.—On the right of a state to appeal in a criminal case—see note to People ex rel. Hodson v. Miner, 19 L.R.A. 342.

On the location of a mining claim—see note to Dwinnell v. Dyer, 7 L.R.A. (N.S.) 763.

is embraced by the provision of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, making criminal conspiracies "to defraud the United States in any manner or for any purpose."

[For other cases, see Conspiracy, 2-9, in Digest Sup. Ct. 1908.]

Mines — coal-land entry — false and fraudulent papers.

5. Making and presenting false, fictitious, and fraudulent papers in connection with an entry of coal lands is not made criminal by U. S. Rev. Stat. § 4746, U. S. Comp. Stat. 1901, p. 3279, as amended by the act of July 7, 1898 (30 Stat. at L. 718, chap. 578, U. S. Comp. Stat. 1901, p. 3279), because such amendatory statute, in repeating the original words, "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions," adds the words "or of the Secretary of the Interior," since such section as originally enacted, related exclusively to pension or bounty land claims, and every enumeration or description of new acts or papers, in addition to those embraced in the section prior to the amendment, alone concerns pension or bounty land claims.

Appeal — by government in criminal case — scope of review.

6. The whole case is not open to review in the Supreme Court of the United States on the writ of error to a Federal district or circuit court, authorized on behalf of the government in criminal cases by the act of March 2, 1907, but the scope of review is limited to the particular decisions enumerated in that statute.

[No. 286.]

Argued October 22, 23, 26, 1908. Decided December 14, 1908.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment quashing an indictment for a conspiracy illegally to obtain coal lands from the United States. Reversed and remanded for further proceedings.

See same case below, 157 Fed. 396.

The facts are stated in the opinion.

Attorney General Bonaparte argued the cause, and, with Solicitor General Hoyt and Mr. Edwin W. Lawrence, filed a brief for plaintiff in error:

Many other laws, or departmental regulations even, furnish the occasion for crimes under statutes which otherwise have no connection with them.

Caha v. United States, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; *Curley v. United States*, 64 C. C. A. 369, 130 Fed. 1.

For individuals or associations to acquire from the United States coal lands in excess of the specified quantity through "dummy" entrymen is a violation of the coal-land laws and an actual fraud.

53 L. ed.

United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57; *United States v. Lonabaugh*, 158 Fed. 314.

The coal-land laws cannot be construed one way in a suit to cancel patents issued thereunder, and another way in criminal prosecutions involving those laws.

Northern Securities Co. v. United States, 193 U. S. 197, 401, 48 L. ed. 679, 726, 24 Sup. Ct. Rep. 436.

While it has been often urged in Federal courts that the word "defraud" was used in U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, in its common-law sense, that argument has heretofore always been rejected. The decision of the district court in these cases is not only without precedent, but is contrary to numerous decisions of district and circuit courts, circuit courts of appeals, and this court.

Hyde v. Shine, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760; *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680; *United States v. Lonabaugh*, supra; *United States v. Robbins*, 157 Fed. 999; *Stearns v. United States*, 82 C. C. A. 48, 152 Fed. 900; *Bradford v. United States*, 31 C. C. A. 607, 152 Fed. 617; *Gantt v. United States*, 47 C. C. A. 210, 108 Fed. 61; *United States v. Owen*, 32 Fed. 534; *United States v. Gordon*, 22 Fed. 250; *United States v. Mitchell*, 141 Fed. 666; *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *Curley v. United States*, 195 U. S. 628, 49 L. ed. 351, 25 Sup. Ct. Rep. 787, 64 C. C. A. 369, 130 Fed. 1; *United States v. Morse*, 161 Fed. 429; *United States v. Haas*, 163 Fed. 908; *United States v. Stone*, 135 Fed. 392; *McGregor v. United States*, 134 Fed. 187.

Solicitor General Hoyt also argued the cause, and, with Mr. Ernest Knaebel, filed a brief for plaintiff in error:

The content of the term "construction," when concerned practically in legislation and judicial decisions, seems always to include the content of the term "interpretation."

Cooley, Const. Lim. 6th ed. p. 51; *Bouvier's Law Dict. "Interpretation," "Construction,"* 2 *Parsons*, Contr. 9th ed. p. 647, n. (a); *Johnson v. Des Moines L. Ins. Co.* 105 Iowa, 277, 75 N. W. 101; *O'Donnell v. Glenn*, 9 Mont. 467, 8 L.R.A. 633, 23 Pac. 1018; *Stratton v. Stratton*, 68 N. H. 585, 44 Atl. 699; *Black*, Constr. & Interpretation of Laws, p. 1; *Terre Haute & L. R. Co. v. Erdel*, 158 Ind. 347, 62 N. E. 706; *Bouvier's Law Dict. Rawle's Rev. "construction."*

The assertions of defendants' counsel that questions of pleading and other questions, independent of those raised upon the stat-

utes, formed in whole or in part the basis of the trial court's decision, are flatly contradicted by the opinion, and need not be otherwise answered. Hence, the attempt to restrict this court's jurisdiction to cases and questions resting exclusively upon construction of statutes is premature, as it is also out of accord with decisions heretofore rendered.

Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; *Burton v. United States*, 196 U. S. 283, 295, 49 L. ed. 482, 485, 25 Sup. Ct. Rep. 243; *Field v. Barber Asphalt Co.* 194 U. S. 618, 620, 48 L. ed. 1142, 1152, 24 Sup. Ct. Rep. 784; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; *Holder v. Aultman, M. & Co.* 169 U. S. 81, 88, 42 L. ed. 669, 671, 18 Sup. Ct. Rep. 269; *Scott v. Donald*, 165 U. S. 58, 71, 41 L. ed. 632, 633, 17 Sup. Ct. Rep. 265; *Chappell v. United States*, 160 U. S. 499, 509, 40 L. ed. 510, 513, 16 Sup. Ct. Rep. 397; *Horner v. United States*, 143 U. S. 570, 576, 36 L. ed. 266, 268, 12 Sup. Ct. Rep. 522.

Mr. Edwin H. Park argued the cause and filed a brief for defendants in error:

Before an act can be punished as a crime, under the Federal laws, that act must be specifically made a crime by statute.

United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538; *Todd v. United States*, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; *United States v. Harris*, 177 U. S. 305, 44 L. ed. 780, 20 Sup. Ct. Rep. 609; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; *Smith v. Townsend*, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634; *United States v. Dietrich*, 126 Fed. 676; *United States v. Chase*, 135 U. S. 255, 259, 261, 34 L. ed. 117, 119, 120, 10 Sup. Ct. Rep. 756; *United States v. Williams*, 3 Fed. 491; *United States v. Comerford*, 25 Fed. 904; *United States v. Wilson*, 58 Fed. 771; *United States v. Whittier*, 5 Dill. 35, Fed. Cas. No. 16,688; *United States v. Hewecker*, 79 Fed. 64; *Re McDonough*, 49 Fed. 362; *Sarlls v. United States*, 152 U. S. 570, 575, 38 L. ed. 556, 558, 14 Sup. Ct. Rep. 720; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 37, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508; *Lewis's Sutherland*, Stat. Constr. 2d ed. § 491.

The court below rightly held that § 5440, U. S. Rev. Stat., is limited to cases where the object of the conspiracy is criminal, and not the means employed.

Connor v. People, 18 Colo. 378, 25 L.R.A. 341, 36 Am. St. Rep. 295, 33 Pac. 159; *Miller v. People*, 22 Colo. 533, 45 Pac. 408;

Lipschitz v. People, 25 Colo. 265, 53 Pac. 1111; *Short v. People*, 27 Colo. 184, 60 Pac. 350; *United States v. Harris*, 177 U. S. 305, 309, 44 L. ed. 780, 781, 20 Sup. Ct. Rep. 609; *United States v. Britton*, 108 U. S. 199, 206, 27 L. ed. 698, 700, 2 Sup. Ct. Rep. 531; *United States v. Crafton*, 4 Dill. 145, Fed. Cas. No. 14,881; *United States v. Cruikshank*, 92 U. S. 542, 558, 23 L. ed. 588, 593.

The word "defraud" not being defined in the statute itself, nor in any other statute, it is to be presumed that Congress used the word "defraud" in its common-law meaning; and we should turn to the common law to find what acts of fraud are held to be criminal.

An interpretation will not be given to a statute which would lead to injustice, oppression, or absurd consequences.

Lake County v. Rollins, 130 U. S. 662, 32 L. ed. 1060, 9 Sup. Ct. Rep. 651.

In going to the common law for a definition of the word "defraud," the indictment receives no assistance, but is there demonstrated to be essentially, and in this vital particular wholly, insufficient, and does not charge defendants with any criminal offense.

Wharton, Crim. Law, § 2316; 3 *Greenl. Ev.* § 90; *Wharton, Crim. Law*, 7th ed. § 2288; *Alderman v. People*, 4 Mich. 414, 69 Am. Dec. 321.

It was not the intention of Congress to embrace constructive fraud, and the act cannot be construed to embrace any such frauds. The statute only includes those frauds known as a crime at common law,—those involving moral turpitude; and not merely a violation of an act which merely limits or prohibits.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347.

Whatever may be the meaning of the word "defraud" as used in equity, it has a totally different and distinct meaning when the same word is used in a penal statute.

Ferrett v. Atwill, 1 Blatchf. 156, Fed. Cas. No. 4,747; *United States v. Sheldon*, 2 Wheat. 119, 4 L. ed. 199; *Myers v. Foster*, 6 Cow. 567; *Daggett v. State*, 4 Conn. 60, 10 Am. Dec. 100; *United States v. Maid*, 116 Fed. 652; *United States v. Stone*, 135 Fed. 392; *Curley v. United States*, 64 C. C. A. 369, 130 Fed. 1.

The utmost that can be gathered from the indictment is that the defendants sought to violate the limitation of the amount of acreage of coal lands. It is *malum prohibitum*, not "*malum in se*." The act did not violate good morals; moral turpitude is not involved.

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 57, 26 L. ed. 347, 349.

The coal laws are far short of anything of a penal nature.

Smith v. Townsend, *supra*.

The word "fraud" has no definite meaning.

Meldrum v. Meldrum, 15 Colo. 487, 11 L.R.A. 65, 24 Pac. 1083.

The maxim that "every man is charged with a knowledge of the law" means that he is charged with the knowledge of what the law designates as offenses. If the law fails to define an offense, the individual cannot be charged with knowing more than the law itself knows.

Eddy, Combinations, § 352.

Under the bankrupt laws of the United States it is held that the word "fraud," as there used, means only positive fraud,—the fraud in fact, involving moral turpitude, or intentional wrong, as does embezzlement.

Forsyth v. Vehmeyer, 177 U. S. 177, 181, 44 L. ed. 723, 725, 20 Sup. Ct. Rep. 623; Bullis v. O'Beirne, 195 U. S. 606, 620, 49 L. ed. 340, 346, 25 Sup. Ct. Rep. 118.

The word "defraud" used in the statute is coupled with the word "offense;" and under the maxim of *noscitur a sociis* the word "defraud" must be construed to mean something in the nature of an offense, recognized as such by some statute of the United States.

Barry v. Snowden, 106 Fed. 571.

The government, in disposing of its public lands, acts as a private corporation, as distinguished from its governmental purposes.

Lee v. Kaufman, 3 Hughes, 36, Fed. Cas. No. 8,191; Elliot v. Van Voorst, 3 Wall. Jr. 301, Fed. Cas. No. 4,390; Cotton v. United States, 11 How. 229, 331, 13 L. ed. 675, 676; United States v. Iron Silver Min. Co. 128 U. S. 673, 676, 32 L. ed. 571, 572, 9 Sup. Ct. Rep. 195; McKinley Creek Min. Co. v. Alaska United Min. Co. 183 U. S. 563, 571, 46 L. ed. 331, 334, 22 Sup. Ct. Rep. 84; Parsons v. Venzke, 164 U. S. 89, 92, 41 L. ed. 360, 362, 17 Sup. Ct. Rep. 27; Sturr v. Beck, 133 U. S. 541, 548, 33 L. ed. 761, 764, 10 Sup. Ct. Rep. 350; People v. Shearer, 30 Cal. 658; State v. Bachelder, 5 Minn. 223, Gil. 179, 80 Am. Dec. 410; Camp v. Smith, 2 Minn. 155, Gil. 131; Stockdale v. Webster County, 12 Iowa, 538; United States v. Cornell, 2 Mason, 60, Fed. Cas. No. 14,867; Woodruff v. North Bloomfield Gravel Min. Co. 9 Sawy. 441, 18 Fed. 772; Pollard v. Hagan, 3 How. 212, 224, 11 L. ed. 565, 571.

The words, "not exceeding 160 acres to such individual, or 320 acres to such association," and the words, "only one entry by the same person or association of persons," are words of limitation, and not prohibition.

53 L. ed.

Re Peterson, 6 Land Dec. 371; Pereles v. Weil, 157 Fed. 419.

Words of limitation and words of prohibition are distinct, and have distinctly different meanings. The word "prohibition" means the act of forbidding or inderdicting; prohibitory.

Anderson's Law Diet.

The word "limitation" has reference to boundary, circumspection, restriction, curtailment.

Ibid.

A statute containing simple words of limitation has never been construed as the basis, when violated, of a criminal prosecution, and no criminal action can or will lie therefor. A contract based upon a violation of a limitation is not even void; a contract based upon the violation of a prohibitory statute may or may not be void.

A contract in violation of U. S. Rev. Stat. § 5200, U. S. Comp. Stat. 1901, p. 3494, for loaning more than one-tenth part of the capital stock of a bank to one individual, is not even void.

Union Gold Min. Co. v. Rocky Mountain Nat. Bank, 96 U. S. 640, 24 L. ed. 648.

The breach of any statute or regulation of the Department relating to coal lands is not a crime, and has never been so construed by the Department.

Re Northern P. Coal Co. 7 Land Dec. 422; Kerr v. Utah-Wyoming Improv. Co. 2 Land Dec. 728; Re Allen, 8 Land Dec. 140; Larson v. Weisbecker, 1 Land Dec. 409; Re Durango Land & Coal Co. 18 Land Dec. 382; Re Donahue, 32 Land Dec. 349; Dawson v. Higgins, 22 Land Dec. 544.

The coal-land law is a part of the mineral laws of the United States, and must be construed together with all the mineral laws.

Re Crowder, 30 Land Dec. 95; Colorado Coal & I. Co. v. United States, 123 U. S. 307-324, 325, 31 L. ed. 182-189, 8 Sup. Ct. Rep. 131; Mullan v. United States, 118 U. S. 271, 277, 30 L. ed. 170, 172, 6 Sup. Ct. Rep. 1041.

Contemporaneous construction of the statutes is controlling.

Gardner v. Collins, 2 Pet. 58, 7 L. ed. 347; United States v. State Bank, 6 Pet. 29, 39, 8 L. ed. 308, 311; Robertson v. Bradbury, 132 U. S. 491, 493, 33 L. ed. 405, 406, 10 Sup. Ct. Rep. 158; United States v. Macdaniel, 7 Pet. 1, 8 L. ed. 587; United States v. Gilmore, 8 Wall. 330, 19 L. ed. 396; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 50 L. ed. 499, 26 Sup. Ct. Rep. 282; United States v. Moore, 95 U. S. 760, 763, 24 L. ed. 588, 589; Heath v. Wallace, 138 U. S. 573, 582, 34 L. ed. 1063, 1067, 11 Sup. Ct. Rep. 380; Sturr v. Beck, 133 U. S. 541, 548, 33 L. ed. 761, 764, 10 Sup. Ct. Rep. 350; Hewitt v. Schultz, 180 U. S.

139, 157, 45 L. ed. 463, 472, 21 Sup. Ct. Rep. 309.

The statutes bearing upon the right of alienation of the rights acquired by entry-men under the various provisions of the public-land laws have always been interpreted most liberally.

Mullen v. Wine, 26 Fed. 206; Pourier v. Barnes, 57 Fed. 956; Webster v. Luther, 163 U. S. 331, 339, 41 L. ed. 179, 181, 16 Sup. Ct. Rep. 963; Myers v. Croft, 13 Wall. 291, 20 L. ed. 562; Davenport v. Lamb, 13 Wall. 418, 430, 20 L. ed. 655, 658; Lamb v. Davenport, 18 Wall. 307, 314, 21 L. ed. 759, 761; St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 656, 657, 43 L. ed. 320, 322, 323, 19 Sup. Ct. Rep. 61; Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 651, 26 L. ed. 875, 880; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; Adams v. Church, 193 U. S. 510, 516, 48 L. ed. 769, 771, 24 Sup. Ct. Rep. 512; Hafemann v. Gross, 199 U. S. 342, 50 L. ed. 220, 26 Sup. Ct. Rep. 80; United States v. Detroit Timber & Lumber Co. 200 U. S. 321, 339, 50 L. ed. 499, 506, 26 Sup. Ct. Rep. 282; Williamson v. United States, 207 U. S. 425, 462, 52 L. ed. 278, 297, 28 Sup. Ct. Rep. 163.

No crime is charged in count two of the indictment, either under U. S. Rev. Stat. § 4746, U. S. Comp. Stat. 1901, p. 3279, or amendment thereto, for the reason that said section and the amendment have reference solely and alone to pension matters.

Edgington v. United States, 164 U. S. 361, 41 L. ed. 467, 17 Sup. Ct. Rep. 72; United States v. Wood, 127 Fed. 171; Pooler v. United States, 62 C. C. A. 307, 127 Fed. 514.

If the amendment be ambiguous or unintelligible, or if any doubt exists as to its application, the court is at liberty to consult the proceedings of Congress in order to determine the evil sought to be remedied by the enactment of the statute.

American Net & Twine Co. v. Worthington, 141 U. S. 468, 474, 35 L. ed. 821, 824, 12 Sup. Ct. Rep. 55; Church of the Holy Trinity v. United States, 143 U. S. 457, 462, 36 L. ed. 227, 229, 12 Sup. Ct. Rep. 511; Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513.

The words "or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions or the Secretary of the Interior," under the rule of *ejusdem generis*, the other matter must be of a like or similar character, and pertaining to matters within the jurisdiction of the Commissioner of Pensions, to-wit: concerning any claim for pension or payment thereof.

United States v. Beach, 71 Fed. 160; Caldwell's Case (United States v. Caldwell) 19

Wall. 264, 268, 22 L. ed. 114, 115; State v. Sumner, 10 Vt. 587, 33 Am. Dec. 219; Edson v. Hayden, 20 Wis. 683; American Manganese Co. v. Virginia Manganese Co. 91 Va. 280, 21 S. E. 466; United States v. Bitty, 208 U. S. 393, 402, 52 L. ed. 543, 546, 28 Sup. Ct. Rep. 396.

If given its broadest meaning, the statute would be unlimited in its scope and purpose. This was not the intention of Congress, as a perusal of the whole act, as amended, would prevent any such unlimited construction.

United States v. Sheldon, 2 Wheat. 119, 121, 4 L. ed. 199, 200; McKee v. United States, 164 U. S. 287, 293, 41 L. ed. 437, 439, 17 Sup. Ct. Rep. 92.

The courts have long distinguished between "interpretation" and "construction."

Bloomer v. Todd, 3 Wash. Terr. 612, 1 L.R.A. 111, 19 Pac. 138; Morris Aqueduct v. Jones, 36 N. J. L. 206; State ex rel. Hastings v. Smith, 35 Neb. 22, 16 L.R.A. 791, 52 N. W. 700; People ex rel. Twenty-third Street R. Co. v. Tax Comrs. 95 N. Y. 559; Deane v. State, 159 Ind. 313, 64 N. E. 916; Terre Haute & L. R. Co. v. Erdel, 158 Ind. 347, 62 N. E. 706; United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. ed. 37, 42.

Judge Lewis, in the court below, simply denied the existence of facts necessary to bring the indictment within the operation of the statutes claimed to have been violated.

Crary v. Devlin, 154 U. S. 619, appx., and 23 L. ed. 510, 14 Sup. Ct. Rep. 1199.

In order to give this court jurisdiction, the construction of the statute must have been the controlling question decided by the court below.

Carey v. Houston & T. C. R. Co. 150 U. S. 171, 181, 37 L. ed. 1042, 1044, 14 Sup. Ct. Rep. 63; Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Klinger v. Missouri, 13 Wall. 257, 263, 20 L. ed. 635, 637; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 576, 40 L. ed. 536, 540, 16 Sup. Ct. Rep. 389; Harrison v. Morton, 171 U. S. 38, 47, 43 L. ed. 63, 66, 18 Sup. Ct. Rep. 742.

A construction of a statute is not necessarily involved because the right of one of the parties is based upon the statute.

Cameron v. United States, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 507, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726; Dower v. Richards, 151 U. S. 658, 662, 666, 38 L. ed. 305, 307, 308, 14 Sup. Ct. Rep. 452; Ferry v. King County, 141 U. S. 668, 673, 35 L. ed. 895, 898, 12 Sup. Ct. Rep. 128; Snow v. United States, 118 U. S. 346, 30 L. ed. 207, 6 Sup. Ct. Rep. 1059; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 651, 34 L. ed. 1110, 1115, 11

Sup. Ct. Rep. 435; *Bushnell v. Crooke Min. & Smelting Co.* 148 U. S. 682, 690, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Giles v. Teasley*, 193 U. S. 146, 160, 48 L. ed. 655, 24 Sup. Ct. Rep. 359; *Sloan v. United States*, 193 U. S. 614, 48 L. ed. 814, 24 Sup. Ct. Rep. 570; *Caro v. Davidson*, 197 U. S. 197, 200, 49 L. ed. 723, 724, 25 Sup. Ct. Rep. 428; *Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 233, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476; *Budzisz v. Illinois Steel Co.* 170 U. S. 41, 42 L. ed. 941, 18 Sup. Ct. Rep. 503; *Muse v. Arlington Hotel Co.* 168 U. S. 430, 42 L. ed. 531, 18 Sup. Ct. Rep. 109; *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 690; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *United States v. Lynch*, 137 U. S. 280, 34 L. ed. 700, 11 Sup. Ct. Rep. 114.

Although the record discloses a construction of a statute, or that constitutional rights are asserted, it will not change the real character of the controversy and make it a case in which the controlling rule of decision involves the construction of a statute or application of the Constitution.

District of Columbia v. Gannon, 130 U. S. 227, 229, 32 L. ed. 922, 923, 9 Sup. Ct. Rep. 508; *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 312, 47 L. ed. 480, 486, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Arkansas Southern R. Co. v. German Nat. Bank*, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78.

Mr. Frederick N. Judson also argued the cause, and, with Messrs. Tyson S. Dines and John F. Green, filed a brief for defendants in error:

There are no common-law offenses against the United States. Any offense which may be the subject of criminal procedure in a court of the United States must be an act committed or omitted in violation of a public law of the United States either prohibiting it or commanding it.

United States v. Hudson, 7 Cranch, 32, 3 L. ed. 259; *United States v. Coolidge*, 1 Wheat. 415, 4 L. ed. 124; *United States v. Wiltberger*, 5 Wheat. 76, 5 L. ed. 37; *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. ed. 159, 11 Sup. Ct. Rep. 559; *United States v. Eaton*, 144 U. S. 678, 36 L. ed. 592, 12 Sup. Ct. Rep. 764; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; *United States v. Clayton*, 2 Dill. 219, Fed. Cas. No. 14,814; *United* 53 L. ed.

States v. Manion, 44 Fed. 800; *Todd v. United States*, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

It necessarily follows, and has been declared by this court, that a requirement in a rule or regulation of a department cannot make any act or neglect to act a criminal offense in the absence of a statute making such act or neglect a criminal offense.

United States v. Eaton, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764; *Caha v. United States*, 152 U. S. 211, 38 L. ed. 415, 14 Sup. Ct. Rep. 513; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

In the coal-land statute there is no prohibition of alienation by pre-contract or otherwise, and such prohibition cannot be inferred from any supposed public policy which Congress has failed to enact in a statute.

St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61.

As there are no common-law offenses in the United States, criminal conspiracies are punishable only as such when they are distinctly declared in the statute. There must be a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. It is thus sharply distinguished from conspiracy at common law, which has been substantially modified both by judicial decisions and statute in England and in the courts of the several states.

United States v. Britton, 108 U. S. 192, 27 L. ed. 703, 2 Sup. Ct. Rep. 525; *Pettibone v. United States*, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542; 2 Stephen, *History of Crim. Law, Eng.* 121-127; 2 Wharton, *Crim. Law*, 10th ed. § 1356a, b and note; Wright, *History of Crim. Conspiracies*, Am. ed. 6, 68.

It follows that the word "defraud" in the second clause of the conspiracy statute must be construed in the sense of committing a fraud made so by Federal statute.

2 Wharton, *Crim. Law*, 10th ed. 1356a, b. The indictment does not state a case of "defraud" at common law.

Bouvier's Law Dict. "defraud;" 7 Cyc. *Law & Proc.* p. 123, "cheats;" 19 Cyc. *Law & Proc.* p. 387, "false pretenses;" *United States v. Wilson*, 44 Fed. 751; 2 Stephen, *History of Crim. Law, Eng.* 121-127.

The statutory requirement of overt acts in conspiracies against the government is analogous to and taken from the constitutional requirement in indictments for treason; and this latter has sprung from the dread of constructive treason, and is controlled by considerations of public policy,

which prohibit the extension by judicial construction of statutory crimes which are dangerous to liberty.

4 Bl. Com. chap. VI.; United States v. Hirsch, 100 U. S. 33, 25 L. ed. 539; The Federalist, No. 43; 2 Curtis, History of U. S. Const. 384; 3 Coke, Inst. p. 23; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Wright, History of Crim. Conspiracies, p. 68; 2 Wharton, Crim. Law, 10th ed. § 1338, a. b.

The conspiracy must therefore be sufficiently charged irrespective of any averment of overt acts, which are merely to afford a *locus paenitentiae*.

United States v. Britton and Pettibone v. United States, *supra*; United States v. Taffe, 86 Fed. 113.

As the United States cannot be defrauded by the exercise by a citizen's sale of his right of entry and purchase of coal lands when it has not been prohibited by statute, it is not necessary to consider the distinction between frauds at common law and the frauds cognizable in a court of equity, which latter, it is said, are incapable of definition.

To say that constructive fraud, such as is cognizable only in a court of equity, can be the basis of a criminal prosecution for conspiracy, would, in effect, say that no man could tell whether he had committed a crime until the chancellor had passed judgment thereon.

Thus, the word "fraud," as used in the bankruptcy act, has been held to mean positive fraud, involving moral turpitude.

Neal v. Clark (Neal v. Seruggs) 95 U. S. 704, 24 L. ed. 586. See also Hennequin v. Clews, 111 U. S. 676, 28 L. ed. 565, 4 Sup. Ct. Rep. 576.

It is impossible to define the equitable conception of fraud.

2 Pom. Eq. Jur. 873; Stephen, History of Crim. Law, p. 121.

United States v. Trinidad Coal & Coking Co. 137 U. S. 161, 34 L. ed. 640, 11 Sup. Ct. Rep. 57, relied upon by counsel in the court below, is clearly not in point, as this is a criminal action, and, even in civil cases, in view of the recent decision of the Supreme Court in the case of Adams v. Chureh, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512, must be limited to its special facts; and in this latter case the court distinctly upheld this inherent right of contract.

Hafemann v. Gross, 199 U. S. 342, 50 L. ed. 220, 26 Sup. Ct. Rep. 80; Hartman v. Butterfield Lumber Co. 199 U. S. 335, 50 L. ed. 217, 26 Sup. Ct. Rep. 63; United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; Myers v. Croft, 13 Wall. 291, 20 L. ed. 562.

The government of the United States, therefore, cannot be defrauded by the exer-

cise by a citizen of the right of alienation by contract, where, for a consideration, deemed satisfactory to himself, he extinguishes his own right.

Had Congress intended to prevent the exercise of this right, it would have said so. The specific acts of defendant must be shown to have been clearly forbidden by the statute.

France v. United States, 164 U. S. 676, 41 L. ed. 595, 17 Sup. Ct. Rep. 219.

The cases relied on by counsel (Curley v. United States, 64 C. C. A. 369, 130 Fed. 1, and United States v. Stone, 135 Fed. 393) are not in point, for the reason that, in those cases, the conspiracies relate directly to the exercise of governmental functions in public service, and in the protection of lives upon the high seas, and involved the invasion, not the violation, of specific statutes, and were acts in themselves *mala in se*, and not *mala prohibita*.

There is no averment in either count of the indictment that any entryman did not possess the qualifications required by the statute, or that any entryman was disqualified by having already exhausted his right, or that there was any false personation or imposition, or that any statutory requirement was not performed; nor is there any charge that any lands were entered with any misrepresentations or concealment as to the character of the lands. Therefore the indictment in neither count states any crime under the laws of the United States.

The second count of the indictment is specifically based upon U. S. Rev. Stat. § 4746, U. S. Comp. Stat. 1901, p. 3279, which is distinctly a pension statute, and not applicable to the case at bar.

The court is at liberty to refer to the proceedings in Congress in order to determine the evil sought to be remedied by the enactments of the statute.

Hepburn v. Griswold, 8 Wall. 603, 19 L. ed. 513; American Net & Twine Co. v. Worthington, 141 U. S. 468-473, 35 L. ed. 821-823, 12 Sup. Ct. Rep. 55; Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511; Northern P. R. Co. v. United States, 36 Fed. 285; United States v. Union P. R. Co. 37 Fed. 551; Untermeyer v. Freund, 50 Fed. 80; United States v. Patterson, 4 Inters. Com. Rep. 775, 55 Fed. 641; United States v. Wilson, 58 Fed. 768; United States v. Hansee, 79 Fed. 303.

This statute was construed as a pension statute in Pooler v. United States, 62 C. C. A. 307, 127 Fed. 509. See also Edgington v. United States, 164 U. S. 361, 41 L. ed. 467, 17 Sup. Ct. Rep. 72.

As the act under which this writ of error is sued out in no wise limits the jurisdic-

tion of the court, it follows that the court has the duty, if necessary, of reviewing the whole case.

Burton v. United States, 196 U. S. 283, 49 L. ed. 482, 25 Sup. Ct. Rep. 243; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396; United States v. Macdonald, 207 U. S. 120, 52 L. ed. 130, 28 Sup. Ct. Rep. 53.

As this case is brought before this court under the statute of 1907, it is before the court for all purposes, both as to the crime under the statute and the sufficiency of the indictment in all respects.

Ledbetter v. United States, 170 U. S. 613, 42 L. ed. 1164, 18 Sup. Ct. Rep. 774.

Messrs. Frederick N. Judson and Edwin H. Park also filed a reply brief for defendants in error:

Laws which create a crime ought to be so explicit that all men subject to their penalties may know what acts it is their duty to avoid. Before any man can be punished, his case must be plainly and unmistakably within the statute.

One of two alternatives we must here accept. We must, with the old English judges, look upon all voluntary combinations as suspicious, and an object of judicial suppression; or we must declare that only such combinations are penally cognizable as are here declared beforehand to be unlawful.

Wharton, Crim. Law, § 2288.

The courts have uniformly declared that the right of alienation is incident to every property right which is capable of possession in any sense. Whatever a man owns he can transfer, unless there is some statute prohibiting the exercise of that right.

St. Louis Min. & Mill. Co. v. Montana Min. Co. 171 U. S. 650, 43 L. ed. 320, 19 Sup. Ct. Rep. 61; Mullen v. Wine, 26 Fed. 206; Pourier v. Barnes, 57 Fed. 956, 12 C. A. 9, 27 U. S. App. 500, 64 Fed. 14; Webster v. Luther, 163 U. S. 331, 41 L. ed. 179, 16 Sup. Ct. Rep. 963.

Under the mining law, assignments of placer claims have been sustained. This principle of the assignability of property rights is illustrated in the rulings of the courts upon the assignability of claims under the mining laws of the United States, as in the case of "grub-stake" contracts, which have been held assignable, though oral, and wherever capable of proof.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 654, 26 L. ed. 875, 881.

In the absence of actual fraud, perjury, and dummy entrymen, there is no criminal conspiracy in the corporations securing coal

lands through pre-contract with the entrymen.

Pereles v. Weil, 157 Fed. 419.

Mr. Justice White delivered the opinion of the court:

The United States prosecutes this writ of error upon the assumption that the decision of the district court was based upon an erroneous construction of the statutes upon which the indictment was founded, and therefore, by virtue of the act of March 2, 1907, chap. 2564, 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1907, p. 209, the right obtained *to review the decision by [380 writ of error direct from this court.

The indictment contained two counts. Without quoting them fully, it suffices to say, for the purposes of the questions which we are called upon to decide, if we have authority to decide them, that the first count charged that the eleven defendants illegally conspired, in violation of § 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676), with certain named persons and others unknown, to illegally obtain the title of certain coal lands belonging to the United States. The conspiracy was to be effected by procuring various persons as agents to enter coal lands in their own name, ostensibly for their own benefit, but in reality for the use and benefit of the accused and a named organization; the purchases being made by the agents as above stated, not with their own money, but with money of the accused or the corporation, and under agreements to convey the title, when acquired, to the accused or to the corporation, thus enabling the accused and the corporation to obtain coal lands belonging to the United States in excess of the quantity which they were allowed by law to enter. Copious averments were made in the count as to the use of alleged false, fictitious, and fraudulent papers in making the entries in question, which papers, as filed and entries made, had for their object and purpose to deceive the land officers of the United States, so as thereby to cause them to allow the entries in the name of the agents on the supposition that the entries were for the benefit of the entrymen, and which entries they would not have had the power to allow under the law, and would not have allowed, had the truth been disclosed. The second count charged an illegal conspiracy to do acts made criminal by § 4746, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3279), in making and presenting, and causing to be made and presented, in connection with the entries of coal land, certain false, forged, fictitious, etc., affidavits and papers.

To clear the approach to the issues to be decided we bring into view the statutes which

must be passed on. Section 5440, relating to conspiracies, was amended May 17, 1879 [21 Stat. at L. 4, chap. 8, U. S. Comp. Stat. 381] 1901, p. 3676], by changing *the penalties imposed by the section as primarily enacted. As amended this section is as follows:

"Sec. 5440. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

The text of §§ 2347, 2348, 2349, and 2350 (U. S. Comp. Stat. 1901, pp. 1440, 1441), which provide for the sale of coal lands belonging to the United States, is as follows:

"Sec. 2347. Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register or the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

"Sec. 2348. Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved: Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and im- 382] proving *any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

"Sec. 2349. All claims under the preceding section must be presented to the register of the proper land district within sixty days after the date of actual possession and 238

the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvement shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

"Sec. 2350. The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof, and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant."

Section 2351 provides for conflicting claims in designated cases, and thus concludes:

"The Commissioner of the General Land Office is authorized *to issue all need-[383 ful rules and regulations for carrying into effect the provisions of this and the four preceding sections."

Section 4746 of the Revised Statutes, embraced in the title "Pensions," was amended by the act of July 7, 1898 (30 Stat. at L. 718, chap. 578, U. S. Comp. Stat. 1901, p. 3279). The section, as amended, is as follows, the amendments which the law of 1898 enacted being printed in italics:

"That every person who knowingly or wilfully *makes or aids, or assists in the making*, or in any wise procures the making or presentation of any false or fraudulent affidavit, *declaration, certificate, voucher, or paper, or writing purporting to be such*, concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions *or of the Secretary of*

the Interior, or who knowingly or wilfully makes or causes to be made, or aids or assists in the making, or presents or causes to be presented at any pension agency any power of attorney or other paper required as a voucher in drawing a pension, which paper bears a date subsequent to that upon which it was actually signed or acknowledged by the pensioner, and every person before whom any declaration, affidavit, voucher, or other paper or writing to be used in aid of the prosecution of any claim for pension or bounty land or payment thereof purports to have been executed who shall knowingly certify that the declarant, affiant, or witness named in such declaration, affidavit, voucher, or other paper or writing personally appeared before him and was sworn thereto or acknowledged the execution thereof, when, in fact, such declarant, affiant, or witness did not personally appear before him or was not sworn thereto or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five hundred dollars or by imprisonment for a term of not more than five years."

On behalf of the various defendants motions to quash the indictment were filed, which the court granted. The grounds of demurrer were substantially the same, many being addressed to technical attacks upon the sufficiency of the indictment; but in each of the motions the validity of the indictment ³⁸⁴ was assailed upon the ground that neither count stated an offense within the statutes when properly understood.

The court, in the reasons given by it for granting the motions to quash, substantially held as follows:

1st. That the first count related exclusively to cash entries of coal lands under § 2347, Rev. Stat. That under this section no affidavits or papers were required other than the application to purchase, and therefore that all the allegations of the count respecting false and fictitious affidavits, papers, etc., related to documents required solely by the rules and regulations of the Land Department, which, not being expressly authorized by the statute, could not form the basis of a criminal conspiracy. The papers were therefore put out of view.

2d. That the coal-land statutes did not prohibit one who was qualified to enter coal lands from making a cash entry of such lands in his own name, ostensibly for himself, but really for the benefit of another, who was disqualified to directly make the entry, even although the ostensible entryman, in making the purchase in his own name, was really acting as the agent of the disqualified person, paid the price of the land with the money of such disqualified

person, and made the entry under an obligation, on the completion of the purchase from the United States, to transfer the land to such disqualified person.

3d. From the import of the coal-land statutes thus announced it was decided that a conspiracy to acquire coal lands from the United States by the means stated was not a violation of § 5440, as the acts alleged did not constitute a defrauding of the United States within the meaning of the word "defraud" as used in the second clause of the Section, because that word must be interpreted in a restricted sense, and be given only its assumed common-law significance, and could not be used so as to embrace acts not expressly forbidden by law, upon the theory that their performance was contrary to a public policy which it might be assumed caused the enactment of the statutes.

*4th. It was directly held that the ³⁸⁵ conclusions just stated were not in conflict with a previous adjudication of this court, construing the coal-land laws, as the decision had been rendered in a civil controversy, and could not be extended and carried over so as to control the construction of the statute in a criminal prosecution, thus "spelling out" a crime where none was expressly declared in the statute.

5th. As to the second count, it was decided that § 4746 embraced only affidavits, etc., relating to pension and bounty land claims, and the charge of a conspiracy to commit a crime in violation of the section in question could not be based upon allegations of the use of false and fictitious papers, etc., in connection with entries of coal lands.

At the threshold our jurisdiction is questioned because it is asserted the case does not come within the act of March 2, 1907. The grounds of this contention are as follows:

First. That the court below merely held that the facts charged in the indictment were not within the statute, and therefore the indictment, and not the statute, was interpreted or construed.

Second. Because, in any event, the court below did not construe, but merely interpreted, the statutes.

As to the first ground, we dispose of it simply by saying that the analysis which we have hitherto made of the decision of the court below demonstrates that the contention is devoid of all merit.

In support of the second ground, it is insisted that the construction of a statute is one thing and its interpretation another and different thing. That abstractly there may be a difference between the two terms is not denied in argument by the United

States, and finds support in works of respectable authority.

But, conceding the abstract distinction, and granting, for the sake of the argument only, 386] that the conclusion of the *court below might properly be classed, abstractly speaking, as an interpretation, and not a construction, of the statute, we think the contention without merit. It may not be doubted that, in common usage, interpretation and construction are usually understood as having the same significance. This was aptly pointed out in Cooley's Constitutional Limitations, 6th edition, where, after stating the theoretical difference, it is observed (p. 52): "In common use, however, the word 'construction' is generally employed in the law in a sense embracing all that is properly covered by both, when each is used in a sense strictly and technically correct." We think, when the context of the act of March 2, 1907, is taken into view, and the remedial character of the act is given due weight, it becomes apparent that the word "construction" is employed in the statute in its common signification, and hence includes both construction and interpretation, although there may be an abstract difference between them. This being so, it follows that we have jurisdiction to review the action of the court in quashing the indictment.

Putting aside for the moment technical objections to the sufficiency of the indictment, it is conceded by both sides that if the statutes which the court below construed be given the meaning which the United States, by the assignments of error, assert is the correct one, an offense against the United States was stated in both counts of the indictment. The construction of the statutes, therefore, is the real question for decision. We propose to examine the statutes applicable to each count separately; and, in doing so, to weigh the conflicting contentions urged in argument bearing on the question of the true construction. We reserve, however, for final consideration various contentions relating merely to the construction of the indictment as a pleading, by which the United States contends that the court below was wrong, even if, for the sake of argument, it be assumed that its construction of the statutes was right, and by which the defendants in error contend that the order quashing the indictment was 387] right, even if the court was *wrong in its view of the law, because of defects in the indictment.

1. *The first count.*

This count requires us to consider only the conspiracy provision, § 5440, and the coal-land provisions, §§ 2347, 2348, 2349, and 2350. As the applicability of § 5440

to the facts charged largely depends upon whether those acts were forbidden by the sections last mentioned, we proceed first to their consideration. Under these sections the question is, Do they prohibit a person who is disqualified from acquiring additional coal lands from the United States, because he has already purchased the full quantity permitted by law, from employing one who would be qualified if he made any entry of coal land in his own behalf, to make such entry ostensibly for himself, but really as agent for the disqualified principal, to pay for the land with money of such principal under the obligation, when the title has been obtained by purchasing from the United States, to turn over the land purchased to the concealed and disqualified principal? That the statute does expressly prohibit such a transaction we think is foreclosed by a previous decision of this court. Before coming to so demonstrate, however, in view of the contrary conclusion reached by the court below and the earnestness with which the correctness of that conclusion has been pressed at bar, we shall briefly consider the subject upon the hypothesis that it is open, and not foreclosed. Beyond question, by § 2347, Rev. Stat., everyone possessing the qualifications of age and citizenship therein stipulated is entitled, upon application and on payment of the price fixed by law, to purchase in his own behalf 160 acres of coal land, and every association of persons possessing the qualifications therein mentioned is entitled to purchase 320 acres of such land. This right, however, to thus purchase, is not uncontrolled, since it is limited by the § 2350, saying:

"The three preceding sections shall be held to authorize only one entry of the same person or association of persons; *and[388 no association of persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions. . . ."

The express command that the preceding sections shall be held to authorize only one entry by the same person or association of persons causes the grant to purchase not to embrace more than one entry by the same person; and as the right to purchase the coal land did not exist except by the authority conferred by the statute, it follows that the express provision excluding the right to do a particular act is, both in form and substance, a prohibition against the doing of such act. To hold that this prohibition does not exclude the existence

in a disqualified person of a power to employ an agent to make a second entry, to furnish him with the money to pay for the land, under an obligation, when he has bought from the United States, to transfer the land to the disqualified person, would require us to say that the power was given to do that which the statute, in express terms, declares shall not be done. In other words, it would compel us to decide that an act done for a disqualified person by an agent acting for him and for his exclusive benefit was not the act of the disqualified principal. But this would be to nullify the prohibition upon the inconceivable hypothesis that the act of a duly authorized agent was not the act of his principal. To escape this impossible result it is insisted in argument that where a person qualified to purchase buys in his own name, without disclosing that he is a mere agent for a disqualified person, as he, the agent, thereby exhausts his individual right, the purchase must be treated as his, and not that of the undisclosed principal. This, however, does not change the situation, but simply seeks to avoid it by the statement of a distinction without a difference, since it again but reads the prohibition out of the statute by 389]*causing it to be inoperative if the disqualified person elects to do by another, his agent, that which the statute forbids him to do. True, the statute imposes no limitation on the right of a purchaser who has acquired coal land from the United States to sell the same after he has become the owner of the land. The absence, however, of a limitation on the power to sell after acquisition affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. This clearly follows, since the right to sell that which one has lawfully acquired neither directly nor indirectly implies the authority to unlawfully acquire in violation of an express prohibition.

It is elaborately argued that the laws as to the sale of coal lands were originally embraced in the general statutes regulating the disposition of mineral lands, in which there were no limitations whatever as to the number of entries that a single entryman might make. With this genesis in mind it is urged that the sole purpose of the prohibition forbidding more than one entry by the same person, inserted in the coal-land laws when that subject came to be separately dealt with, was to secure to every citizen the right, if he chose, to make one entry; in other words, to prevent the monopolization by one person by means of many entries of the whole or a vast part of the coal fields belonging to the United States.

From this it is insisted the prohibition forbidding more than one entry by the same person should not be held to embrace an entry made by a qualified person for the benefit and as the agent of a disqualified one when the qualified person did not disclose the fact that he was acting as an agent. Conceding, for the sake of argument, the premise, we do not perceive its relevancy. That is to say, we do not comprehend how such concession lends support to the proposition that the prohibition against more than one entry by the same person should be disregarded by allowing more than one entry by the same person, if only that person chose, after making one entry in his own name, *to cause other and subsequent entries *ad libitum* to be made for his benefit by his agent, with his money, and for his exclusive account.

But if the mind could bring itself, upon grounds of the supposed public policy of the statute, to disregard the prohibition which it expressly contains, the argument here advanced, instead of conducing to that result, leads directly to the contrary. The purpose of the prohibition being, as the argument insists, to keep open the opportunity to every citizen to make one entry for himself, thus discouraging monopoly, it is obvious that that public purpose would be frustrated by allowing a person to make one entry in his own name and thereafter as many as he chose through his agents and for his exclusive benefit. It is a misconception to assume that there is any real identity between a purchase made by a qualified person in his own name and for himself with a purchase made by such person ostensibly for himself but really as the agent of a disqualified person. In the one case the person securing coal land from the United States for himself is free to dispose of the land after acquisition as he may deem best for his interest and for the development of the property acquired. In the other case, the ostensible purchaser acquires with no dominion or control over the property, with no power to deal with it free from the control of the disqualified person for whose benefit the purchase was made.

And the legislation of Congress subsequent to the coal-land laws indicates that Congress contemplated, in enacting the prohibition against more than one entry, the distinction between an entry made by one for himself, with the full power of disposition after entry, and an entry made by one ostensibly for himself, but in reality for another. Thus, under the timber culture act of June 14, 1878, chap. 190, 20 Stat. at L. 113, which conferred authority upon citizens of the United States, or persons who had declared their intention to become such,

to make one entry of not exceeding one quarter section of land for the cultivation of timber, the statute was sedulous to require **391]***that the person desiring to hold and cultivate the land should, at the time of making his entry, swear in his application that his filing and entry was made for his own exclusive use and benefit.

And the public policy lying at the foundation of the prohibition against an entry of land for the conceded benefit of another, whilst leaving full power of disposition in one who acquired the land in compliance with the statute, was pointed out in *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575, where, in considering the timber and stone act of June 3, 1878, chap. 151, 20 Stat. at L. 89, U. S. Comp. Stat. 1901, p. 1545, it was said (p. 163):

"The act does not, in any respect, limit the dominion which the purchaser has over the land after its purchase from the government, or restrict in the slightest his power of alienation. All that it denounces is a prior agreement,—the acting for another in the purchase. If, when the title passes from the government, no one save the purchaser has any claim upon it, or any contract or agreement for it, the act is satisfied."

We shall not further pursue the analysis, as we think it is patent that the whole argument rests upon a plain disregard of the prohibition which the statute contains, or seeks to render that prohibition nugatory by contradictory assumptions; that is to say, by assuming that things which are one and the same are wholly different; and, on the other hand, by asserting that things which are different are one and the same. This is said because such is the result of the contention that a purchase made by one through his agent is, in legal effect, a different thing from a purchase made by the principal; and, on the other hand, by the proposition that a purchase made by one for his own account is not different from a purchase made by the same person, not for his own account, but for another.

But, as we have hitherto observed, the review of the contentions as an original question was not essential, because their want of merit affirmatively appears from a prior adjudication of this court. The case referred to is *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57. The *United States* **392]**sued to *annul certain patents to coal lands on the ground that the land had been purchased by officers and employees of a corporation when the corporation itself was disqualified, because it had already made one entry. The court below had sustained a demurrer to the bill. Its decree was re-

versed and it was expressly decided that the entries made both by the officers of the corporation and its employees were void. The contention was urged that the employees, having each a right to make an entry for his own account, it was not unlawful to do so for the benefit of the corporation. This was expressly negatived, the court saying (p. 167):

"It is true, in the present case, that some of the persons who made the entries in question were not, strictly speaking, members of the corporation, but only its employees. But, as they were parties to the alleged scheme, and were, in fact, agents of the defendant in obtaining from the government coal lands that could not rightfully have been entered in its own name, that circumstance is not controlling. . . . There is, consequently, in view of all the allegations of the bill, no escape from the conclusion that the lands in question were fraudulently obtained from the United States. We say fraudulently obtained, because, if the facts admitted by the demurrer had been set out in the papers filed in the Land Office, the patent sought to be canceled could not have been issued without violating the statute. The defendant would not have been permitted to do indirectly that which it could not do directly."

Because the statute was thus construed in a civil cause affords no reason for saying that the authoritative construction of the statute is not to be applied in a criminal case. It is true that, in the reasoning of the opinion, the public policy upon which the prohibition of the statute was founded was pointed out; but this does not justify the contention that the decision was rested, not upon the prohibition, but upon public policy alone.

The contention that the rules and regulations of the General Land Office or decisions made thereunder have recognized *the **[393]** right of a qualified person to enter coal lands in his own name, ostensibly for himself, but really for a disqualified person, under the obligation to transfer the land after purchase to such person, we think finds no semblance of support, either in the rules and regulations or in the decisions of the Department.

The meaning of the coal-land statutes being thus fixed, the consideration of the conspiracy statute, § 5440, Rev. Stat., is free from difficulty. It will be observed that the section embraces two classes of conspiracies: the first, "to commit any offense against the United States;" and the other, "to defraud the United States in any manner or for any purpose." The count we are now considering, it is not disputed, was framed upon the second clause. The propo-

sition urged in argument that a charge of the commission of crime cannot constitutionally be predicated upon the averment of a conspiracy to defraud under the second clause, unless the acts charged were antecedently made criminal, is without merit, and is foreclosed by *Hyde v. Shine*, 199 U. S. 62, 50 L. ed. 90, 25 Sup. Ct. Rep. 760, wherein it was expressly held that a prosecution would lie upon the charge of a conspiracy to obtain, by fraudulent practices, public lands of the United States. And, indeed, the ruling in that case was but the reiteration of the prior rulings in *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539, and *Dealy v. United States*, 152 U. S. 539, 38 L. ed. 545, 14 Sup. Ct. Rep. 680.

The contention that the word "defraud" must be confined to its common-law significance, and hence cannot embrace the acts here charged, is without merit, even if we concede, for the sake of argument, that the word has a common-law meaning, and that that meaning would be implied if the word stood alone in the statute. This follows because the argument rests upon the assumption that the word "defraud" stands alone in the statute, and ignores the broader meaning which must result from the words "in any manner or for any purpose," by which the word "defraud" is accompanied in the statute. Besides, the contention is foreclosed by *United States v. Trinidad Coal & Coking Co.*, 394 where transactions of the very nature of those here charged were declared to be a fraudulent obtaining of the lands of the United States, and, indeed, transactions generally of a like character formed the subject-matter of the ruling in *Hyde v. Shine*.

The unsoundness of the argument that as when the prohibited entries were made the price of the lands was paid to the United States, therefore the United States could not have been defrauded, is refuted by its mere statement. If it were true, then in every case, however flagrant, where the lands of the United States were procured in violation of express prohibitions of law, the element of fraud would cease to exist by the mere payment of the price; that is to say, the successful operation of the fraud would deprive the transaction of its fraudulent character. But the inherent weakness of the contention need not be further pointed out, because its want of merit is conclusively established by the ruling in *Hyde v. Shine*, where a like contention was decided to be without foundation.

The attempt to distinguish this case from *Hyde v. Shine*, upon the theory that there the parties obtaining the land were disqualified, whilst in this they were not, rests upon the misconstruction of the coal-land statutes which we have already pointed out,—

a misconstruction which we have seen led the court, in its ultimate conclusion, erroneously to say that the entrymen who acted as the agents of the disqualified persons or corporation were not forbidden by the statute to act as they did, because they might have made an entry for themselves.

Nor do we deem it necessary to do more than briefly refer to the elaborate statements at bar concerning constructive crimes and the fear which also found expression in the opinion below, that, if the words "to defraud in any manner or for any purpose" receive a broad significance, charges of crime may be hereafter predicated upon acts not prohibited and innocuous in and of themselves, and which, when they were committed, might have been deemed by no one to afford the basis of a criminal prosecution. It will be time enough to *consider such [395 forebodings when a case arises indicating that the dread is real, and not imaginary. That they are mere phantoms when applied to the case here presented results from the obvious consideration that the conspiracy charged had for its purpose the doing of acts which were in clear violation of the direct prohibition of the coal-land laws,—a prohibition whose meaning and effect had been unmistakably announced and applied by a decision of this court rendered many years before the formation of the conspiracy here charged. The cogency of these considerations becomes more pointedly manifest when it is borne in mind that the purpose and necessary effect of the conspiracy complained of was to obtain the lands of the United States by the suppression of facts which, had they been disclosed, would have rendered the acquisition impossible.

2. *The second count.*

The court below considered that the second count was framed solely upon the first clause of § 5440; that is, it held that the count charged the formation of a conspiracy to commit an offense against the United States through a violation of § 4746; and because of the construction given to that section, it was decided that the count stated no offense. In testing the count in this aspect, we must primarily fix the meaning of § 4746, as violations of that section were charged to have been the subject of the alleged conspiracy.

It was conceded by the United States in argument, and indeed it could not have been in reason denied, that the section in question, as originally embodied under the head of "Pensions" in the Revised Statutes, related exclusively to pension or bounty land claims. No crime, therefore, could have been predicated under the original section upon the affidavits or other papers used in making

the coal-land entries, as alleged in the indictment. The contention, therefore, as now made by the United States, to sustain the second count, rests upon the proposition that the amendment to § 4746 by the act of July 7, 1898 (30 Stat. at L. 718, chap. 578, U. S. Comp. Stat. 1901, p. 3279), had the effect of bringing within that section subjects *to which, prior to the amendment, the section in no manner related. Turning to the text, which we have previously quoted, with the provisions incorporated by the amending act printed therein in italics, it will be observed that every enumeration or description of new acts or papers in addition to those embraced in the section prior to the amendment, alone concern pension or bounty land claims. The argument as to the broad scope of the statute in its present form rests therefore alone upon the proposition that because the amendatory statute, in repeating the original words, *viz.*, "concerning any claim for pension or payment thereof, or pertaining to any other matter within the jurisdiction of the Commissioner of Pensions," adds to them the following, *viz.*, "or of the Secretary of the Interior," therefore the statute now embraces not only acts done in connection with pension or bounty land claims, but all acts of the prohibited character as to any matter coming before the Secretary of the Interior, or subject to so come, entirely without reference to whether they were in pension or bounty land claims or proceedings. But to adopt this latitudinarian construction would cause the statute to create a multitude of new and substantive crimes, wholly disconnected with claims for pensions or bounty land, with which latter it was alone evidently the purpose of the original as well as the amendatory statute to deal. We think to state the proposition is in effect to answer it. When the original text and the amendments which were made are taken into view, the conclusion inevitably follows that the purpose of the amendment was but to more specifically define the pension or bounty land papers, etc., with which the statute was concerned, and to enlarge the operation of the statute in respect to such papers so as to cause it to be criminal to use the pension or bounty land papers, etc., to which the statute refers, as well before the Secretary of the Interior as before the Commissioner of Pensions. In other words, that the only purpose of the amendment was to more fully deal with the subjects with which the provision which was amended *dealt, and not by way of the amendment to legislate concerning every conceivable subject coming within the jurisdiction of the Secretary of the Interior. To otherwise hold would not only violate the most elementary rules of

construction, but would require the treating as superfluous the new words of enumeration concerning pension matters which the amendatory act expressed. This follows, because, if the adding by way of amendment of the words "or of the Secretary of the Interior," contemplated bringing within the criminal inhibitions of the statute every act of a like nature to those forbidden, done in connection with every subject within the jurisdiction of the Secretary of the Interior, then the new enumerations made in the amendment were wholly unnecessary, because, without enumeration, they would have been embraced in the statute as amended. Indeed, if the purpose intended to be accomplished by the amendment had been to embrace all acts of the prohibited nature as to every subject within the jurisdiction of the Secretary of the Interior, no reason can be suggested why the new legislation should have taken the form of mere amendment to the section of the statutes which was alone concerned with pension and bounty land claims. Construing the statute as relating only to the subject of pension and bounty land claims coming within the authority of the Commissioner of Pensions or the Secretary of the Interior, it follows that a violation of its provisions could not arise from the acts charged in the indictment concerning the coal-land entries.

Finally we come to the two contentions of the government which we have hitherto temporarily put aside, and to the various contentions on the part of the defendants in error, insisting either that the court below misconstrued the indictment, or that there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes which led the court below to do so. But we do not think we have jurisdiction on this writ of error to consider these questions. The right of the United States to come directly *to this[398] court because of the construction of the statutes by the court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907, the text of which is printed in the margin.† That act,

†Chap. 2564.—An Act Providing for Writs of Error in Certain Instances in Criminal Cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:

"From a decision or judgment quashing, setting aside, or sustaining a demurrer to,

we think, plainly shows that, in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, it contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. 399]*We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same. It follows from what we have said that the court erred in its construction of the statutes by which it quashed the first count of the indictment, and that, from a rightful construction of the statutes, no error was committed in quashing the second count. The order, therefore, quashing the first count, is reversed, and that quashing the second count is affirmed, and the case is reversed and remanded for further proceedings in conformity to this opinion.

any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.

"From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

"The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered, and shall be diligently prosecuted, and shall have precedence over all other cases.

"Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

"Approved, March 2, 1907." 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1907, p. 209.

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UNITED STATES, Plff. in Err.,

v.

ROBERT FORRESTER, Benjamin N. Freeman, Otis B. Spencer, Frank Eldredge, and George C. Franklin.

(See S. C. Reporter's ed. 399-404.)

Mines — entry for disqualified principal.

Persons entitled, under U. S. Rev. Stat. §§ 2348, 2349, U. S. Comp. Stat. 1901, p. 1440, to a preferential right of entry of coal lands, are prevented, by § 2350 (U. S. Comp. Stat. 1901, p. 1441), prohibiting the making of more than one entry by the same person, from entering such lands apparently for themselves, but in fact as agents for a person who is himself disqualified because he has already purchased the full quantity permitted by law.

[For other cases, see *Mines*, 18-18b, in *Digest Sup. Ct.* 1908.]

[No. 287.]

Argued October 22, 23, 26, 1908. Decided December 14, 1908.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment quashing an indictment for conspiring illegally to obtain title to coal lands of the United States. Reversed and remanded for further proceedings.

The facts are stated in the opinion.

Solicitor General Hoyt and Attorney General Bonaparte argued the cause, and, with Mr. Edwin W. Lawrence, filed a brief for plaintiff in error. For their contentions, see their briefs as reported in *United States v. Keitel*, ante, 230.

Mr. John M. Waldron argued the cause, and, with Mr. G. Q. Richmond, filed a brief for defendants in error:

The rationale of opinion in *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163, *per se* warrants affirmance of the judgment under review.

Congress has never in terms prohibited the making of contracts of the character set forth in the indictment, and crimes cannot be created by judicial implication or construction.

United States v. Worrall, 2 Dall. 384, 394, 1 L. ed. 426, 430, Fed. Cas. No. 16,766; *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42; *United States v. Hudson*, 7 Cranch, 32, 34, 3 L. ed. 259, 260; *Manchester v. Massachusetts*, 139 U. S. 240, 262, 35 L. ed. 159, 166, 11 Sup. Ct. Rep. 559;

NOTE. — On the right of a state to appeal in a criminal case—see note to *People ex rel. Hadson v. Miner*, 19 L.R.A. 342.

Todd v. United States, 158 U. S. 278, 282, 39 L. ed. 982, 983, 15 Sup. Ct. Rep. 889; Jones v. United States, 137 U. S. 202, 211, 34 L. ed. 691, 695, 11 Sup. Ct. Rep. 80; United States v. Dietrich, 126 Fed. 678; Peters v. United States, 36 C. C. A. 105, 94 Fed. 131; United States v. Coppersmith, 4 Fed. 198; Smith v. Alabama, 124 U. S. 465, 478, 31 L. ed. 508, 512, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

The term "defraud," employed in U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3720, defines nothing. Hence, unaided by other Federal legislation, is ineffective as the basis of a criminal prosecution.

4 Elliott, Ev. § 2922; 2 Wharton, Crim. Law, 9th ed. § 1356a.

"Fraud" and "fraudulent" are words so frequently employed by bench, bar, and laity, that their precise meaning and exact import might superficially seem to be thoroughly established; and yet, upon inquiry and reflection, they and their congener, "defraud," will be found to embody mere abstract ideas, and are consequently devoid of specific significance, and are undefined and undefinable.

McAleer v. Horsey, 35 Md. 452; 2 Parsons, Contr. 7th ed. p. 769; Benjamin, Sales, Rev. ed. p. 554; 1 Eddy, Combinations, § 63; Anderson's Law Dict. title, "Fraud," p. 475; 1 Bigelow, Fr. p. 3; 20 Cyc. Law & Proc. p. 14; Story, Contr. § 546; 1 Perry, Tr. § 169; Hobbs v. Boatright, 195 Mo. 693, 5 L.R.A. (N.S.) 906, 113 Am. St. Rep. 709, 93 S. W. 934.

Crime is not to arise upon doubtful construction of a statute, where a person of ordinary intelligence, reading the statute, would not understand from it that the act was forbidden.

2 Wilson's Works, p. 374; 1 Wilson's Works, p. 21; United States v. Brewer, 139 U. S. 278, 288, 35 L. ed. 190, 193, 11 Sup. Ct. Rep. 538; United States v. Reese, 92 U. S. 214, 220, 23 L. ed. 563, 565; United States v. Comerford, 25 Fed. 902; Com. v. Adams Exp. Co. 123 Ky. 720, 97 S. W. 386.

The term "defraud" has repeatedly been adjudged to be vague and indeterminate from the standpoint of the criminal law when unaided by the context in a penal statute.

United States v. Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588, 593; State v. Keach, 40 Vt. 113; State v. Parker, 43 N. H. 88; State v. Roberts, 34 Me. 320; Alderman v. People, 4 Mich. 414, 69 Am. Dec. 321; Com. v. Shedd, 7 Cush. 515; Com. v. Wallace, 16 Gray, 221.

The term "fraud" may have a different signification when employed in a criminal statute than when the like term appears in

an act relating solely to civil rights or remedies.

2 Bishop, New Crim. Law, § 818.

Language employed in criminal statutes, no less certain in its essence than the term "defraud" in U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, has been held void, and upon the express ground that it would be an unconstitutional exercise of authority for the judiciary to define, wholly unaided by statute, the acts necessary to constitute the offense inadequately attempted to be denounced by the legislature.

Cook v. State, 26 Ind. App. 282, 59 N. E. 489; State v. Mann, 2 Or. 238; Augustine v. State, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77; Jennings v. State, 16 Ind. 335; Marvin v. State, 19 Ind. 181; McConvill v. Jersey City, 39 N. J. L. 38; State v. Partlow, 91 N. C. 550, 49 Am. Rep. 652; State v. Gaster, 45 La. Ann. 639, 12 So. 739.

Some act of Congress must exist which, in and of itself, clearly defines as a crime the particular conduct sought to be penalized.

State v. Bates, 14 Utah, 300, 43 L.R.A. 33, 47 Pac. 78; 10 Am. & Eng. Enc. Law, 2d ed. pp. 303, 304; Cooley, Const. Lim. 7th ed. 163.

The words "fraud," "defraud," and "fraudulent," when employed in a pleading, even in a civil suit, are respectively universally regarded as a statement of a mere legal conclusion, and not descriptive of any actionable fact or facts whatsoever.

Kerr, Fraud & Mistake, p. 366; Ambler v. Choteau, 107 U. S. 586, 591, 27 L. ed. 322, 324, 1 Sup. Ct. Rep. 556; Fogg v. Blair, 139 U. S. 118-127, 35 L. ed. 104, 107, 11 Sup. Ct. Rep. 476; Lumley v. Wabash R. Co. 71 Fed. 27; Cella v. Brown, 75 C. C. A. 608, 144 Fed. 754.

Conspiracy as a common-law offense is not cognizable in the Federal courts, and the word "defraud," being of uncertain import, resort cannot be had to that system of jurisprudence to determine its meaning.

2 Lewis's Sutherland, Stat. Constr. § 398; United States v. Smith, 5 Wheat. 154, 160, 5 L. ed. 57, 58.

The word "entry" has a technical meaning, and applies only to the formal proceedings culminating in the payment of the requisite purchase price to the government for the lands desired to be acquired.

Hastings & D. R. Co. v. Whitney, 132 U. S. 357, 363, 33 L. ed. 363, 366, 10 Sup. Ct. Rep. 112; McFadden v. Mountain View Min. & Mill. Co. 87 Fed. 154; Stearns v. United States, 82 C. C. A. 48, 152 Fed. 900; Kansas P. R. Co. v. Dunmeyer, 113 U. S. 629-638, 28 L. ed. 1122-1125, 5 Sup. Ct. Rep. 566; Lockwitz v. Larson, 16 Utah, 279, 52 Pac. 279.

The contracts forming the sole basis of
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this prosecution are not denounced by the letter or express terms of the coal-land act as illegal, fraudulent, or in any manner prohibited, and for the judiciary to denounce such contracts as a criminal conspiracy will be the creating of a crime by purely judicial construction or implication; and constructive crimes, as this court has expressly held, are unknown to Federal criminal jurisprudence.

Todd v. United States, 158 U. S. 282, 39 L. ed. 982, 15 Sup. Ct. Rep. 889.

The fundamental principles of the common law prohibit the enlargement of the letter of the statute by construction for the purpose of entailing penal consequences upon a citizen.

Harrison v. Vose, 9 How. 373-379, 13 L. ed. 179-182; Sarlls v. United States, 152 U. S. 570, 576, 38 L. ed. 556, 558, 14 Sup. Ct. Rep. 720; State v. Moore, 5 Blackf. 118; United States v. Harris, 177 U. S. 305, 310, 44 L. ed. 780, 782, 20 Sup. Ct. Rep. 609; France v. United States, 164 U. S. 676, 683, 41 L. ed. 595, 597, 17 Sup. Ct. Rep. 219; Bishop, Statutory Crimes, § 220; Endlich, Interpretation of Statutes, p. 455; Potter's Dwarr. Stat. & Const. p. 247; James v. Bowman, 190 U. S. 127, 47 L. ed. 979, 23 Sup. Ct. Rep. 678; United States v. Reese, 92 U. S. 214, 23 L. ed. 563; United States v. Fox, 95 U. S. 670, 24 L. ed. 538.

All interests, inchoate or vested, to, in, or concerning lands, public or private, are assignable in the absence of an express prohibitory statute.

St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 651, 26 L. ed. 875, 880; Maxwell v. Moore, 22 How 185, 16 L. ed. 251; Gilbert v. Thompson, 14 Minn. 544; Gil. 414; Myrick v. Thompson, 99 U. S. 291, 296, 297, 25 L. ed. 324, 326, 327; 1 Pom. Eq. Jur. 3d ed. § 168; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673.

The contracts assailed by the indictment would not furnish the basis for a common-law criminal conspiracy.

3 Coke, Inst. 143; Jacob's Dict. title "Conspiracy;" Black's Law Dict. title "Conspiracy;" 4 Bl. Com. p. 136; Schick v. United States, 195 U. S. 65, 69, 49 L. ed. 99, 102, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585; 2 Wilson's Works, p. 429; 2 Wharton, Crim. Law, 9th ed. § 1338; Wright, Criminal Conspiracies, p. 48.

The prevailing definition of "conspiracy" at the present time, *viz.*, "A combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means," is a modern innovation and enlargement by a process of judicial legislation upon the true common-law rule.

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R. v. Jones, 4 Barn. & Ad. 348; State v. Buchanan, 5 Harr. & J. 317, 9 Am. Dec. 534; Com. v. Hunt, 4 Met. 111, 38 Am. Dec. 346; Pettibone v. United States, 148 U. S. 197, 37 L. ed. 419, 13 Sup. Ct. Rep. 542.

The modern cases expanding the doctrine of conspiracy so as to include virtually whatever a court may see proper to declare to be an unlawful object have been bitterly assailed.

1 Eddy, Combinations, §§ 353, 354.

When Federal courts seek to ascertain the status of the common law on a given subject, they accept such law as expounded and settled by the decisions of the English courts prior to, and not after, the separation of the thirteen colonies from the mother country.

6 Am. & Eng. Enc. Law, 2d ed. pp. 279, 280; Cathcart v. Robinson, 5 Pet. 264, 8 L. ed. 120.

The term "unlawful," as an element of the modern judicial definition of "conspiracy," means unlawful in a criminal, and not merely in a civil, sense.

Wright, Crim. Conspiracies, pp. 50, 51; 1 Roscoe, Crim. Ev. 8th ed. p. 565; State v. Van Pelt, 136 N. C. 646, 68 L.R.A. 760, 49 S. E. 177, 1 A. & E. Ann. Cas. 495; Endlich, Interpretation of Statutes, § 119; 3 Greenl. Ev. 15th ed. § 90a; Johnson v. State, 66 Ohio St. 66, 61 L.R.A. 277, 90 Am. St. Rep. 564, 63 N. E. 607; Potter v. State, 162 Ind. 213, 64 L.R.A. 942, 102 Am. St. Rep. 198, 70 N. E. 129, 1 A. & E. Ann. Cas. 32; Com. v. Adams, 114 Mass. 324, 19 Am. Rep. 362; Estelle v. State, 51 N. J. L. 185, 17 Atl. 118; Pettibone v. United States, *supra*; 6 Encyclopædia Britannica, 9th ed. p. 294; 21 Am. & Eng. Enc. Law, 2d ed. p. 748.

Precedents sustaining prosecutions for conspiracy to "defraud" under U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, are limited to combinations involving "moral turpitude" or acts *malum in se*, and this case presents neither of these elements.

Neal v. Clark (Neal v. Scruggs) 95 U. S. 704, 24 L. ed. 586; Hagerman v. Buchanan, 45 N. J. Eq. 299, 14 Am. St. Rep. 732, 17 Atl. 946.

Does the making of contract which merely violates an implied prohibition contained in a statute, but which, in and of itself, would not, *per se*, be in derogation of any principle of the common law (independent of the statutory prohibition), involve the commission of "moral turpitude?"

Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; Blackburn v. Clark, 19 Ky. L. Rep. 659, 41 S. W. 431; Baxter v. Mohr, 37 Misc. 833, 76 N. Y. Supp. 982; Re Coffey, 123 Cal. 522, 56 Pac. 448; State v. Horton, 139 N. C. 592, 1 L.R.A. (N.S.) 991, 111 Am. St. Rep. 818, 51

S. E. 945, 4 A. & E. Ann. Cas. 797; *People v. Phyfe*, 136 N. Y. 554, 19 L.R.A. 141, 32 N. E. 978; *United States v. Britton*, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531.

Where a statute merely prohibits the doing of an act, but provides no penalty as a result of its violation, the only legal liability which can follow from such infraction is a recovery in a civil suit by the injured party.

Chapman v. Douglas County, 107 U. S. 348, 356, 27 L. ed. 378, 381, 2 Sup. Ct. Rep. 62; *Pratt v. Short*, 79 N. Y. 445, 35 Am. Rep. 531.

The exposition of the coal-land act contained in the opinion of this court in the equity suit of *United States v. Trinidad Coal & Coking Co.* 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57, is neither authoritative nor applicable in the pending prosecution.

The reasoning and conclusions in the *Trinidad Case* have been, in effect, overruled, *sub silentio*, even for purposes of purely equitable relief.

United States v. Budd, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; *Hafemann v. Gross*, 199 U. S. 342, 50 L. ed. 220, 26 Sup. Ct. Rep. 80; *Adams v. Church*, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; *Hartman v. Butterfield Lumber Co.* 199 U. S. 335, 50 L. ed. 217, 26 Sup. Ct. Rep. 63. See also *United States v. Trinidad Coal & Coking Co.* 37 Fed. 180; *Lipscomb v. Nichols*, 6 Colo. 290.

Civil and criminal law are wholly independent branches of jurisprudence.

Andrews, Am. Law, § 688; 2 *Bishop*, New Crim. Law, § 818; *Com. v. Tobin*, 108 Mass. 429, 11 Am. Rep. 375; *State v. Moore*, 12 N. H. 47; *Milton v. State*, 40 Fla. 251, 24 So. 60; *Kerr*, *Fraud & Mistake*, p. 43.

Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal, but this difference is here to be taken, when the statute acts upon the offender and inflicts a penalty, as the pillory or a fine; it is then to be taken strictly; but when the statute acts upon the offense by setting aside the fraudulent transaction, here it is to be construed liberally.

1 *Bl. Com.* 88; 2 *Sutherland*, Stat. Constr. 2d ed. §§ 337-683; *Potter's Dwarrr. Stat. & Const.* p. 260; *Smith v. Townsend*, 148 U. S. 490, 497, 37 L. ed. 533, 534, 13 Sup. Ct. Rep. 634.

The same expressions may be differently construed according to their appearing in a civil or criminal action.

Sedgw. Stat. & Const. Law, p. 335; *Com. v. Duane*, 1 Binn. 601, 2 Am. Dec. 497.

The same language may have a broader

scope and effect for remedial purposes than under the restraining influence of considerations which induce strict construction.

2 *Lewis's Sutherland*, Stat. Constr. 2d ed. § 517.

There is no impropriety in putting a literal construction on a penal clause and a liberal construction on a remedial clause in the same act of Parliament.

Short v. Hubbard, 2 Bing. 355.

In construing statutes to prevent frauds there is a pressure toward a liberal interpretation; but, if they also provide a penalty, being a thing odious to the law, there is another pressure toward the strict rule.

Bishop, Statutory Crimes, § 199.

The courts have adopted the sensible proposition that, in so far as the statute is remedial, it is to be liberally construed; but strictly construed in so far as it is penal.

State ex rel. Reeves v. Ross, 62 W. Va. 106, 57 S. E. 284.

The words "fraud" and "defraud" in equity may receive an entirely different meaning from the sense in which the same terms are understood even in a civil action at law; and, *a fortiori*, a radically distinct acceptation when like terms are employed in a penal statute.

Broome v. Beers, 6 Conn. 198; *Kilbourn v. Sunderland*, 130 U. S. 505, 515, 32 L. ed. 1005, 1009, 9 Sup. Ct. Rep. 594; 2 *Pom. Eq. Jur.* 3d ed. § 922; 16 *Cyc. Law. & Proc.* pp. 84, 87, note, 44; 2 *Bigelow*, Fr. pp. 9, 10; 14 *Am. & Eng. Enc. Law*, 2d ed. p. 19, note 2.

The judicial exposition of a statute is not law in future controversies.

Alferitz v. Borgwardt, 126 Cal. 201, 58 Pac. 460; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 371, 37 L. ed. 772, 774, 13 Sup. Ct. Rep. 914; *Swift v. Tyson*, 16 Pet. 1, 18, 19, 10 L. ed. 865, 871; *Yates v. Lansing*, 9 Johns. 415, 6 Am. Dec. 290; *United States Sav. & L. Co. v. Harris*, 113 Fed. 27; *Phipps v. Harding* (*Hudson Furniture Co. v. Harding*) 30 L.R.A. 513, 17 C. C. A. 203, 34 U. S. App. 148, 70 Fed. 468; *Falconer v. Simmons*, 51 W. Va. 172, 41 S. E. 193.

A Federal court cannot lawfully create a crime by construction, where Congress has omitted to even remotely suggest such result in direct terms.

United States v. Hudson, 7 Cranch, 32; 3 L. ed. 259; *Todd v. United States*, 158 U. S. 278, 282, 39 L. ed. 982, 983, 15 Sup. Ct. Rep. 889; *Field v. United States*, 69 C. C. A. 568, 137 Fed. 8; *People v. Phyfe*, 136 N. Y. 559, 19 L.R.A. 141, 32 N. E. 978; *Ex parte McNulty*, 77 Cal. 164, 11 Am. St. Rep. 257, 19 Pac. 237; *Jones v. United States*, 137 U. S. 202, 211, 34 L. ed. 691, 695,

11 Sup. Ct. Rep. 80; *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42.

If the court entertains a reasonable doubt touching the rules of law or either of them, applicable in a criminal proceeding, the defendant is entitled to the benefit thereof.

Endlich, *Interpretation of Statutes*, § 330; *State v. Beck*, 21 R. I. 295, 45 L.R.A. 269, 43 Atl. 366; 2 *Sutherland*, Stat. Constr. p. 966; *State v. Walsh*, 43 Minn. 444, 45 N. W. 721; *State v. Krueger*, 134 Mo. 271, 35 S. W. 604; *State v. Dailey*, 76 Neb. 770, 107 N. W. 1095; *Harrison v. Vose*, 9 How. 372, 13 L. ed. 179.

Jurists recognize conspiracy enactments as the most dangerous to the liberty of the citizen to be found upon the statute books of a state or nation; and this is true because, by elasticity of judicial construction, cases may be in practice brought within their operation when the law-making power may never have intended that such result should follow.

2 *Wharton*, *Crim. Law*, 9th ed. §§ 1338, 1360; 3 *Chitty*, *Crim. Law*, pp. 1138, 1139; *Lambert v. People*, 9 Cow. 597.

In many of the continental countries of Europe conspiracy as a substantive offense has been expressly abolished by legislative enactment.

2 *Wharton*, *Crim. Law*, 9th ed. § 1360.

Mr. John M. Waldron also filed a separate brief for defendants in error:

Decisions of the Land Department are valueless because the Department has boxed the compass in this behalf by changing its construction from time to time to fit its particular policy prevailing at any given period.

Re *McConnell*, 18 Land Dec. 414; 35 Land Dec. 665; Re *Allen*, 8 Land Dec. 143.

A settled policy of the Department will not control in the construction of any act of Congress.

Dewey v. United States, 178 U. S. 510-521, 44 L. ed. 1170-1174, 20 Sup. Ct. Rep. 981; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528-536, 34 L. ed. 767, 769, 11 Sup. Ct. Rep. 168; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; *Deming v. McClaughry*, 51 C. C. A. 349, 113 Fed. 641.

Defendants' construction of the coal-land act of 1873 is supported by the fact that Congress, in enacting such statute, thereby withdrawing coal lands from entry under the general mining law of 1872, did not insert specific prohibitions forbidding alienation contracts by entrymen or those qualified to enter coal lands prior to final entry, as it had done in the homestead and pre-emption statutes theretofore passed by it.

53 L. ed.

Such departure from preceding public-land legislation is significant and must have been intentional, not accidental. The later stone-and-timber and timber-culture acts specifically forbid an entryman to sell or contract to sell his right of entry prior to final purchase from the government.

When Congress so failed to prohibit such contracts in the coal-land act, the rationale of the following decisions denies the right of judicial legislation under the guise of construction to accomplish such end.

Maxwell v. Moore, 22 How. 185, 16 L. ed. 251; *Myers v. Croft*, 13 Wall. 291, 20 L. ed. 562; *Gilbert v. Thompson*, 14 Minn. 544, Gil. 414; *Myrick v. Thompson*, 99 U. S. 291, 25 L. ed. 324; *United States v. Budd*, 144 U. S. 154, 36 L. ed. 384, 12 Sup. Ct. Rep. 575; *Hafemann v. Gross*, 199 U. S. 342, 50 L. ed. 220, 26 Sup. Ct. Rep. 80; *Adams v. Church*, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512; *Hartman v. Butterfield Lumber Co.* 199 U. S. 335, 50 L. ed. 217, 26 Sup. Ct. Rep. 63; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163.

Mr. Justice White delivered the opinion of the court:

A demurrer having been sustained to an indictment found against the present defendants in error, this writ of error was prosecuted on behalf of the United States under the authority of the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209).

The five persons named as defendants were accused of having at Durango, Colorado, entered into an unlawful conspiracy to defraud the United States of more than 3,500 acres of coal lands, eighteen tracts of which land were particularly described. The purpose and object of the conspiracy was averred to have been the obtaining of the title to the lands for a Colorado corporation, styled the Calumet Fuel Company, in a quantity far greater than the corporation could lawfully acquire. The lands were averred to be "all then and there lands of the United States, chiefly valuable for the deposit of coal therein, situated within said land district, and open to entry and purchase as coal lands at the said land office, under the laws of the United States relating to the entry and sale of coal lands, and the rules and regulations then in force, which had theretofore been made under authority of said laws of the Commissioner of the General Land Office, with the approval of the Secretary of the Interior." The means by which *the lands were to be fraud-**[401]** ulently acquired were substantially as follows: Persons qualified to enter coal lands were to be procured, who would be fur-

nished by the conspirators or the corporation with the means to purchase such lands upon antecedent agreements that the lands, when acquired, should be conveyed as directed by the conspirators, each entryman to make the application to purchase and the final entry, and, in so doing, to make affidavit, in which, among other things, it would be falsely stated that the entryman was making the entry for his own use and benefit, and not directly or indirectly for the use or benefit of any other person, whereby the local land officers would be deceived, etc. Forty-nine separate overt acts were charged to have been done in furtherance of the conspiracy. In six of the paragraphs relating to the commission of overt acts the making of affidavits at purchase concerning six of the eighteen tracts enumerated in the body of the indictment was alleged, and the affidavits were set forth verbatim. In each affidavit, besides asserting citizenship, no previous exercise of a right to purchase, and stating the character of the lands, the applicant declared that he had expended a small sum (in one instance fifty dollars, in the others fifteen or twenty dollars) in developing a mine on the particular tract, that the applicant was in actual possession of the mine, and that the entry was made for his own use and benefit, and not indirectly for the use or benefit of any other party. The remaining overt acts concerned the borrowing of the money to make the purchases, the furnishing of the money to the entrymen to make the payments, the execution of deeds by the entrymen, the surveying of certain of the lands, an affidavit as to the distance of some of the lands from a completed railroad, etc.

Among other grounds of demurrer to the indictment was one asserting that no offense was stated therein. The demurrer was sustained "for reasons given on consideration of the first count in case No. 2022, *United States v. Keitel*." The decision thus made the [402]basis of the *ruling was that reviewed in case No. 286, which we have just decided (211 U. S. 370, ante, 230, 29 Sup. Ct. Rep. 123). As pointed out in the opinion in that case, the court below, in quashing the indictment there considered, treated it as relating solely to cash entries made under the provisions of § 2347, Rev. Stat. (U. S. Comp. Stat. 1901, p. 1440). If the indictment in this case is also to be so treated, it clearly follows from the ruling which we have made in the previous case that the court erred in sustaining the demurrer. But it is insisted on behalf of the defendants in error that this case differs from the *Keitel* Case, because the conspiracy here charged did not concern cash entries so-called, but embraced only entries of coal lands made

by persons who had secured, by the opening and developing of mines and the filing of declaratory statements, as provided in § 2349, preferential rights of entry. If it be certain that the court below had construed the indictment as solely relating to strictly cash entries, then, under the views expressed in the *Keitel* Case, the contention now made as to the true significance of the indictment would not be open upon this record. It does not, however, follow that the court below interpreted the indictment here as relating solely to cash entries, because it referred to the reasons given for quashing the first count of the indictment in the *Keitel* Case as affording the basis for its action in sustaining the demurrer to the indictment in this. We say this because it may well be that the court deemed that the construction which it gave to the statutes as applied in the *Keitel* Case to cash entries was applicable, even although the indictment in the case was concerned with preferential entries. In any event, in applying the ruling which it made in the *Keitel* Case to this, the court below must have construed the conspiracy charged in the indictment as relating to all or any of the following classes: 1, to the procuring of the making of original cash entries by qualified entrymen in their own names while secretly acting as agents for a disqualified person; 2, to the procuring of qualified persons to take possession and improve coal lands and to file declaratory statements, with the ultimate object and purpose of entering the lands for the *benefit of disqualified persons; [403] and, 3, to cause persons in whose favor preference rights to enter coal lands had arisen to exercise such rights by purchasing the land ostensibly for themselves, but in reality for the benefit of disqualified persons, and to pay for the same with money furnished by those persons under an obligation to convey the land to them.

The first two of these classes are so obviously controlled by the construction of the statute which we have just announced in the *Keitel* Case, as to demonstrate beyond contention that the court below erred in its ruling on the demurrer. The third class is, we think, also necessarily governed by the construction which we have given the statute in the *Keitel* Case. It being settled in that case that the prohibition against more than one entry of coal lands by the same person prohibits a qualified person from entering such lands apparently for himself, but in fact as the agent of a disqualified person, it follows that the prohibition embraces an entry made by one through the procurement and for the benefit of another, although the entryman had previously initiated a preference right to enter the land

for his own account. The mere preference right obtained as the result of taking the steps enumerated in §§ 2348 and 2349, Rev. Stat., including the filing of the declaratory statement, is, as described in § 2348, simply "a preference right of entry, under the preceding section, of the mine so opened and improved." Turning to § 2347, the preceding section referred to, it will be seen that the entry therein provided for is the cash entry made by applying to purchase the land, and contemporaneously therewith making payment for the same, which entry, as we have decided in the Keitel Case, excludes the right of a qualified person to make the entry in his own name with the money and for the benefit of a disqualified person. When it is considered that the preference which the statute allows is but a right within the time limited in the statute to make the entry authorized by § 2347, it cannot be held, without destroying that section, that the obtaining of such mere right of preference authorized the making, not only 404] of an *entry which the statute permitted, but as well one which the statute forbade. All the argument which seeks to demonstrate that the provision which gives the right to be preferred in making an authorized entry endows with the authority to make an illegal because prohibited entry rests upon a mere misconception of the nature and character of the right of preference for which the statute provides. The argument assumes that the right of preference is, in and of itself, the equivalent of an entry, not controlled by the prohibition which the statute expresses, when in truth and in fact the right of preference is merely a privilege given to make the statutory entry of a particular tract of coal land in preference to others. And the misconceptions upon which the argument rests concerning the nature and character of the preference right for which the coal-land statutes provide, when duly appreciated, at once demonstrate the irrelevancy of previous rulings of this court concerning the right of an entryman after entry, or after the doing of acts made by the statute equivalent to an entry, to dispose of the land embraced within the entry.

It follows from the construction which we have given the statutes in the opinion delivered in the Keitel Case, No. 286, just decided, and for the reasons here stated, that the court below erred in sustaining the demurrer to the indictment.

Reversed and remanded for further proceedings in conformity to this opinion.

UNITED STATES, Plff. in Err.,
v.

CHARLES E. HERR and George C. Franklin.

(See S. C. Reporter's ed. 404, 405.)

This case is governed by the decisions in United States v. Keitel, ante, 230, and United States v. Forrester ante, 245.

[No. 291.]

Argued October 22, 23, 26, 1908. Decided December 14, 1908.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment quashing an indictment for conspiring illegally to obtain title to coal lands of the United States. Reversed and remanded for further proceedings.

Solicitor General Hoyt and Attorney General Bonaparte argued the cause, and, with Mr. Edwin W. Lawrence, filed a brief for plaintiff in error. For their contentions, see their briefs as reported in United States v. Keitel, ante, 230.

Mr. B. W. Ritter argued the cause, and, with Mr. N. C. Miller, filed a brief for defendants in error.

Mr. Justice White delivered the opinion of the court:

The court below sustained a demurrer to the indictment in this case, for the reasons which caused it to quash the first count of the indictment in the case of United States v. Keitel [211 U. S. 370, ante, 230, 29 Sup. Ct. Rep. 123].

The indictment alleged a conspiracy to defraud the United States of coal lands, in violation of § 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676). The conspiracy charged was, speaking in a broad sense, of the same general nature as that set forth in the first count of the indictment in the Keitel Case. In the argument at bar, however, counsel differ as to the correct construction of the indictment here under consideration, the United States contending that the conspiracy to which the indictment related concerned entries based upon preferential rights, while, on the part of the defendants in error, it is insisted that the conspiracy related to only cash entries. In view, however, of our ruling in the Keitel Case, No. 286, and the reasoning by which the decision in that case was held to be controlling in United States v. Forrester, No. 287, just decided [211 U. S. 399, ante, 245, 29 Sup. Ct. Rep. 132], the contentions referred to are irrelevant on this writ of error.

As it results from the opinions in the cases just referred to that the court below erred in sustaining the demurrer to the indictment, its order so doing must be reversed.

Reversed and remanded for further proceedings in conformity to this opinion.

406] *UNITED STATES, Plff. in Err.,
v.

CHARLES E. HERR.

(See S. C. Reporter's ed. 406, 407.)

This case is governed by the decision in *United States v. Keitel*, ante, 230.

[No. 292.]

Argued October 22, 23, 26, 1908. Decided
December 14, 1908.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment quashing an indictment for a conspiracy illegally to obtain coal lands from the United States. Affirmed.

Solicitor General **Hoyt** and Attorney General **Bonaparte** argued the cause, and, with Mr. Edwin W. Lawrence, filed a brief for plaintiff in error. For their contentions see their brief as reported in *United States v. Keitel*, ante, 230.

Mr. N. C. Miller argued the cause, and, with Messrs. B. W. Ritter and Edgar Buchanan, filed a brief for defendant in error;

It is not enough that a question of construction of the statute was presented to the court below. It must, we think, appear affirmatively that such question was not only presented, but that its decision was necessary to the determination of the cause, and that it was the actual basis of the decision, or that the judgment rendered could not have been given without deciding it. In other words, such must have been the controlling question involved.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556-576, 40 L. ed. 536-541, 16 Sup. Ct. Rep. 389; *Harrison v. Morton*, 171 U. S. 38-47, 43 L. ed. 63-66, 18 Sup. Ct. Rep. 742; *Eustis v. Bolles*, 150 U. S. 361, 366, 37 L. ed. 1111, 1112, 14 Sup. Ct. Rep. 131; *Carey v. Houston & T. C. R. Co.* 150 U. S. 170, 181, 37 L. ed. 1041, 1044, 14 Sup. Ct. Rep. 63; *Cameron v. United States*, 146 U. S. 533, 36 L. ed. 1077, 13 Sup. Ct. Rep. 184; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505-509, 44 L. ed. 864-866, 20 Sup. Ct. Rep. 726; *Ferry v. King County*, 141 U. S. 668, 673, 35 L. ed. 895, 898, 12 Sup. Ct. Rep. 128;

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Giles v. Teasley, 193 U. S. 146, 167, 48 L. ed. 655, 661, 24 Sup. Ct. Rep. 359; *Sloan v. United States*, 193 U. S. 614, 620, 48 L. ed. 814, 817, 24 Sup. Ct. Rep. 570; *Caro v. Davidson*, 197 U. S. 197-200, 49 L. ed. 723, 724, 25 Sup. Ct. Rep. 428; *Empire State-Idaho Min. & Developing Co. v. Hanley*, 205 U. S. 225, 233, 51 L. ed. 779, 782, 27 Sup. Ct. Rep. 476; *United States ex rel. Taylor v. Taft*, 203 U. S. 461, 51 L. ed. 269, 27 Sup. Ct. Rep. 148; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Arkansas Southern R. Co. v. German Nat. Bank*, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78.

"Interpretation" has been said to be the "finding of the true sense of the special form of words used;" and "construction" to be "the drawing of conclusions respecting subjects that lie beyond the direct expression of the text."

Bloomer v. Todd, 3 Wash. Terr. 612, 1 L.R.A. 111, 19 Pac. 135; *Morris Aqueduct v. Jones*, 36 N. J. L. 206; *State ex rel. Hastings v. Smith*, 35 Neb. 22, 16 L.R.A. 791, 52 N. W. 700; *People ex rel. Twenty-third Street R. Co. v. Tax Comrs.* 95 N. Y. 559; *Deane v. State*, 159 Ind. 316, 64 N. E. 916; *Terre Haute & L. R. Co. v. Erdel*, 158 Ind. 347, 62 N. E. 706.

There are no common-law offenses against the United States, and every indictment must, therefore, be founded upon a statute.

Todd v. United States, 158 U. S. 278, 39 L. ed. 982, 15 Sup. Ct. Rep. 889; *United States v. Eaton*, 144 U. S. 677, 36 L. ed. 591, 12 Sup. Ct. Rep. 764.

There is no room for "construction"—in its true sense—when the statute is plain and unambiguous.

United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. ed. 37, 43; *Thornley v. United States*, 113 U. S. 310, 28 L. ed. 999, 8 Sup. Ct. Rep. 491; *St. Paul, M. & M. R. Co. v. Phelps*, 137 U. S. 528, 34 L. ed. 767, 11 Sup. Ct. Rep. 168; *United States v. Alger*, 152 U. S. 384, 38 L. ed. 488, 14 Sup. Ct. Rep. 635.

In cases of doubt, the title and subject of the act may always be resorted to to determine the meaning of the body of the act.

Myer v. Western Car Co. 102 U. S. 1, 26 L. ed. 59; *Church of the Holy Trinity v. United States*, 143 U. S. 457, 36 L. ed. 226, 12 Sup. Ct. Rep. 511.

The original statute applied only to pension matters, and was further restricted to the proceedings in these matters while pending before, and within the jurisdiction of, the Commissioner of Pensions himself. It did not impose a penalty upon the person who himself prepared a false affidavit, but only upon the one who procured it to be

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done; nor did it cover, under the first clause, any paper other than an affidavit; nor did it cover a case where, on appeal from the Commissioner of Pensions, a false affidavit was procured to be presented to the Secretary of the Interior.

United States v. Kuentsler, 74 Fed. 220; Edgington v. United States, 164 U. S. 361, 41 L. ed. 467, 17 Sup. Ct. Rep. 72.

The amendment of 1898 is plainly of a very special character, and broadens the original act only to a very limited extent.

Pooler v. United States, 62 C. C. A. 307, 127 Fed. 513.

When we remember that the old statute covered only certain offenses in pension matters, and applies only to a restricted class of persons, at particular stages only of the proceedings, it is not unreasonable to suppose, unless the language of the amendment necessarily repels the presumption, that Congress intended only to extend the provisions of the section to persons who made, as well as those who procured, any material false paper in a pension matter at any stage of the proceeding.

Brewer v. Blougher, 14 Pet. 178, 10 L. ed. 408; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. ed. 1144, 12 Sup. Ct. Rep. 325; Cherokee Intermarriage Cases, 203 U. S. 76, 89, 51 L. ed. 96, 102, 27 Sup. Ct. Rep. 29; McKee v. United States, 164 U. S. 287, 41 L. ed. 437, 17 Sup. Ct. Rep. 92.

When a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive, and the general words treated as referring to matters *ejusdem generis* with such class.

Broom, Legal Maxims, 625; Sutherland, Stat. Constr. § 268; Sedgw. Stat. & Const. Law, p. 361. Bishop, Statutory Crimes, p. 261, § 245; Sarlls v. United States, 152 U. S. 570, 38 L. ed. 556, 14 Sup. Ct. Rep. 720; United States v. Irwin, 5 McLean, 178, Fed. Cas. No. 15,445; Caldwell's Case (United States v. Caldwell) 19 Wall. 264, 22 L. ed. 114; United States v. Beach, 71 Fed. 160; State v. Bryant, 90 Mo. 534, 2 S. W. 836; State v. Schuchmann, 133 Mo. 111, 33 S. W. 35, 34 S. W. 842; State ex rel. Balch v. Fry, 186 Mo. 198, 85 S. W. 328; Wheeler v. Northern Colorado Irrig. Co. 9 Colo. 248, 11 Pac. 103; Hover v. People, 17 Colo. App. 375, 68 Pac. 679; Morse v. Morrison, 16 Colo. App. 449, 66 Pac. 169; Troy Laundry & Machinery Co. v. Denver, 11 Colo. App. 368, 53 Pac. 256; Brooks v. Cook, 44 Mich. 617, 38 Am. Rep. 282, 7 N. W. 216; Moore v. Settle, 82 Ky. 187, 56 Am. Rep. 889; State v. Sumner, 10 Vt. 587, 33 Am. Dec. 219; Edson v. Hayden, 20 Wis. 683; American Manganese Co. v. Virginia Manganese Co. 91 Va. 272, 21 S. E. 466; 53 L. ed.

State v. Goodrich, 84 Wis. 359, 54 N. W. 577; Shirk v. People, 121 Ill. 61, 11 N. E. 888; State v. Fontenot, 112 La. 628, 36 So. 634; People v. New York & M. B. R. Co. 84 N. Y. 569; Bevitt v. Crandall, 19 Wis. 582; 26 Am. & Eng. Enc. Law, 2d ed. p. 610.

Mr. Justice White delivered the opinion of the court:

The indictment in this case contains two counts, each purporting to charge the commission of an offense in violation of Rev. Stat., § 4746 (U. S. Comp. Stat. 1901, p. 3279), as amended.

The substantial charge in each count is that the defendant unlawfully procured a named person, in connection with a preferential entry of coal lands, to make and present to the Secretary of the Interior, by and through the register and receiver of the United States land office at Durango, Colorado, an affidavit at purchase, which was false and fraudulent in specified particulars. A demurrer to the indictment was filed and the validity of each count was assailed on many grounds. In disposing of the demurrer it was assumed by the district *judge[407 as conceded by the government, that the affidavit was not, in fact, presented to the Secretary of the Interior, but was simply filed in the local land office.

The demurrer was sustained "for reasons given on consideration of the second count in the indictment" in the case against F. W. Keitel et al. The case at bar comes within the principles applied by us in No. 286, just decided [211 U. S. 370, ante, 230, 29 Sup. Ct. Rep. 123], where, in passing upon the rulings made below in the Keitel Case, it was held that the second count of the indictment there considered, when the statute was correctly construed, stated no offense. The judgment below, which involved a similar ruling, is therefore affirmed.

EDWARD H. HARRIMAN, Appt.,
v.

INTERSTATE COMMERCE COMMISSION.
(No. 315.)

OTTO H. KAHN, Appt.,
v.

INTERSTATE COMMERCE COMMISSION.
(No. 316.)

INTERSTATE COMMERCE COMMISSION,
Appt.,
v.

EDWARD H. HARRIMAN. (No. 317.)
(See S. C. Reporter's ed. 407-429.)

Interstate Commerce Commission —
power to compel testimony.

Witnesses cannot be required to testify

before the Interstate Commerce Commission except in connection with complaints for violation of the interstate commerce act or with the investigation by the Commission of subjects that might have been made the object of complaint, these being the only matters contemplated by the provision of § 12 of that act, giving the Commission power to require testimony "for the purposes of this act," which power cannot be exercised by the Commission in performing its duty under that section to keep itself informed as to the manner and method in which the business of common carriers is conducted, nor in connection with the enforcement of the requirement of § 20 respecting reports by carriers, nor to aid the Commission in recommending, pursuant to § 21, additional legislation to Congress. [For other cases, see Interstate Commerce Commission, in Digest Sup. Ct. 1908.]

[Nos. 315, 316, 317.]

Argued November 3, 4, 1908. Decided December 14, 1908.

TWO APPEALS from the Circuit Court of the United States for the Southern District of New York to review orders directing appellants to answer certain questions put during an investigation by the Interstate Commerce Commission. Reversed. Also an

APPEAL from the Circuit Court of the United States for the Southern District of New York to review an order denying a petition of the Interstate Commerce Commission to compel an answer to certain questions put during an investigation by the Commission. Affirmed.

See same case below, 157 Fed. 432.

The facts are stated in the opinion.

Messrs. John G. Milburn and John C. Spooner argued the cause, and, with Mr. Robert S. Lovett, filed a brief for Harriman:

The appellant Harriman was not bound to answer the questions in dispute if they did not relate to any particular matter under investigation, or to any matter which the Commission is entitled, under the Constitution or laws, to investigate.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 479, 38 L. ed. 1047, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

The subject-matter of the questions propounded is not interstate commerce, nor so related to interstate commerce as to be subject to regulation by Congress under the commerce clause.

(1) The power of Congress under the commerce clause is limited to matters in direct relation to interstate commerce, and does not extend to the acts, transactions,

and dealings of state corporations and their officers not in that relation.

Angell & A. Priv. Corp. 11th ed. p. 19, § 684; *Hale v. Henkel*, 201 U. S. 75, 50 L. ed. 665, 26 Sup. Ct. Rep. 370; *Gibbons v. Ogden*, 9 Wheat. 211, 6 L. ed. 73; *Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 225, 52 L. ed. 1036, 28 Sup. Ct. Rep. 638; *Baltimore & O. R. Co. v. Maryland*, 21 Wall. 472, 22 L. ed. 684; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 701, 40 L. ed. 849, 859, 16 Sup. Ct. Rep. 714; *Ashley v. Ryan*, 153 U. S. 436, 38 L. ed. 773, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Mobile, J. & K. C. R. Co. v. Mississippi*, 210 U. S. 187, 202, 52 L. ed. 1016, 1023, 28 Sup. Ct. Rep. 650; *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; *United States v. E. C. Knight Co.* 156 U. S. 1, 12, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277; *Mobile County v. Kimball*, 102 U. S. 691, 702, 26 L. ed. 238, 241; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 623, 48 L. ed. 1142, 1154, 24 Sup. Ct. Rep. 784; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 229, 44 L. ed. 136, 143, 20 Sup. Ct. Rep. 96; 17 *Harvard Law Rev.* 536, 537; *Northern Securities Co. v. United States*, 193 U. S. 197, 348, 349, 48 L. ed. 679, 704, 705, 24 Sup. Ct. Rep. 436.

(2) The subject-matter of the questions propounded was not interstate commerce nor directly related to it.

The questions have no relation to the reasonableness of the rates of the Union Pacific.

A state corporation does not, by engaging in interstate commerce, subject all its affairs to the regulation and control of Congress.

Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Capital is not an "instrumentality" of interstate commerce in the sense that Congress may regulate the financial affairs of a state corporation and inquire into a possible devastation of its funds.

United States v. Union P. R. Co. 98 U. S. 569, 25 L. ed. 143.

There is no peculiar or special right to regulate the present Union Pacific Railroad Company, owing to the Federal grant of corporate powers and franchises to its predecessor in title.

The possibility that the Commission may consider whether Congress should require all corporations engaging in interstate commerce to reincorporate or take out a

license under Federal law does not warrant an inquiry into transactions of individuals, or the relations between state corporations and their directors.

Congress has not the power under the Constitution to compel testimony in aid of its legislative functions, and consequently could not delegate such power to the commission.

12 Senate Miscellaneous Documents, 2d Sess. 53d Cong. 1893, 1894, Digest of Decisions and Precedents, p. 277.

The 5th Amendment of the Constitution protects the citizen against such an intrusion into his affairs.

McCray v. United States, 195 U. S. 27, 61, 49 L. ed. 78, 97, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561; Monongahela Nav. Co. v. United States, 148 U. S. 312, 336, 37 L. ed. 463, 471, 13 Sup. Ct. Rep. 622; Kilbourn v. Thompson, 103 U. S. 168, 182, 26 L. ed. 377, 384; Re Pacific R. Commission, 32 Fed. 241; Ex parte Jackson, 96 U. S. 727, 732, 24 L. ed. 877, 879; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 833, 17 Sup. Ct. Rep. 427; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 762, 28 L. ed. 585, 588, 4 Sup. Ct. Rep. 652; Powell v. Pennsylvania, 127 U. S. 678, 684, 32 L. ed. 253, 256, 8 Sup. Ct. Rep. 992, 1257; Re Davies, 168 N. Y. 105, 56 L.R.A. 855, 61 N. E. 118; Bank of Columbia v. Okely, 4 Wheat. 235, 244, 4 L. ed. 559, 561; Dent v. West Virginia, 129 U. S. 114, 124, 32 L. ed. 623, 626, 9 Sup. Ct. Rep. 231; 1 Kent, Com. 10th ed. p. 601; Cooley, Const. Lim. p. 434; Taylor v. Porter, 4 Hill, 145, 40 Am. Dec. 274; Norman v. Heist, 5 Watts & S. 173, 40 Am. Dec. 493; Westervelt v. Gregg, 12 N. Y. 209, 62 Am. Dec. 160; Boyd v. United States, 116 U. S. 616, 628, 29 L. ed. 746, 750, 6 Sup. Ct. Rep. 524; Allen v. Georgia, 166 U. S. 138, 140, 41 L. ed. 949, 950, 17 Sup. Ct. Rep. 525; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581; Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383; Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 280, 15 L. ed. 372, 376.

The fact that the practice has been successfully adopted in some instances does not, for that reason, establish its legality.

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 690, 40 L. ed. 849, 855, 16 Sup. Ct. Rep. 714.

If Congress has power to compel testimony in aid of its legislative functions, the power is legislative in its character, and may not be delegated to an administrative body under a general grant of power.

Wayman v. Southard, 10 Wheat. 15-17, 6 L. ed. 256, 257; Marshall Field & Co. v. 53 L. ed.

Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; Cooley, Const. Lim. p. 163.

Congress has conferred upon the Commission authority to investigate, and, in connection therewith, compel the testimony of witnesses, only in aid of its duty to execute and enforce the provisions of the act to regulate commerce.

Mr. John C. Spooner also filed a separate brief for Harriman:

A railway corporation created by a state, and authorized to build and operate a railway within a state, which also engages in interstate commerce, remains, notwithstanding, a state corporation, and subject to the control of the state as to its organization, the number of its directors, the amount of its capital stock, the liability of its stockholders, its authority to borrow money and to mortgage its property, in possession and expectancy, including its franchises, to extend its railway into other states, by their consent, by construction, purchase, or by stock ownership in other state railway corporations, and as to the general regulation of its powers, the increase or diminution of its franchises, its conduct of commerce "completely internal."

Louisville & N. R. Co. v. Kentucky, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; Northern Securities Co. v. United States, 193 U. S. 349, 48 L. ed. 705, 24 Sup. Ct. Rep. 436; Interstate Commerce Commission v. Brimson, 154 U. S. 472, 38 L. ed. 1055, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 276, 36 L. ed. 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 391, 50 L. ed. 521, 26 Sup. Ct. Rep. 272; Gibbons v. Ogden, 9 Wheat. 211, 6 L. ed. 73; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 497, 52 L. ed. 308, 28 Sup. Ct. Rep. 141.

The subject-matter of the inquiries addressed to the appellant Harriman are, if open to inquiry other than a judicial one, an invasion of the visitatorial power exclusively possessed by the state which created the Union Pacific Railway Company and the other state corporation involved; and beyond the power of the Congress to deal with; and therefore outside of any power which could be conferred upon the Interstate Commerce Commission to investigate.

2 Kent, Com. 306, 313; Angell & A. Priv. Corp. p. 724, § 687; Guthrie v. Harkness, 199 U. S. 148, 50 L. ed. 130, 26 Sup.

Ct. Rep. 4, 4 A. & E. Ann. Cas. 433; Sinking Fund Cases, 99 U. S. 720, 25 L. ed. 501; Clark & M. Priv. Corp. § 864; Northern Securities Co. v. United States, 193 U. S. 348, 48 L. ed. 704, 24 Sup. Ct. Rep. 436.

The power of a state to authorize a railway corporation created by it to acquire and hold the stocks of other railway corporations is indisputably subject only to the limitation that no state may give a corporation created by its laws authority to restrain interstate or international commerce against the will of the nation, as lawfully expressed by Congress.

It is clear that the power of inquiry conferred by § 12. of the interstate commerce law does not warrant such inquiry as is contended for into the organization, internal management and affairs of a state railway corporation, or the questions propounded by it to the appellant Harriman.

It will not be denied, we suppose, that if an interstate railway corporation, engaged in both interstate and intrastate commerce, conducted the latter separately as to trains, employees, and otherwise from the former, that there could not be imputed to Congress an intent to authorize the Commission to inquire and keep themselves informed as to the method and manner in which the corporation conducted its business of intrastate commerce alone. That is, as to regulation, beyond the power of Congress.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 19, 51 L. ed. 941, 27 Sup. Ct. Rep. 585.

If it were admitted that either house or the Congress may lawfully delegate to the Commission power to compel the attendance and testimony of witnesses solely for the purpose of enabling the Commission to gather information upon which to base recommendations to Congress of new legislation, it has not delegated the power to the Commission.

Neither house of Congress nor the Congress possesses, under the Constitution, power to compel the attendance and testimony of witnesses or the production of papers solely in aid of its legislative power.

Kilbourn v. Thompson, 103 U. S. 189, 26 L. ed. 386; Re Pacific R. Commission, 32 Fed. 250; Re Chapman, 166 U. S. 661, 41 L. ed. 1154, 17 Sup. Ct. Rep. 677.

But, if either house of Congress or the Congress possesses the power to compel the attendance and testimony of witnesses in aid of legislation, the power is legislative, and cannot be delegated.

The Commission had no jurisdiction of the subject-matter of the investigation as delineated by the resolution or order under which it was conducted, and therefore no power under the interstate commerce law to

issue subpoenas, or to have the compulsory testimony of witnesses therein.

Sprigg v. Baltimore & O. R. Co. 8 Inters. Com. Rep. 457; China & J. Trading Co. v. Georgia R. Co. 12 Inters. Com. Rep. 241.

Whatever the conduct and transactions of the directors may have been, no cause of action exists in respect of them except by or for the company, and the transactions were their private affairs to all the world except the real party in interest.

United States v. Union P. R. Co. 98 U. S. 609, 25 L. ed. 153; State v. Milwaukee Electric R. & Light Co. (Wis.) 116 N. W. 900.

The subject-matter of the questions is judicial in its nature, and the compulsory testimony of the appellant in respect thereof, save in a suit brought by the real party in interest, in a court of competent jurisdiction, and conducted according to the forms of law, would deprive him of his liberty without due process of law, contrary to article 5 of the Amendments of the Constitution of the United States.

Kilbourn v. Thompson, *supra*.

Mr. Walker D. Hines argued the cause, and, with Mr. Paul D. Cravath, filed a brief for Kahn:

Even on the Commission's theory, the questions are not relevant unless they relate to the value of the property employed by the Union Pacific for the public convenience, and therefore throw light upon the reasonableness of the Union Pacific rate schedules, considered as a whole.

Smyth v. Ames, 169 U. S. 466, 546, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; Central Yellow Pine Asso. v. Illinois C. R. Co. 10 Inters. Com. Rep. 539.

The Commission has declared frequently that its powers are confined to the enforcement of the act, and do not extend to investigating financial operations, or matters which may injuriously affect the corporations.

Commission's Second Annual Report to Congress (1888) p. 21; Thirteenth Annual Report (1899) p. 10; Fourteenth Annual Report (1900) p. 10; New York Produce Exchange v. Baltimore & O. R. Co. 7 Inters. Com. Rep. 658.

The Commission's construction has been regularly reported to Congress, has been relied upon by Congress, and, therefore, should control, even if the language of the statute were doubtful.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 401, 50 L. ed. 515, 525, 26 Sup. Ct. Rep. 272.

No court has held that the Commission has any power to make inquiries of private

persons when not relating to any violation of the act.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563; *Interstate Commerce Commission v. Reichmann*, 145 Fed. 235.

The compulsory disclosure of private affairs, although allowable for the enforcement of rights already established by law, is not allowable for mere general purposes of administration or legislation.

Interstate Commerce Commission v. Brimson, *supra*; *Re Pacific R. Commission*, 32 Fed. 250; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Kilbourn v. Thompson*, 103 U. S. 168, 26 L. ed. 377.

While state courts have considered occasionally the powers of state legislatures to conduct investigations, the cases have related not to inquiries into strictly private affairs, but to investigations of public officers.

Burnham v. Morrissey, 14 Gray, 226, 74 Am. Dec. 676; *Lowe v. Summers*, 69 Mo. App. 637; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *Ex parte Parker*, 74 S. C. 466, 114 Am. St. Rep. 1011, 55 S. E. 122, 7 A. & E. Ann. Cas. 874; *Re Falvey*, 7 Wis. 630.

The power to compel the disclosure of purely private affairs for the enforcement of established rights rests upon absolute necessity, whereas such disclosures are not an absolute necessity, but, at most, only a convenience, with respect to the performance of mere executive or legislative functions.

Amey v. Long, 9 East, 484; *Summers v. Moseley*, 2 Crompt. & M. 488; *Hale v. Henkel*, 201 U. S. 43, 73, 50 L. ed. 652, 665, 26 Sup. Ct. Rep. 370; 3 Wigmore, Ev. § 2192.

Unless the Commission's powers of investigation are confined to the enforcement of the act, there is no standard by which the exercise of those powers can be guided, and there is an unconstitutional delegation of legislative power.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union* 53 L. ed.

Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

The provision of § 12 requiring the courts to aid the Commission in obtaining testimony is constitutional only upon the theory that the statute itself creates and defines the duty of the witness which the court is called upon to enforce; hence, the statute must be so construed as to define a duty upon the part of the witness.

Interstate Commerce Commission v. Brimson, 154 U. S. 476, 38 L. ed. 1057, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

Statutes conferring discretionary power upon administrative bodies should not be extended by unnecessary implication, so as to enlarge the administrative body's opportunities for arbitrary action.

Yick Wo v. Hopkins, 118 U. S. 356, 369, 30 L. ed. 220, 226, 6 Sup. Ct. Rep. 1064.

If the statute could be construed as conferring such general inquisitorial power on the Commission, the court should reject such construction, to avoid the grave constitutional doubts pointed out.

Knights Templars' & M. Life Indemnity Co. v. Jarman, 187 U. S. 197, 204, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108.

Messrs. *Cordenio A. Severance* and *Frank B. Kellogg* argued the cause, and, with Mr. Henry L. Stimson, filed a brief for the Interstate Commerce Commission:

The Interstate Commerce Commission, in making this investigation, had all the power of a congressional committee of inquiry, so far as interstate carriers are concerned, and could inquire into the management of such interstate carriers, and all the financial operations and business thereof, not only for the purpose of regulating rates, fares, and charges, as provided by the interstate commerce act, but for the purpose of recommending additional legislation.

Interstate Commerce Commission v. Brimson, 154 U. S. 447, 474, 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 506, 42 L. ed. 243, 255, 17 Sup. Ct. Rep. 896; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 438, 51 L. ed. 553, 558, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075.

A marked instance of legislation resulting from the investigation of a matter in which the Commission had no power to make an order will be seen in the report entitled "Re Alleged Unlawful Discrimination," 11 Inters. Com. Rep. 597, which opinion was handed down April 5, 1906, and a provision, inserted in § 15 of the Hepburn act on June 29, 1906, evidently pursuant

to the recommendation contained in such report of the Commission.

The importance of the powers of investigation conferred by § 12 was recognized by the Commission from the very first; and they have been with increasing frequency exercised to the present time without challenge, since the decision in the *Brimson Case*.

Commission, 1st report, p. 25, § 12; Seventeenth Annual Rep. (1903) pp. 32, 33; Annual Rep. Dec. 19, 1906; *Re Through Routes & Through Rates*, 12 Inters. Com. Rep. 163; *Re Differential Freight Rates*, 11 Inters. Com. Rep. 13; *Re Charges for Transportation of Fruit*, 11 Inters. Com. Rep. 129, 10 Inters. Com. Rep. 360; *Re Rates on Corn & Corn Products*, 11 Inters. Com. Rep. 212; *Re Rates from St. Louis to Texas Common Points*, 11 Inters. Com. Rep. 238; *Re Power or Train Brakes*, 11 Inters. Com. Rep. 429; *Re Transportation of Salt*, 10 Inters. Com. Rep. 1; *Re Transportation of Immigrants*, 10 Inters. Com. Rep. 13; *Re Tariffs on Export & Import Traffic*, 10 Inters. Com. Rep. 55; *Re Allowances to Elevators*, 10 Inters. Com. Rep. 309; *Re Atchison, T. & S. F. R. Co.* 10 Inters. Com. Rep. 473.

Nor are such powers of investigation or such investigations, novel outside the sphere of Federal jurisdiction. They are precisely the same powers which have been conferred upon similar bodies in the various states of this country, as the only intelligent means of dealing with similar problems.

Massachusetts Acts of 1902, chap. 432, § 12; chap. 265, §§ 17, 19, 21-23, 25; Public Service Com. Law of N. Y. 45, 48.

Prior to the amendments contained in the Hepburn act, this court held that while the equity powers of the Commission did apply to § 20, owing to the specific limitations upon the power of mandamus in the old law, the writ of mandamus did not apply. *Knapp v. Lake Shore & M. S. R. Co.* (United States ex rel. *Knapp v. Lake Shore & M. S. R. Co.*) 197 U. S. 536, 49 L. ed. 870, 25 Sup. Ct. Rep. 538. In the new law, Congress has removed the limitation on mandamus thus established; it would seem that Congress, therefore, had expressed its intention that § 20 should have the most complete remedies possible for its enforcement.

The present efforts of the respondents substantially to nullify § 20 and the powers of the Commission thereunder are similar to those with which the Commission was confronted immediately after the enactment of the interstate commerce act. At that time the broad purpose of the section and its constitutionality were ably defended by

Judge Cooley, in the Second Annual Report of the Commission, p. 4.

The power of Congress to regulate commerce is not confined to the control of the act of transporting persons or goods. It includes the power to employ all means necessary to make such regulations effective. Pursuant to this power, Congress may, therefore, regulate the instrumentalities engaged in interstate commerce, and directly or indirectly affecting the same.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *The Daniel Ball*, 10 Wall. 557, 565, 19 L. ed. 999, 1002; *Hall v. De Cuir*, 95 U. S. 485, 24 L. ed. 547; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Hopkins v. United States*, 171 U. S. 597, 43 L. ed. 297, 19 Sup. Ct. Rep. 40; *Northern Securities Co. v. United States*, 193 U. S. 344, 48 L. ed. 703, 24 Sup. Ct. Rep. 436; *Johnson v. Southern P. Co.* 196 U. S. 22, 49 L. ed. 371, 25 Sup. Ct. Rep. 158; *Hale v. Henkel*, 201 U. S. 75, 50 L. ed. 665, 26 Sup. Ct. Rep. 370; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; *Stockton v. Baltimore & N. Y. R. Co.* 1 Inters. Com. Rep. 411, 32 Fed. 17; *Perkins v. Northern P. R. Co.* 155 Fed. 454; *United States v. Colorado & N. W. R. Co.* 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 321.

If a given subject affects or is connected with interstate commerce, Congress can take hold of and legislate in regard to it with the same freedom as if there were no state lines. Its power is complete and dominant. It has the full powers of any national legislature acting upon subjects within its jurisdiction.

Gibbons v. Ogden, 9 Wheat. 197, 6 L. ed. 70; *Cohen v. Virginia*, 6 Wheat. 264, 413, 5 L. ed. 257, 293; *Northern Securities Co. v. United States*, 193 U. S. 336, 48 L. ed. 699, 24 Sup. Ct. Rep. 436; *Stockton v. Baltimore & N. Y. R. Co.* and *Hale v. Henkel*, *supra*.

Congress has passed many laws regulating certain of these instrumentalities more or less remote from the immediate carriage of the goods.

Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 494, 52 L. ed. 307, 28 Sup. Ct. Rep. 141; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158.

Within its sphere the power of Congress is supreme. The appellants completely lose sight of the difference between the power

of Congress over interstate commerce and the power of the state over intrastate commerce; while, undoubtedly, each is supreme within its own distinctive jurisdiction, if regulations conflict in any degree the action of Congress is controlling, under the 6th article of the Constitution.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Kidd v. Pearson*, 128 U. S. 1, 18, 32 L. ed. 346, 349, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Leisy v. Hardin*, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211-227, 44 L. ed. 136-142, 20 Sup. Ct. Rep. 96; *United States v. Colorado & N. W. R. Co.* supra.

It cannot at this day be disputed that Congress may create interstate corporations, regulate their capital, rates of transportation, the duties of their officers, the relation of the line to other lines of railway, provide for rates of dividend and the dealings between officials and the company. This is clearly within the constitutional power of Congress, and the Commission may inquire into the management of existing interstate carriers with a view to recommending similar regulations.

M'Culloch v. Maryland, 4 Wheat. 316, 407-409, 420-422, 4 L. ed. 579, 601, 602, 605; *California v. Central P. R. Co.* 127 U. S. 1, 39, 32 L. ed. 150, 157, 2 Inters. Com. Rep. 153, 8 Sup. Ct. Rep. 1073; *Wilson v. Shaw*, 204 U. S. 25, 34, 51 L. ed. 352, 357, 27 Sup. Ct. Rep. 233.

The constitutional history of the national banks affords a striking parallel and convincing authority for the construction of the commerce power for which we contend.

M'Culloch v. Maryland, 4 Wheat. 408, 409, 4 L. ed. 602; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204.

We are not announcing any new doctrine, or advancing one step beyond the construction of Chief Justice Marshall, when we say that when the state corporation projects itself across the state line and engages in interstate commerce, it becomes subject to the same regulation, with respect to all its affairs, directly or indirectly relating to such business, as it would if created by Congress itself.

Northern Securities Co. v. United States, 193 U. S. 197, 345, 48 L. ed. 679, 703, 24 Sup. Ct. Rep. 436; *Hale v. Henkel*, 201 U. S. 43, 75, 50 L. ed. 652, 665, 26 Sup. Ct. Rep. 370; *Crutcher v. Kentucky*, 141 U. S. 47, 57, 35 L. ed. 649, 652, 11 Sup. Ct. Rep. 851; *Snead v. Central R. Co.* 151 Fed. 619.

Can it be said for a moment that a commission which had power to investigate the method of the conduct of its transportation by the Union Pacific was without power to

investigate these transactions, so inextricably bound up with that transportation?

Interstate Commerce Commission v. Baird, 194 U. S. 25, 48 L. ed. 860, 24 Sup. Ct. Rep. 563.

To hold that the investment business of an interstate carrier, conducted by the same fiscal instrumentalities as its transportation business is conducted, cannot be inquired into by Congress because the carrier operates under a state charter, and the chartering state permits such an investment business, is to limit the plenary power of Congress to regulate commerce by the divergent notions of policy and self-interest held by forty-six states.

Northern Securities Co. v. United States, 193 U. S. 344, 345, 48 L. ed. 703, 704, 24 Sup. Ct. Rep. 436.

The situation is even more serious than when a court is called upon to pass upon the constitutionality of a statute. In such a case the court will not set aside the statute unless the unconstitutionality exists beyond a reasonable doubt.

Legal Tender Cases, 12 Wall. 531, 20 L. ed. 305; *Trade-Mark Cases*, 100 U. S. 96, 25 L. ed. 552; *Nicol v. Ames*, 173 U. S. 514, 43 L. ed. 791, 19 Sup. Ct. Rep. 522.

But the case now before the court goes even further. To uphold these appellants in their contumacy is to prejudge Congress, and to hold that, by no rational possibility, could it legislate upon the subject-matter at issue; and this without permitting Congress, through the Interstate Commerce Commission, to obtain, the facts upon which such legislation could properly be constitutionally based; and without permitting Congress itself, after it shall have acquired such facts, within its constitutional powers of debate, to consider them.

The cases of *Re Chapman*, 166 U. S. 668, 41 L. ed. 1158, 17 Sup. Ct. Rep. 677; *People ex rel. McDonald v. Keeler*, 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319, and *Re Falvey*, 7 Wis. 630, lay down very clearly the rule which entitles legislative committees to elicit information of the character here sought.

The basic principle by which the judiciary respects and enforces the determination of the legislative branch of the government is especially applicable to economic legislation like the interstate commerce act. For it is particularly true of such legislation that the constitutionality or non-constitutionality of a given statute will often depend upon the facts out of which the general rule of conduct prescribed by the statute has been derived by induction. Thus, a proposed exercise of the power of eminent domain may be held constitutional

as to some portions of the United States, and unconstitutional as to others, by reason of the difference of facts existing in each locality.

Clark v. Nash, 198 U. S. 361-369, 49 L. ed. 1085-1088, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; Strickley v. Highland Boy Gold Min. Co. 200 U. S. 527, 531, 50 L. ed. 581, 583, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. No. 1133.

To foreclose inquiry on the ground that the subject-matter has in the past not been regarded as relating to interstate commerce is to lose sight of the fact that, while the nature of the power to regulate commerce does not change, the scope of its operation must often be extended to new matter.

Re Debs, 158 U. S. 591, 39 L. ed. 1105, 15 Sup. Ct. Rep. 900; Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 9, 24 L. ed. 710.

Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.

McCulloch v. Maryland, 4 Wheat. 316, 421, 423, 4 L. ed. 579, 605.

Congress is not limited in its employment of means to those that are absolutely essential to the accomplishment of the objects within the scope of the powers granted to it.

Interstate Commerce Commission v. Brimson, 154 U. S. 473, 38 L. ed. 1056, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125.

If there be involved any delegation of powers in the creation of an administrative body with authority to investigate the subject of interstate commerce, then not only has this delegation been expressly sustained by this court in the Brimson Case, but the standard by which the delegated powers are to be exercised is as definite as that sanctioned in a number of cases.

Marshall Field & Co. v. Clark, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; Dunlap v. United States, 173 U. S. 65, 74, 43 L. ed. 616, 619, 19 Sup. Ct. Rep. 319; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

The information sought by the Commission and refused by the respondents is ma-

terial as bearing upon the reasonableness of the rates in force on the Union Pacific.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; Re Rates from St. Louis to Texas Common Points, 11 Inters. Com. Rep. 240; Smyth v. Ames, 169 U. S. 546, 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; Re Proposed Advances in Freight Rates, 9 Inters. Com. Rep. 402; Kennebec Water Dist. v. Waterville, 97 Me. 200, 60 L.R.A. 856, 54 Atl. 6; Noyes, American R. Rates, p. 27; San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 412, 38 L. ed. 1014, 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 442, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571; Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; Falmouth v. Falmouth Water Co. 189 Mass. 325, 62 N. E. 255; Brunswick & T. Water Dist. v. Maine Water Co. 99 Me. 371, 59 Atl. 537; Smith v. Griffith, 3 Hill, 338, 38 Am. Dec. 639; Kountz v. Kirkpatrick, 72 Pa. 388, 13 Am. Rep. 687; Sedgw. Damages, 8th ed. § 249.

The resolution of the Commission was amply broad to cover the entire investigation; though in fact it is immaterial whether or not the resolution recited all the subject-matter developed in the course of the investigation.

Re Chapman, 166 U. S. 669, 41 L. ed. 1158, 17 Sup. Ct. Rep. 677.

The contention that the inquiry involved the private business of the appellants is no answer to the right of the Commission to have the inquiry answered.

Wigmore, Ev. § 2192; Interstate Commerce Commission v. Baird, 194 U. S. 46, 48 L. ed. 869, 24 Sup. Ct. Rep. 563; Burnham v. Morrissey, 14 Gray, 226, 74 Am. Dec. 676; Re Chapman, supra; Lloyd v. Freshfield, 2 Car. & P. 325; Emmott v. Star Newspaper Co. 62 L. J. Q. B. N. S. 77; Hannum v. McRae, 18 Ont. Pr. Rep. 185.

Messrs. Cordenio A. Severance and Frank B. Kellogg also filed a separate brief for the Interstate Commerce Commission:

While Congress may not grant or repeal the charters of state corporations, yet, when those corporations become instrumentalities of interstate commerce, and within the regulative power of Congress, it may impose proper restrictions; and, where some portion of the corporate activities authorized by the charter is repugnant to the regulation of Congress, may prevent the corporations from exercising them, in so far

as such exercise bears upon or affects interstate commerce.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493.

Capital is an instrumentality of interstate commerce in the sense that Congress may regulate the financial affairs of a state corporation engaged in such commerce.

Crutcher v. Kentucky, 141 U. S. 47, 35 L. ed. 649, 11 Sup. Ct. Rep. 851.

The power of Congress, in making inquiries concerning subjects upon which it has the right to legislate, cannot be distinguished from the power of the state legislatures in cases committed to their jurisdiction, and the decisions of the state courts sustain this power to the full extent.

People ex rel. McDonald v. Keeler, 99 N. Y. 463, 52 Am. Rep. 49, 2 N. E. 615; *People v. Sharp*, 107 N. Y. 427, 1 Am. St. Rep. 851, 14 N. E. 319; *Re Falvey*, 7 Wis. 630; *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676; *Hovey v. Foster*, 118 Ind. 508, 21 N. E. 39; *Wickelhausen v. Willett*, 10 Abb. Pr. 164.

Mr. Justice Holmes delivered the opinion of the court:

These are appeals; on the one side, from an order of the circuit court directing the appellants, Harriman and Kahn, to answer certain questions put during an investigation by the Interstate Commerce Commission, and, on the other, from a denial of a like order as to two other questions, answers to which the Commission had required.

In November, 1906, the Interstate Commerce Commission, of its own motion, and not upon complaint, made an order reciting the authority and requirements of the act to regulate commerce (Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154), and proceeding as follows: "And whereas it appears to the Commission that consolidations and combinations of carriers subject to the act, and the relations now and heretofore existing between such carriers, including community of interests therein, and the practices and methods of such carriers affecting the movement of interstate commerce, the rates received and facilities furnished therefor, should be made the subject of investigation by the Commission to the end that it may be fully informed in respect thereof, and to the further end that it may be ascertained whether such consolidations, combinations, relations, community of interests, practices, or methods result in violations of said act or tend to defeat its purposes,—it is ordered that a proceeding of

investigation and inquiry into and concerning the matters above stated be, and the same is hereby, instituted." A time and place was set for the first hearing, and the inquiry thus begun was continued for about two months, resulting in the report of July, 1907, entitled "Consolidations and Combinations of Carriers," etc. 12 Inters. Com. Rep. 277.

In the course of the inquiry the appellant Harriman was called by the Commission and testified as a witness. At the time of the transactions referred to he was a director and also the president and the chairman of the executive committee of the Union Pacific Railroad Company. The relations between the Union Pacific and other connecting roads, parallel or not, were under investigation and are set forth in the Commission's report. It is enough to say that the Union Pacific Railroad Company is incorporated under the laws of Utah, and, as has been asserted and assumed, has power under the state laws to purchase the stock of other railroads,—a power that it has exercised[415 on a large scale. Among other things, it bought 103,401 shares of the preferred stock of the Chicago & Alton Railway Company. These shares had been deposited with bankers, Kuhn, Loeb, & Company, by their owners, under an agreement authorizing the bankers to sell them to any purchaser at such price and upon such terms as should be approved by Messrs. Stewart, Mitchell, and the witness, Harriman. He was asked whether he owned any of the stock so deposited, and how much, if any. These questions, under the advice of counsel, he declined to answer.

Next he was asked with regard to stock of the Atchison, Topeka, & Santa Fé Railroad Company, bought by the Oregon Short Line Railroad Company, another Utah corporation, the stock of which was owned by the Union Pacific, whether it was a part of the stock that had been acquired previously by him and two others, and whether it or any part of it was owned by any of the three. After answering the first question, "I think not," he was stopped by his counsel and refused to answer further. Again, it appearing that the Union Pacific, in July, 1906, purchased 90,000 shares of Illinois Central Railroad stock from Messrs. Rogers, Stillman, and the witness, he was asked whether that stock was acquired by a pool of the three, whether it was acquired with a view of selling it to the Union Pacific, and whether it or any part of it was bought at a much lower price than \$175 a share with the intent just mentioned. These questions the witness declined to answer. It appearing further that Kuhn, Loeb, & Company, who were the fiscal agents of the Union

Pacific, had sold to it 105,000 shares of the Illinois Central stock on the same date, he was asked if he had any interest in these shares, and whether they were acquired by a pool for the purpose of selling them to the Union Pacific. These questions the witness declined to answer. Again, it appearing that the Union Pacific had purchased stock of the St. Joseph & Grand Island Railroad Company from the witness since the last-mentioned date, he was asked when he acquired the stock and what he paid for [416]it, and again declined *to answer. Finally, after it had been shown that since July, 1906, the Union Pacific had bought a large amount of New York Central Railroad stock, the witness was asked whether any of the directors of the Union Pacific were interested, directly or indirectly, in this stock at the time when it was sold. An answer to this question also was declined. All these refusals to answer were persisted in after a direction to answer from the Commission. The circuit court ordered them to be answered and Harriman appealed.

The petition of the Interstate Commerce Commission set forth two other questions which the witness refused to answer, and on which it asked the order of the circuit court. One was a general one, whether he was interested in any stocks bought between the 19th of July and the 17th of August that appreciated, and another, more specific, was whether he or any director bought any Union and [or] Southern Pacific in anticipation of a certain dividend, the suggestion being that announcement of the dividend was delayed for the directors to profit by their secret knowledge and that they did so. With regard to these the petition was denied, and the Interstate Commerce Commission appealed.

The appellant Kahn was a member of the firm of Kuhn, Loeb, & Company. He also was asked whether any of the directors of the Union Pacific were the real owners of any of the shares of the Chicago & Alton Railroad deposited, as has been stated, with Kuhn, Loeb, & Company, and sold to the Union Pacific. He was asked further in various forms whether the before-mentioned 105,000 shares of Illinois Central stock, or any part of them, really belonged to or were held for any of the directors of the Union Pacific. And again, whether, at the same time that he bought these shares, he bought for Messrs. Harriman, Rogers, and Stillman the stocks they sold at the same time that he sold his. Finally he was asked whether the 105,000 shares, and the 90,000 shares turned in by Stillman Rogers, and Harriman, were all bought through his instrumentality for a pool of which they and he [417]were members, that *was operating in

Illinois Central stocks for some months before July, 1906. All these questions he was directed by the Commission to answer, but refused. The circuit court ordered him to answer, and he appealed.

Many broad questions were discussed in the argument before us, but we shall confine ourselves to comparatively narrow ground. The contention of the Commission is that it may make any investigation that it deems proper, not merely to discover any facts tending to defeat the purposes of the act of February 4, 1887, but to aid it in recommending any additional legislation relating to the regulation of commerce that it may conceive to be within the power of Congress to enact; and that in such an investigation it has power, with the aid of the courts, to require any witness to answer any question that may have a bearing upon any part of what it has in mind. The contention necessarily takes this extreme form, because this was a general inquiry started by the Commission of its own motion, not an investigation upon complaint, or of some specific matter that might be made the object of a complaint. To answer this claim it will be sufficient to construe the act creating the Commission, upon which its powers depend.

Before taking up the words of the statute the enormous scope of the power asserted for the Commission should be emphasized and dwelt upon. The legislation that the Commission may recommend embraces, according to the arguments before us, anything and everything that may be conceived to be within the power of Congress to regulate, if it relates to commerce with foreign nations or among the several states. And the result of the arguments is that whatever might influence the mind of the Commission in its recommendations is a subject upon which it may summon witnesses before it and require them to disclose any facts, no matter how private, no matter what their tendency to disgrace the person whose attendance has been compelled. If we qualify the statement and say only legitimately influence the mind of the Commission in the opinion of the court called in aid, still it will be seen *that the power, if it exists, is unpar-[418]alleled in its vague extent. Its territorial sweep also should be noticed. By § 12 of the act of 1887, the Commission has authority to require the attendance of witnesses "from any place in the United States, at any designated place of hearing." No such unlimited command over the liberty of all citizens ever was given, so far as we know, in constitutional times, to any commission or court.

How far Congress could legislate on the subject-matter of the questions put to the witnesses was one of the subjects of dis-

cussion, but we pass it by. Whether Congress itself has the unlimited power claimed by the Commission, we also leave on one side. It was intimated that there was a limit in *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 478, 479, 38 L. ed. 1047, 1057, 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125. Whether it could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act.

Whatever may be the power of Congress, it did not attempt, in the act of February 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, to do more than to regulate the interstate business of common carriers, and the primary purpose for which the Commission was established was to enforce the regulations which Congress had imposed. The earlier sections of the statute require that charges shall be reasonable, prohibit discrimination and pooling of freights, require the publication of rates, and so forth, in well-known provisions. Then, by § 11, the Interstate Commerce Commission is created, and by § 12, as amended by later acts, the Commission has "authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission 419] is hereby authorized and required *to execute and enforce the provisions of this act." District attorneys to whom the Commission may apply are to institute and prosecute all necessary proceedings for the enforcement of the act and for the punishment of violations of it; and "for the purposes of this act the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation." [26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3162.] Then comes the provision to which we already have called attention, by which a witness could be summoned from Maine to Texas, and then follow clauses for enforcing obedience to the subpoena by an order of court and for taking depositions, which do not need statement.

The Commission, it will be seen, is given 53 L. ed.

power to require the testimony of witnesses "for the purposes of this act." The argument for the Commission is that the purposes of the act embrace all the duties that the act imposes and the powers that it gives the Commission; that one of the purposes is that the Commission shall keep itself informed as to the manner and method in which the business of the carriers is conducted, as required by § 12; that another is that it shall recommend additional legislation under § 21, to which we shall refer again, and that for either of these general objects it may call on the courts to require anyone whom it may point out to attend and testify if he would avoid the penalties for contempt.

We are of opinion, on the contrary, that the purposes of the act for which the Commission may exact evidence embrace only complaints for violation of the act, and investigations by the Commission upon matters that might have been made the object of the complaint. As we already have implied, the main purpose of the act was to regulate the interstate business of carriers, and the secondary purpose, that for which the Commission was established, was to enforce the regulations enacted. These, in our opinion, are the purposes referred to; in other words, the power to require testimony is limited, as it usually is in English-speaking countries, at least, to the only cases where the sacrifice *of privacy is neces- 420 sary—those where the investigations concern a specific breach of the law.

That this is the true view appears, we think, sufficiently from the original form of § 14. That section made it the duty of the Commission, "whenever an investigation shall be made," to make a report in writing, which was to "include the findings of fact upon which the conclusions of the Commission are based, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found to have been injured; and such findings so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found." As this applied, in terms, to all investigations, it is plain that at that time there was no thought of allowing witnesses to be summoned except in connection with a complaint for contraventions of the act, such as the Commission was directed to "investigate" by § 13, or in connection with an inquiry instituted by the Commission, authorized by the same section, "in the same manner and to the same effect as though complaint had been made." Obviously such an inquiry is limited to matters that might have been the object of a complaint.

The plain limit to the authority to institute an inquiry given by § 13, and the duty to make a report with findings of facts, etc., in the section next following, with hardly a word between, hang together, and show the purposes for which it was intended that witnesses should be summoned. They quite exclude the inference of broader power from the general words in § 12, as to inquiring into the management of the business of common carriers subject to the provisions of the act, the Commission keeping itself informed, etc. They equally exclude such an inference from § 21, the other section on which most reliance is placed. That, as it now stands, requires an annual report, containing "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of commerce, together with such recommendations as to additional legislation *relating thereto as the Commission may deem necessary." Act of March 2, 1889, chap. 382, § 8. 25 Stat. at L. 555, 862, U. S. Comp. Stat. 1901, pp. 3158, 3170.

It is true that, in the latest amendment of § 14, findings of fact are required only in case damages are awarded. Act of June 29, 1906, chap. 3591, § 3, 34 Stat. at L. 584, 589, U. S. Comp. Stat. Supp. 1907, pp. 892, 899. But there is no change sufficient to affect the meaning of the words in § 12, as already fixed. If, by virtue of § 21, the power exists to summon witnesses for the purpose of recommending legislation, we hardly see why, under the same section, it should not extend to summoning them for the still vaguer reason that their testimony might furnish data considered by the Commission of value in the determination of questions connected with the regulation of commerce. If we did not think, as we do, that the act clearly showed that the power to compel the attendance of witnesses was to be exercised only in connection with the quasi judicial duties of the Commission, we still should be unable to suppose that such an unprecedented grant was to be drawn from the counsels of perfection that have been quoted from §§ 12 and 21. We could not believe, on the strength of other than explicit and unmistakable words, that such autocratic power was given for any less specific object of inquiry than a breach of existing law, in which, and in which alone, as we have said, there is any need that personal matters should be revealed.

In §§ 15 and 16 are further provisions for the enforcement of the act, not otherwise material than as showing the main purpose that Congress had in mind. The only other section that is thought to sustain the argument for the Commission is § 20, amended

by act of June 29, 1906, chap. 3591, § 7, 34 Stat. at L. 584, 593, U. S. Comp. Stat. Supp. 1907, pp. 892, 906. This authorizes the Commission to require annual reports from all the carriers concerned, with details of what is to be shown, to which the Commission may add in certain particulars, and further, "to require from such carriers specific answers to all questions upon which the Commission may need information." The Commission may require certain other reports, and is to have access to all accounts, records, and memoranda. The section now deals at length with this matter and how accounts *shall be kept and the like. It [422 seems to us plain that it is directed solely to accounts and returns, and is imposing a duty on the common carrier only from whom the returns come.

All that we are considering is the power, under the act to regulate commerce and its amendments, to extort evidence from a witness by compulsion. What reports or investigations the Commission may make without that aid, but with the help of such returns or special reports as it may require from the carrier, we need not decide. Upon the point before us we should infer from the later action of Congress with regard to its resolution of March 7, 1906 (34 Stat. at L. 823), directing the Commission to investigate and report as to railroad discrimination and monopolies in coal and oil, that it took the same view that we do. For it thought it advisable to amend that resolution on March 21 by adding a section giving the Commission the same power it then had to compel the attendance of witnesses in the investigation ordered. 34 Stat. at L. 824. The mention of the power then possessed obviously is intended simply to define the nature and extent of the power by reference to § 12 of the original act. The passage of the amendment indicates that without it the power would be wanting. The case is not affected by the provision of § 9 of the act of June 29, 1906, chap. 3591, 34 Stat. at L. 595, U. S. Comp. Stat. Supp. 1907, p. 910, extending the former acts relating to the attendance of witnesses and the compelling of testimony to "all proceedings and hearings under this act." If we felt more hesitation than we do, we still should feel bound to construe the statute not merely so as to sustain its constitutionality, but so as to avoid a succession of constitutional doubts, so far as candor permits. *Knights Templars' & M. Life Indemnity Co. v. Jarman*, 187 U. S. 197. 205. 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108.

Order in 315 and 316 reversed.

Order in 317 affirmed.

Petition denied.

Mr. Justice Moody, not having been present at the argument, took no part in the decision.

423] *Mr. Justice Day, dissenting:

I am constrained to dissent from the opinion of the court in this case. It seems to me that too narrow a construction has been given to the act of Congress conferring power upon the Interstate Commerce Commission to conduct investigations into the affairs of corporations engaged in interstate commerce.

The court, in the prevailing opinion, has not placed its decision upon the want of power in Congress to legislate concerning the subject-matter of investigation in this case. The decision is based wholly upon the construction of the act of Congress; and, as I am unable to concur in the view taken in the opinion, I will state the grounds upon which my dissent rests.

The reports of committees which accompanied the enactment of the interstate commerce law in its original form show that importance was attached to the power conferred upon the Commission to make investigation as well as to make orders relating to specific complaints as to practices affecting the conduct of interstate commerce and the instrumentalities by which the same is carried on. It was to have a power of investigation, such as had been conferred upon similar bodies in the states and in the English acts regulating the subject, with a view to eliciting information important to be had, in order to lay the basis for intelligent and efficient action in the legislative branch of the government to which the Constitution has delegated power to regulate commerce among the states and with foreign nations.

In speaking of this power, Judge Cooley, the eminent chairman of the Commission, in its first annual report, said:

"This is a very important provision, and the Commission will no doubt have frequent occasion to take action under it. It will not hesitate to do so in any case in which a mischief of public importance is thought to exist, and which is not likely to be brought to its attention on complaint of a private prosecutor."

424] *In numerous instances investigations have been conducted by the Commission having in view the exercise of its authority to afford information as to the manner and methods in which corporations engaged in interstate commerce are conducting their business. These investigations have been undertaken upon the initiative of the Commission; witnesses have been subpœnaed; and testimony has been taken without objection from those interested that the power

of the Commission conferred by the acts of Congress had been exceeded. While these considerations are not determinative of the extent of the powers conferred in the act, they are suggestive of the practical construction which those interested have put upon it.

The act itself makes provision for two kinds of investigation,—the one under § 12, upon the initiative of the Commission without written complaint; the other under § 13, where investigation and orders are made upon complaint.

We are concerned in this case with an investigation undertaken upon the initiative of the Commission under § 12 of the act. That section, so far as pertinent, provides:

"That the Commission hereby created shall have authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted, and shall have the right to obtain from such common carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created; and the Commission is hereby authorized and required to execute and enforce the provisions of this act; and, upon the request of the Commission, it shall be the duty of any district attorney of the United States to whom the Commission may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this act and for the punishment of all violations thereof; and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States; [425 and, for the purposes of this act, the Commission shall have power to require, by subpœna, the attendance and testimony of witnesses and the production of all books, papers, tariffs, contracts, agreements, and documents relating to any matter under investigation.

"Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And, in case of disobedience to a subpœna, the Commission, or any party to a proceeding before the Commission, may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of books, papers, and documents under the provisions of this section." [As amended by act of Feb. 10, 1891, 26 Stat. at L. 743, chap. 128, U. S. Comp. Stat. 1901, p. 3162.]

The plain reading of this section is that, for the purposes of the act, the Commission shall have power to require, by subpoena, the attendance and testimony of witnesses, and the production of books, papers, contracts, tariffs, agreements, and documents relating to any matter under investigation. Notwithstanding the broad language used by Congress, it is now held that the power of the Commission to require testimony embraces only subjects stated in complaints for the violation of the act, or investigations by the Commission upon matters which might have been the subject of complaint. I am unable to follow the reasoning which thus cuts down the expressed words of the act, which enables the Commission to require testimony for all purposes of the act. The complaints under the act may relate to unreasonable rates, to discriminating practices, to the management of the affairs of the carrier as involved in or connected with the conduct of interstate commerce, to the relations of interstate carriers with each other, and the like matters, directly affecting corporations and individuals engaged in interstate commerce. These things are within the purposes of the act, but no more so, in my judgment, than the declared purpose of the act to endow the Commission with investigating powers, having in view the ascertainment of the manner in which interstate commerce business is conducted [426]*and managed, with a view to intelligent action upon these important subjects.

For the purposes of the act this power to require the attendance of witnesses and the production of books, papers, tariffs, contracts, etc., relating to any matter under investigation, is specifically conferred by Congress. To make the act read that the power shall be conferred only for the purposes of laying the ground for redress of specific complaints, or things which might be the subject-matter of complaints, narrows its provisions from the broad power conferred in the language used by Congress to powers limited to the execution of only a part of the act. It seems to me that the restricted construction given in the opinion has the effect to entirely reform the act of Congress, substituting for it, by judicial construction, a much narrower act than Congress intended to pass, and did, in fact, pass.

In § 12, which requires the district attorneys under the direction of the Attorney General to take all necessary proceedings for the enforcement of the act, and empowers the Commission, for the purposes of the act, to issue subpoenas and require the production of books, papers, etc., there is in terms conferred, as the basis of this judicial action and this power to summon witnesses,

authority to inquire into the management of the business of corporations subject to the provisions of the act, in order that the Commission may keep itself informed as to the manner and methods in which the same is conducted, and to obtain from common carriers thus engaged full and complete information to enable the Commission to prevent bad practices and to perform the duties and carry out the objects for which it was created.

Nor are the purposes of the act for which the power to subpoena witnesses, require the production of books, papers, etc., alone defined in § 12. In § 20 of the act, in order to enable the Commission to make its reports, it is authorized to require from common carriers specific answers upon all questions upon which the Commission may need information, such reports to *contain a [427 showing of the amount of the capital stock, the amount paid therefor, the manner of payment for the same, etc., and § 21 of the act requires the Commission to make an annual report which shall contain such information and data collected by the Commission as may be considered of value in the determination of questions concerning the regulation of commerce, together with such recommendation as to additional legislation relating thereto as the Commission may deem necessary. These things are "purposes of the act" no less than the hearing of complaints and making orders touching the same. For all these purposes § 12 conferred the power which was sought to be exercised in this case. That inquiries might take a wide range is shown in the acts of Congress giving immunity to persons required to testify, and providing that no person shall be excused from attendance and testifying, or from producing books, papers, etc., before the Interstate Commerce Commission for the reason that his answers or the production of such testimony may tend to criminate him, and granting immunity from prosecution because of such compulsory testimony.

The function of investigation which Congress has conferred upon the Interstate Commerce Commission is one of great importance; and while, of course, it can only be exercised within the constitutional limitations which protect the individual from unreasonable searches and seizures and unconstitutional invasions of liberty, the act should not be construed so narrowly as to defeat its purposes.

In the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 474. 38 L. ed. 1047, 1056, 4 Inters. Com. Rep. 515, 14 Sup. Ct. Rep. 1125, this court had under consideration the provisions of § 12, authorizing the Interstate Commerce Commission

to conduct an investigation upon its own motion, and in that case this court said:

"An adjudication that Congress could not establish an administrative body with authority to investigate the subject of interstate commerce, and with power to call witnesses before it, and to require the production of books, documents, and *papers relating to that subject, would go far towards defeating the object for which the people of the United States placed commerce among the states under national control. All must recognize the fact that the full information necessary as a basis of intelligent legislation by Congress from time to time upon the subject of interstate commerce cannot be obtained, nor can the rules established for the regulation of such commerce be efficiently enforced, otherwise than through the instrumentality of an administrative body representing the whole country, always watchful of the general interests, and charged with the duty not only of obtaining the required information, but of compelling, by all lawful methods, obedience to such rules."

And in *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 506, 42 L. ed. 255, 17 Sup. Ct. Rep. 896, this court said:

"It [the Commission] is charged with the general duty of inquiring as to the management of the business of railroad companies, and to keep itself informed as to the manner in which the same is conducted, and has the right to compel complete and full information as to the manner in which such carriers are transacting their business."

In the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S., at page 438, 51 L. ed. at page 558, 27 Sup. Ct. Rep. at page 354, this court said:

"The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act."

In the case last cited it was held that a rate filed with the Interstate Commerce Commission could only be attacked for unreasonableness by a proceeding before the Commission, with a direct view to a change in the rate. The power thus invested in the Commission, no less than the power conferred in this case, affected shippers from Maine to Texas, and required a shipper making complaint against a common carrier for carriage in a remote part of the country to obtain redress for unreasonable rates only by a proceeding before the Interstate Commerce Commission, which ordinarily sits in 429] the capitol at *Washington. Legislative power vested in Congress over interstate 53 L. ed.

commerce embraces the whole country; and while it may be extremely inconvenient to compel the attendance of witnesses and the production of the papers, etc., throughout a domain so large as ours, that consideration does not detract from the power of Congress over the subject-matter.

Assuming, for the purposes of this case and the construction of the statute, that the relations of directors in a corporation engaged in interstate commerce to the sales of stock to such corporation may be the subject of inquiry when Congress confers such power upon the Commission, I think that in this act Congress has conferred such power. If such is the proper construction of the act, it follows that the Commission had a right to propound the questions which the circuit court directed to be answered. In my view the judgment of the circuit court should be affirmed.

Mr. Justice Harlan and Mr. Justice McKenna concur in this dissent.

Mr. Justice Harlan also dissents in No. 317.

CLINTON J. HUTCHINS, Trustee, Appt.,
v.
WILLIAM W. BIERCE, LIMITED, a Corporation.

(See S. C. Reporter's ed. 429-432.)

Appeal — final judgment below.

There is no final judgment below to sustain an appeal to the Federal Supreme Court from the supreme court of the territory of Hawaii in a case in which the latter court has pursued the usual course upon exceptions, and has not entered or directed a judgment.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

[No. 447.]

Argued November 9, 10, 1908. Decided December 14, 1908.

APPEAL from the Supreme Court of the Territory of Hawaii to review the action of that court in overruling exceptions from the Circuit Court of the First Circuit in that territory in an action of replevin which resulted in a judgment in favor of

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atehison, T. & S. F. R. Co.* 28 C. C. A. 482; *Gibbons v. Ogden*, 5 L. ed. U. S. 302; and *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001.

plaintiff. Dismissed for lack of final judgment.

See same case below, 18 Haw. 511.

The facts are stated in the opinion.

Messrs. **David L. Withington** and **Aldis B. Browne** argued the cause, and, with Messrs. **W. R. Castle**, **Alexander Britton**, and **J. W. Cathcart**, filed a brief for appellant.

Mr. Charles H. Aldrich argued the cause, and, with Messrs. **Henry S. McAuley** and **Henry W. Prouty**, filed a brief for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This case has been before this court once already. 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524. It was an action of replevin and was tried by a judge without a jury. The judge found that the allegations of the complaint were proved, and that the plaintiff, **William W. Bierce, Limited**, was entitled to recover. He also made a series of findings in detail, establishing the plaintiff's case and excluding certain defenses. These findings were excepted to on various grounds; among others, that they were not warranted by the evidence; and the whole evidence was attached to the bill of exceptions. Two of the findings were that the plaintiff had not waived a condition precedent to the passing of title to the property replevied, and that it had not elected against its right to bring this action. The case went to the supreme court of Hawaii on the exceptions, and there, of course, the question was whether it appeared, as matter of law, that the finding for the plaintiff and the judgment rendered upon it were unwarranted. The supreme court held that an election appeared as matter of law, sustained the exceptions, and made the usual order sending the case back for further proceedings in the lower court; but afterwards, on the plaintiff's motion, coupled with an affidavit that it would have no more evidence to offer at a second trial, it ordered judgment for the defendant. Thereupon the plaintiff brought the case here. It was held that the error relied on was not made out against the findings of the trial court, and the judgment of the supreme court of the territory was reversed.

In the discussion here it was assumed that [431] the supreme *court of the territory had power under the local procedure to order judgment as it did, and so to lay a foundation for the appeal. But the difficulties incident to such a course in cases subject to appeal are made manifest by this case. If the supreme court had the power to order judgment, obviously the scope of its inquiry

before rendering judgment was not enlarged by the subsequent appeal or by the liability to it. When it rendered judgment it was confined to the questions of law presented by the bill of exceptions and the record. Logically, on appeal in such a case this court would be confined in the same way. At the broadest, the only questions would be whether it appeared from the record, as matter of law, that the judgment for the defendant ordered by the supreme court, or the judgment for the plaintiff in the court of first instance, or both of them, were wrong. It would be anomalous if the supreme court could make the statement of facts which is contemplated by the statutes and which it was said in our former opinion should have been made, in such form as to open questions on which the supreme court itself had had no power to pass before entering judgment, and so to present to this court grounds for decision which the supreme court of Hawaii could not have taken into account. On the other hand, a statement that should present the questions passed upon and no more would simply have presented the record, even if possibly somewhat abridged, or modified by concessions of which there was some trace in the opinion of the court. So not unnaturally, at the subsequent stage, the supreme court found itself a little perplexed.

Whatever might have been open, in our former decision the only question actually dealt with was whether the judgment of the supreme court could be sustained. There were some subordinate exceptions to the admission of evidence and the allowance of an amendment that were not considered here. When the case went back these were taken up and overruled by the supreme court. It then made a statement of facts in deference to what was said in our decision, and the defendant *appealed to this court. But [432] this time the supreme court did not order judgment, and it may be that, in its present opinion, the former judgment was unwarranted in point of procedure. *Meheula v. Pioneer Mill Co.* 17 Haw. 91. It is unnecessary to consider whether our former decision left anything open, in view of the technical scope of the appeal on the one side and the limited inquiry to which our attention was directed on the other. The statement of facts cannot affect that question, nor can it affect the defendant's right to be here. It is enough that the supreme court of Hawaii has pursued the usual course upon exceptions, and has not entered or directed a judgment. Therefore, as was decided a few days ago, in *Cotton v. Hawaii* [211 U. S. 162, ante, 131, 29 Sup. Ct. Rep. 85], an appeal does not lie.

Appeal dismissed.

WILLIAM McCORQUODALE, Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 432-437.)

Error to state court — raising Federal question on rehearing.

An order of the highest court of a state, on a motion for rehearing, which recites that the cause came on to be heard on such motion, and, "the same being considered by the court, said motion is overruled," does not show that the court passed on the Federal question first raised by such petition, so as to sustain a writ of error from the Supreme Court of the United States.

[For other cases, see Appeal and Error, 1292-1310, in Digest Sup. Ct. 1908.]

[No. 38.]

Argued and submitted December 3, 1908.
Decided December 21, 1908.

IN ERROR to the Court of Criminal Appeals of the State of Texas to review a judgment which affirmed a conviction of murder in the District Court of Brazos County of that state. Dismissed for want of jurisdiction.

See same case below (Tex. Crim. App.) 98 S. W. 879.

The facts are stated in the opinion.

Mr. Sam Streetman argued the cause, and, with **Mr. Thomas H. Ball** and **Andrews, Ball, & Streetman**, filed a brief for plaintiff in error.

Messrs. Robert V. Davidson and **Felix J. McCord** submitted the cause for defendant in error.

433] ***Mr. Justice McKenna** delivered the opinion of the court:

Plaintiff in error, on March 10, 1905, was indicted by the grand jury of the district court of Brazos county, Texas, for the murder of one Henry Spell. He was brought to trial and convicted of murder in the first degree, the jury fixing his punishment at imprisonment for life in the penitentiary.

The judgment, after stating the number and title of the case, the arraignment of the defendant (plaintiff in error), his plea, the impaneling of the jury, the trial of the

case, the presence of the defendant throughout all of the proceedings, the retirement of the jury to consider of their verdict, recites that the jury "afterwards, on April 1st, were brought into open court by the proper officers, the defendant and his counsel being present, and in due form of law returned in open court the following verdict:

"We, the jury, find the defendant guilty of murder in the first degree, and assess his punishment at confinement in the state penitentiary for life.

J. H. White, Foreman.'"

The following is the sentence:

"April 15th, 1905.

"This day this cause being again called, the state appeared by her district attorney, and the defendant, William McCorquodale, was brought into open court in person, in charge of the sheriff, his counsel also being present, for the purpose of having the sentence of the law pronounced against him in accordance with the verdict and judgment herein rendered and entered against him on a former day of this term; and thereupon the defendant, William McCorquodale, was asked by the court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof, whereupon the court proceeded, in the presence of the said defendant, William McCorquodale, to pronounce sentence against him, as follows:

"It is the order of the court that the defendant, William *McCorquodale, who[434] has been adjudged to be guilty of murder in the first degree, and whose punishment has been assessed by the verdict of the jury at confinement in the penitentiary for life, be delivered by the sheriff of Brazos county, Texas, immediately to the superintendent of the penitentiaries of the state of Texas, or other person legally authorized to receive such convicts, and the said William McCorquodale shall be confined in said penitentiaries for life, in accordance with the provisions of the law governing the penitentiaries of said state, and the said William McCorquodale is remanded to jail until said sheriff can obey the direction of this sentence.'"

The judgment was affirmed by the court of criminal appeals. 98 S. W. 879. A motion for rehearing was made by plaintiff in error and denied. Subsequently a motion was made by the state as follows:

"Now comes the state, by the assistant attorney general, and would show the court that the judgment in this cause was affirmed at Tyler, and the appellant's motion for rehearing was overruled at the Dallas term;

"That since which time it has been discovered, and this court's attention is now called to the fact, that the transcript does

NOTE.—On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

As to when the Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to *Chicago, I. & L. R. Co. v. McGuire*, 49 L. ed. U. S. 414.

53 L. ed.

not contain a complete judgment against appellant, though the sentence is contained in the transcript:

"Wherefore, the state prays that the court order the transcript and all papers transferred from Tyler to the Austin branch of the court, to the end that this court may determine its jurisdiction of this appeal, and whether or not the judgment should be reformed and affirmed, or whatever action this court deems necessary.

"Respectfully submitted."

The motion to transfer was granted. The defendant, by his counsel, excepted, and opposed the state's motion to reform and affirm the judgment, on the following grounds: (1) The motion was not disposed of at the term at which it was filed; (2) It was not such a motion as is contemplated 435]by law, is not *a motion for rehearing, nor a motion for the court to correct its own judgment, but it is a motion to enter an original judgment, which the lower court alone has the power to do at the proper time, and that the court of criminal appeals has no power to so do. The latter ground was repeated in many ways, and it was alleged, with much repetition, that the court had no jurisdiction to grant the motion of the state, and it was prayed that the motion be denied in so far as it sought to have a judgment entered, or supplied, or to supply the want of the property judgment in the court below, and in so far as it sought to have the court of criminal appeals make any other order than to issue its mandate in accordance with its opinion theretofore rendered.

The court granted the motion of the state, holding that the judgment was in the ordinary form and complete, so far as it went, but that it did not comply with certain requirements of the Code of Criminal Procedure of the state, in that it did not declare, as provided in subdivisions 9 and 10 of art. 831, that it was considered by the court that the defendant be adjudged guilty of the offense as found by the jury, and that the defendant be punished as determined by the jury. The court further held that it had the power to reform and correct the judgment so as to bring it into accordance with the provisions of the Code of Criminal Procedure. The court, after reciting the proceedings and reviewing prior cases, concluded its opinion as follows:

"Reform" means to correct; to make anew; to rectify. *Rapalje*, Law Dict. p. 1083. Here we have all of the foundation of the judgment, including the verdict of the jury, which is the basic rock on which the judgment is formulated. We have, following this, the final judgment of the court, which is the sentence. This itself adjudi-

cates the guilt of appellant and sentences him, in accordance with the verdict and judgment. From this *data* certainly we can do that which the court *a quo*, in due order, should have done. We accordingly hold that the judgment of the court below should be reformed and corrected, *so as to make[436 it read, in connection with the judgment as entered, and following the verdict, as follows, to wit:

"It is therefore considered, ordered, and adjudged by the court that 'the defendant, William McCorquodale, is guilty of the offense of murder in the first degree, as found by the jury, and that he, the said William McCorquodale, be punished, as has been determined by the jury, by imprisonment for life in the penitentiary; and it is further ordered, adjudged, and decreed by the court that the state of Texas do have and recover of and from the defendant, William McCorquodale, all costs of this prosecution, for which execution may issue; and that the said defendant is now remanded to jail to remain in custody to await the further order of the court.'

"The state's motion to reform is accordingly granted; the judgment is reformed and corrected, as above indicated, and, as reformed and corrected, the judgment is affirmed in accordance with the previous opinion of this court."

In answer to the motion of the state, the defendant did not set up that the action invoked by the state would, if granted, contravene the 14th Amendment of the Constitution of the United States. He, however, presented a petition for, to quote from the petition, "a rehearing upon the state's motion to 'reform and affirm,'" and urged as one of the grounds thereof the following:

"This court's said opinion is further erroneous in that it, in effect, deprives appellant of that due process of law guaranteed him by the Constitution of the state of Texas, and that of the United States, in this: that it is in effect the rendering of a judgment against him in his absence, and the authorization of sentence against him without a judgment."

The other grounds of the motion for rehearing were repetitions of the grounds urged in the answer to the state's motion and other grounds based on the local procedure, the basis of all being the want of jurisdiction in the court.

The order of the court on the motion for a rehearing was as follows:

"*This cause came on to be heard on[437 appellant's motion for a rehearing, and, the same being considered by the court, said motion is overruled."

This court has decided many times that it is too late to raise a Federal question

for the first time in a petition for rehearing in the court of last resort of a state after that court has pronounced its final decision. *Locber v. Schroeder*, 149 U. S. 580, 585, 37 L. ed. 856, 859, 13 Sup. Ct. Rep. 934; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322. It is true that we have also decided that, if the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *Corkran Oil & Development Co. v. Arnaudet*, 199 U. S. 182, 193, 50 L. ed. 143, 149, 26 Sup. Ct. Rep. 41; *Fullerton v. Texas*, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; *McMillen v. Ferrum Min. Co.* 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533. It can hardly be said to so appear in the case at bar. The order of the court is nothing more than a denial of the motion. In other words, it expresses no more than would be implied from a simple denial of the motion.

Writ of error dismissed.

L. L. McCANDLESS, Plff. in Err.,
v.

JAMES W. PRATT,† Commissioner of Public Lands of the Territory of Hawaii.

(See S. C. Reporter's ed. 437-445.)

Appeal — who may maintain — necessity of personal interest.

A property owner and taxpayer has no such personal interest in a suit brought by him to restrain territorial officers from exchanging certain public lands of the territory of Hawaii for other lands as will sustain a writ of error from the Federal Supreme Court to review a judgment of the territorial supreme court, denying the relief sought, where the suit is grounded on the theory that the proposed exchange is illegal under the territorial laws because the lands sought to be exchanged are under lease and are in parcels of more than 1,000 acres.

[For other cases, see Appeal and Error, 2385-2428, in Digest Sup. Ct. 1908.]

[No. 109.]

Argued November 6, 9, 1908. Decided December 21, 1908.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a decree which reversed a decree of the Circuit Court of the First Judicial Circuit in that territory, overruling a demurrer to a bill which

†Substituted as party in place of George R. Carter.
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seeks to enjoin an exchange of public lands by territorial officers. Dismissed.

See same case below, 18 Haw. 221, 269.

The facts are stated in the opinion.

Mr. Aldis B. Browne argued the cause, and, with Messrs. A. G. M. Robertson and Alexander Britton, filed a brief for plaintiff in error:

If the plaintiff in error is right in his contention upon the law, the transaction is illegal. Property injury is not essential to support the power of equity to give relief.

Winn v. Shaw, 87 Cal. 637, 25 Pac. 968; *Nutt v. Knut*, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216; 2 High, Inj. § 1241; 2 Dill. Mun. Corp. 3d ed. §§ 906-922; *Lucas v. American-Hawaiian Engineering & Constr. Co.* 16 Haw. 80.

Mr. A. G. M. Robertson also filed a separate brief for plaintiff in error:

If the writ is in proper form and the court has jurisdiction, all questions touching the right of complainant to the relief sought should await the hearing on the merits.

Sparrow v. Strong, 3 Wall. 97, 105, 18 L. ed. 49, 50.

Under the practice of this jurisdiction it is not necessary for a complainant who is moving purely in the interests of the public to prevent misfeasance in office, or to protect public property from loss through the mistake, incompetence, or worse, of public officers, to show special injury.

Castle v. Kapena, 5 Haw. 27; *Lucas v. American-Hawaiian Engineering & Constr. Co.* 16 Haw. 80; *Castle v. Atkinson*, 16 Haw. 769.

The rule adopted in Hawaii is based on decisions of this court.

Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. ed. 1070.

It should make no difference as to this point that the exchange contemplated by the governor and the commissioner of public lands was to be for lands of equal value. In the numerous reported cases in which the courts have held in favor of the right of a taxpayer to an injunction to prevent the illegal expenditure of public money, the right has not been maintained on the ground that the public was not to receive a *quid pro quo*, but on the ground of the lack of legal authority to make the proposed expenditure.

Winn v. Shaw, 87 Cal. 631, 25 Pac. 968; *Nelson v. Garfield County*, 6 Colo. App. 279, 40 Pac. 474; *Stratford v. Greensboro*, 124 N. C. 127, 32 S. E. 394; *Times Pub. Co. v. Everett*, 9 Wash. 518, 43 Am. St. Rep. 865, 37 Pac. 695; *Stevens v. St. Mary's Training School*, 144 Ill. 336, 18 L.R.A.

832, 36 Am. St. Rep. 438, 32 N. E. 962; State ex rel. Hayes v. Gallagher, 22 Nev. 87, 35 Pac. 485.

Messrs. Charles R. Hemenway and Henry E. Cooper argued the cause and filed a brief for defendant in error:

Equity will restrain violations of law only when accompanied by violations of property rights; and the courts take cognizance of suits only when it is apparent that the complaining party is suffering wrong or is likely to suffer wrong.

Smith v. Indiana, 191 U. S. 138, 48 L. ed. 125, 24 Sup. Ct. Rep. 51; Cooley, Const. Lim. 7th ed. 232; Charles v. Marion, 98 Fed. 166; Allison v. Corson, 32 C. C. A. 12, 60 U. S. App. 387, 88 Fed. 581; Indianapolis Gas Co. v. Indianapolis, 82 Fed. 245; Walla Walla v. Walla Walla Water Co. 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; McCord v. Pike, 2 Am. St. Rep. 85, and note, 121 Ill. 288, 12 N. E. 259; Brown v. Ohio Valley R. Co. 79 Fed. 176; Boston & M. R. Co. v. Sullivan, 177 Mass. 230, 83 Am. St. Rep. 275, 58 N. E. 689; State ex rel. Cranmer v. Thorson, 9 S. D. 149, 33 L.R.A. 582, 68 N. W. 202; Clark v. Kansas City, 176 U. S. 114, 116, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284.

The cases in Hawaii holding that a taxpayer may enjoin acts of executive officers are not in conflict with the rule, but, on the contrary, recognize and are based upon it; for in each case it is apparent that injury would have resulted to plaintiff if the acts complained of had been found to be illegal.

Castle v. Kapena, 5 Haw. 27; Lucas v. American-Hawaiian Engineering & Constr. Co. 16 Haw. 80; Castle v. Atkinson, 16 Haw. 769.

And in the decisions of this court upon which the Hawaiian decisions were based, it is apparent that the right of a complainant to maintain such a suit is dependent upon the fact that some injury will be done property rights.

Crampton v. Zabriskie, 101 U. S. 601, 25 L. ed. 1070; Union P. R. Co. v. Hall, 91 U. S. 343, 23 L. ed. 428.

Messrs. Charles R. Hemenway, Henry E. Cooper, William L. Whitney, and Charles F. Clemons also filed a brief for defendant in error:

The law is settled in Hawaii, as in other jurisdictions, that a taxpayer may have his remedy by injunction against official acts which involve the misuse or waste of public funds.

Crampton v. Zabriskie, 101 U. S. 601, 609, 25 L. ed. 1070, 1071; Castle v. Kapena, 5 Haw. 27; Lucas v. American-Hawaiian

Engineering & Constr. Co. 16 Haw. 80; Castle v. Atkinson, 16 Haw. 769.

It is also a settled rule of law that it must appear affirmatively from the pleadings that injury, and substantial injury, will be sustained by plaintiff from the acts complained of, before such acts will be enjoined.

Smith v. Indiana, 191 U. S. 138, 146, 48 L. ed. 125, 126, 24 Sup. Ct. Rep. 51; Caffrey v. Oklahoma, 177 U. S. 346, 348, 44 L. ed. 799, 800, 20 Sup. Ct. Rep. 664; Clark v. Kansas City, 176 U. S. 114, 118, 44 L. ed. 392, 396, 20 Sup. Ct. Rep. 284; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 558, 45 L. ed. 994, 1000, 21 Sup. Ct. Rep. 703; Albany County v. Stanley, 105 U. S. 305, 314, 26 L. ed. 1044, 1051; Ludeling v. Chaffe, 143 U. S. 301, 304, 36 L. ed. 313, 314, 12 Sup. Ct. Rep. 439; Giles v. Little, 134 U. S. 645, 650, 33 L. ed. 1062, 1063, 10 Sup. Ct. Rep. 623; Owings v. Norwood, 5 Cranch, 344, 348, 3 L. ed. 120, 121; Montgomery v. Hernandez, 12 Wheat. 129, 132, 6 L. ed. 575, 576; Henderson v. Tennessee, 10 How. 311, 322, 13 L. ed. 434, 439; Hale v. Gainces, 22 How. 144, 160, 16 L. ed. 264, 269; Long v. Converse, 91 U. S. 105, 23 L. ed. 233.

Mr. Justice McKenna delivered the opinion of the court:

The plaintiff in error, who was plaintiff in the court below, and whom therefore we shall refer to as plaintiff, brought this suit in the circuit court of the first judicial circuit, territory of Hawaii, at chambers, to enjoin George R. Carter, governor of the territory, and the defendant, commissioner of public lands of the territory, from exchanging certain lands of the territory for other lands.

The governor promulgated, on 29th of November, 1906, the following order:

"Lanai Lands.—Notice is hereby given that, having decided an exchange of the public lands of the island of Lanai to be advisable, the commissioner of public lands is prepared to receive offers of other lands that are equal in value to those of Lanai, and of greater immediate service to the territorial government, from any responsible person, up to and including Saturday, the 15th day of December, 1906."

The island of Lanai contains a total area of 86,400 acres, of which the territory owns 47,679 acres. The lands owned by the territory are divided into five tracts, and are under lease to one Charles Gay for annual rentals which amount in all to *the sum [441 of \$1,600. These facts are alleged in the bill, and that the tracts are of great value,—one containing 8,000 acres of land, which is good grazing land, and has 3 miles of sea

frontage, and extends inland 6 miles, being worth \$40,000. Another tract, it is alleged, is of the same kind of land, and has a sea frontage of 5½ miles and an inland depth of 6 miles, and is worth \$37,000. The other tracts are of the value of \$5,000.

It is alleged that Pratt, as commissioner, threatens to and will exchange such lands for other lands if he receives an offer therefor from a responsible person, and that the governor will consent and approve the exchange unless he and Pratt be enjoined. It is further alleged that Pratt has no legal right to make the exchange nor the governor to approve it.

It is further alleged that the intended and proposed exchange of lands "is not proposed by way of compromise or equitable settlement of the rights of any claimants, nor by way of exchange for parcels of lands acquired for any road or roads, nor for a site or sites of a government building or buildings, nor for any other governmental purpose or purposes."

An injunction was prayed against the exchange and against issuing land patents for the lands received in exchange. A temporary injunction was granted, which, upon the motion of the governor, was dissolved, and the bill dismissed as to him. Pratt demurred to the bill, and urged as grounds thereof that the bill was insufficient, that it did not appear that he, as commissioner, was doing or about to do any act in violation of law, that plaintiff had no legal capacity to sue, that no injury was threatened or otherwise to plaintiff, that he was not sufficiently interested to be entitled to an injunction or to any relief in a court of equity, that the complaint was not properly verified, and that the allegation that the defendant, as commissioner, had no legal authority to exchange public lands, was a conclusion of law.

The demurrer was overruled, the court holding that the plaintiff had the right to bring [442] and maintain the suit, and that "the proposed exchange of lands was 'unlawful, illegal, and unwarranted.'" Ten days were given to further plead, and, in default of which, the injunction was to be made permanent. The decree was reversed by the supreme court of the territory. 18 Haw. 221. This writ of error was then sued out and George R. Carter, governor, named therein as a defendant, but the writ was subsequently dismissed as to him, on motion of his successor, the present governor.

The supreme court of Hawaii assumed, without definitely deciding, that the plaintiff had a right to maintain the suit. The question of the validity of the exchange it decided against the contention of the plaintiff, holding that the commissioner had the

power to make the exchange. Of the right of plaintiff to sue, the court said that it had been adjudicated in that court that a citizen and taxpayer had a right to obtain an injunction against official acts involving unauthorized use of public funds. To sustain this view the court cited *Castle v. Kapena*, 5 Haw. 27; *Lucas v. American Hawaiian Engineering & Constr. Co.* 16 Haw. 80; *Castle v. Atkinson*, 16 Haw. 769. It is an implication, from the comment of the court, that the ground of those decisions was the pecuniary loss that would come to the taxpayer from the action sought to be restrained. But the court, however, went farther, and said that perhaps the right of the taxpayer to "restrain official acts affecting public property ought not to be based on the pecuniary loss, howsoever trivial or conjectural, but on the broad ground that any citizen may obtain a judicial inquiry into the validity of such acts, and an injunction against them if found to be unauthorized." The court remarked, however, that, on account of the view it entertained of the validity of the acts of the officers, it would not decide the question of the right of the plaintiff to sue. On neither question are we called upon to pass, nor are we required to decide whether the land laws of the territory are Federal statutes by virtue of § 83 of its organic act, which provides that its laws "relating to public lands shall continue in force until Congress shall otherwise *provide," and that therefore a [143] Federal question is involved in the case. We have held that the jurisdiction of this court can only be invoked by a party having a personal interest in the litigation. *Smith v. Indiana*, 191 U. S. 138, 148, 48 L. ed. 125, 126, 24 Sup. Ct. Rep. 51.

The plaintiff has not such an interest. He sues as a property owner and taxpayer, and the relief he asks is an injunction against the commissioner of public lands, to restrain him from exchanging the lands described in the bill for other lands. It is contended that such action is illegal, because that officer has no power to exchange lands under lease, nor has he power to exchange lands except in parcels of not over 1,000 acres. The contention is based on the proviso of § 276 of the Revised Laws of Hawaii. We give the section in the margin,† *and also §§ 252 and 254, which [444]

†Sec. 252. "The commissioner of public lands or superintendent of public works, as the case may be, by and with the authority of the governor, shall have power to lease, sell, or otherwise dispose of the public lands and other property, in such manner as he may deem best for the protection of agriculture, and the general welfare of the territory, subject, however, to such restric-

must be considered in connection with it. The argument to support the contention is that the proviso must be understood in the strict technicality of limiting or qualifying the preceding subject-matter, and to the carving out therefrom some special matter, and, it is insisted, giving the proviso that purpose, the specially carved-out matter "is the requirement of an auction sale in the case of the exchange of land," leaving as applicable to such exchange all the other limitations. The supreme court of the territory, as we have seen, decided against the contention. Let 445]us grant, **arguendo*, that the decision may be disputed, what injury has plaintiff shown that he must suffer by the exchange? What injury, indeed, has he shown, either to the territory or to any taxpayer of the territory?

The plaintiff alleges that he is a taxpayer, but does not allege anything from which it can be inferred that he will be injured as a taxpayer, subject to a burden as such. It is true it is alleged that the lands which are offered for exchange are under lease for terms varying from twenty-five to thirty-five years, at a rental of \$1,600. But it

is also alleged that the purpose formed by the governor and commissioner, and the purpose advertised by them, was to get for the lands other lands of equal value and of greater immediate service to the territorial government. The suit was brought to restrain the execution of that purpose. Benefit, therefore, not injury, apparently may result from the exchange, and, so far as we are informed by the record, it may be even a benefit to the policy which plaintiff declares it is the purpose of the land laws of the territory to promote, and upon which he, in part, bases his interpretation of them,—the policy of encouraging "the settlement and homesteading of public lands," and the "parceling out" of them "in limited areas on favorable terms." The plaintiff takes pains to justify this inference, for he avers that the exchange is not proposed for settlement of rights or claims, nor for the use of roads, nor for the site or sites of the government building or buildings, nor for any other government purpose. Therefore, as plaintiff has no personal interest in the matter in litigation, the writ of error is dismissed.

tions as may, from time to time, be expressly provided by law."

Sec. 254. "The provisions of § 253 shall not extend or apply to cases where the government shall, by quitclaim, or otherwise, dispose of its rights in any land, by way of compromise or equitable settlements of the rights of claimants, nor to cases of exchange or sales of government lands in return for parcels of land acquired for roads, sites of government buildings, or other government purposes."

Sec. 276. "The commissioner may, with the consent of the governor, sell public lands not under lease, in parcels of not over 1,000 acres, at public auction for cash. Upon any such sale and the payment of the full consideration therefor, a land patent shall be issued to the purchaser.

"And he may, with such consent, sell public lands not under lease in parcels of not over 600 acres, at public auction, upon part credit and part cash, and deliver possession under an agreement of sale containing conditions of residence on or improvement of the premises sold, or of payment by instalments or otherwise of the purchase price, or all or any of such conditions.

"And in case of default in the performance of such conditions, the commissioner may, with or without legal process, and without notice, demand, or previous entry, take possession of the premises and thereby determine the estate created by such agreement. In case of such forfeiture, such land shall be sold at auction, either as a whole or in parcels, for cash or on terms of time payments, in the discretion of the commissioner; and if such sale shall result in an advance on the original price, the original purchaser shall receive therefrom the

amounts of his payments to the government on account of purchase, without the interest, and a *pro rata* share in such advance in proportion to the amounts of his payments. If such sale shall result, however, in a less price than the original, the amount returnable to him shall be charged with a *pro rata* amount of such decrease, proportioned to the amounts of his payments. The treasurer is hereby authorized to pay the amount returnable to the outgoing tenant, upon the requisition of the commissioner, out of any funds available for such purpose.

"Which agreement shall entitle the purchaser to a land patent of the premises upon the due performance of its conditions.

"The commissioner shall have authority to fix any upset price for all such sales for cash or part credit and part cash.

"All such sales shall be held in Honolulu, or in the district where the land to be sold is situated. Any person designated by the commissioner may act as auctioneer at such sales without taking out an auctioneer's license.

"Provided, however, that land patents may be issued in exchange for deeds of private lands or by way of compromise upon the recommendation of the commissioner and with the approval of the governor without an auction sale, and further provided, that the governor may, in his discretion, upon such recommendation and approval, execute quitclaim deeds for perfecting the titles of private lands where such titles are purely equitable, or where such lands are suffering under defective titles, or in cases of claims to use of lands upon legal or equitable grounds."

446]*TIMOTHY F. PADDELL, Plff. in
Err.,
v.
CITY OF NEW YORK.

(See S. C. Reporter's ed. 446-452.)

Constitutional law — due process of law — equal protection of the laws — taxation of mortgaged property.

Land subject to a mortgage may be assessed at its full value for taxation without violating U. S. Const., 14th Amend., although the mortgage debt is not deducted from the owner's personal estate.

[For other cases, see Constitutional Law, 528-540, in Digest Sup. Ct. 1908.]

[No. 42.]

Argued December 7, 1908. Decided December 21, 1908.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court for the First Judicial Department, affirming a judgment of the Supreme Court in and for the County of New York, sustaining a demurrer to the complaint in a suit to enjoin municipal taxation. Affirmed.

See same case below in Court of Appeals, 187 N. Y. 552, 80 N. E. 1114.

The facts are stated in the opinion.

Mr. Everett V. Abbot argued the cause and filed a brief for plaintiff in error:

The general property tax, as customarily administered in our American commonwealths, involves the assessment and taxation of fictitious values,—that is, of alleged values which demonstrably have no existence whatever.

Cooley, Taxn. 1st ed. 159, 160, 2d ed. p. 220, 1 Cooley, Taxn. 3d ed. p. 387; Seligman, Taxn. 1st ed. 101; Wells, Theory & Pr. of Taxn. (1900) 474-477.

The nearest approach to a decision that taxation by fiction is unconstitutional is to be found in cases that relate, not to fiction of fact, but to fiction of law; and in those cases this court has refused to allow the fiction to be employed. Thus, the maxim, *Mobilia sequuntur personam*, has been declared to be a fiction, and not to justify a state in taxing tangible personal property situated outside of its borders.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493.

Again, the common-law doctrine that the situs of a chose in action consisting of a specialty, such as a promissory note, is the place where the specialty is to be found, has been declared to be a fiction, and not to prevent a state from taxing the real value at its real situs, the home of the debtor.

Metropolitan L. Ins. Co. v. New Orleans, 205 U. S. 395, 51 L. ed. 853, 27 Sup. Ct. Rep. 499.

The California courts began by holding that the mortgagee could not complain of the tax on his mortgage, and ended by holding that he could complain.

People v. McCreery, 34 Cal. 432; Lick v. Austin, 43 Cal. 590; Savings & Loan Soc. v. Austin, 46 Cal. 483; People v. Hibernia Sav. & L. Soc. 51 Cal. 243, 21 Am. Rep. 704.

The final conclusion of the California courts, that the mortgagee should be excused from taxation, has been expressly repudiated by other courts of last resort (Alabama Gold L. Ins. Co. v. Lott, 54 Ala. 499; State v. Carson City Sav. Bank, 17 Nev. 146, 30 Pac. 703; Lamar v. Palmer, 18 Fla. 147; New Orleans v. Mechanics' & T. Ins. Co. 30 La. Ann. 876, 31 Am. Rep. 232), and even in California has been overruled by constitutional amendment.

See also the following cases in which the mortgagee's efforts to avoid taxation have met defeat:

State, Vanatta, Prosecutor, v. Runyon, 41 N. J. L. 98; People v. Rhodes, 15 Ill. 304; Augusta Bank v. Augusta, 36 Me. 255; People v. Worthington, 21 Ill. 171, 74 Am. Dec. 86; Griffin v. Board of Review, 184 Ill. 275, 56 N. E. 397; Appeal Tax Ct. v. Rice, 50 Md. 302; Savings & L. Soc. v. Multnomah County, 169 U. S. 421, 42 L. ed. 803, 18 Sup. Ct. Rep. 392; Morrison v. Manchester, 58 N. H. 538.

In these and other cases in which the mortgagee is plaintiff it is frequently said that real estate may be taxed to a mortgagor in possession while the mortgagee is taxed for the money secured by the mortgage; and these provisions are not considered as subjecting property to double taxation, and this supposed statement of the law has passed into the text books.

State v. Darcy, 2 L.R.A. 350, note; 1 Desty, Taxn. 203; 1 Cooley, Taxn. 3d ed. 391, 392; Gray, Taxn. § 1370.

This doctrine, however, has never been announced in any case to which the mortgagor has been a party, and it is, or should be, clear that casual remarks about the rights of the mortgagor, uttered in legal proceedings to which he is not even a party, are hardly conclusive adjudications that he has no such rights, and that these cases are

NOTE—On due process of law in tax proceedings—see note to Read v. Dingess, 8 C. C. A. 395.

53 L. ed.

not therefore to be taken as, in any sense, precedents for the case at bar.

The right of the mortgagee is a legal interest in the land itself.

United States v. Commonwealth Title Ins. & T. Co. 193 U. S. 651, 48 L. ed. 830, 24 Sup. Ct. Rep. 546; *Savings & L. Soc. v. Multnomah County*, *supra*.

The interest of the mortgagor is limited to that which remains over and above the legal interest of the mortgagee; *i. e.*, is limited to the so-called equity.

Everson v. McMullen, 113 N. Y. 293, 4 L.R.A. 118, 10 Am. St. Rep. 445, 21 N. E. 52.

The mortgagor's taxable property interest in the land is restricted to the contingent interest over and above the liquidated interest of the mortgagee.

People ex rel. Weber Piano Co. v. Wells, 180 N. Y. 62, 72 N. E. 626.

Strangely enough, there seems to be only one reported case in which the constitutionality of taxing A on the property of B has ever been decided. In that case the question was raised and decided in favor of the taxpayer; such a tax was held to offend against the 14th Amendment.

Santa Clara County v. Southern P. R. Co. 9 Sawy. 165, 18 Fed. 385.

Mr. David Rumsey argued the cause, and, with Mr. Francis K. Pendleton, filed a brief for defendant in error:

Both the legislature and the courts have recognized the probability of error in human judgment in determining that most elusive of all facts,—the fact of value; and have sanctioned an extreme conservatism in valuation of real property, by which assessors are supported in appraising at a percentage substantially less than full value.

People ex rel. Equitable Gaslight Co. v. Barker, 144 N. Y. 99, 39 N. E. 13; *People ex rel. Warren v. Carter*, 109 N. Y. 576, 17 N. E. 222; *People ex rel. Stewart v. Feitner*, 95 App. Div. 481, 88 N. Y. Supp. 774; *Greater New York Charter*, § 906.

Neither a court of law nor a court of equity will disturb assessments of real property unless it is made to appear that the complainant's property has been assessed at more than its value or more than the prevailing ratio of assessment to value.

Greater New York Charter, § 906; *People ex rel. Warren v. Carter*, *supra*; *Mercantile Nat. Bank v. New York*, 172 N. Y. 35, 64 N. E. 756.

No discrimination in the burden of taxation is shown to exist as between persons similarly situated; and a system of taxation by which an equal burden is imposed upon all in the same class is not repugnant to the Constitution of the United States.

Merchants' & M. Nat. Bank v. Pennsylvania, 167 U. S. 464, 42 L. ed. 237, 17 Sup. Ct. Rep. 829; *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 295, 42 L. ed. 1043, 18 Sup. Ct. Rep. 594; *Davidson v. New Orleans*, 96 U. S. 97, 104, 24 L. ed. 616, 619; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Kentucky Railroad Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57.

The property taxed is unquestionably in existence, and the plaintiff's claim, when analyzed, amounts to a contention that it was excessively valued.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533.

*Mr. Justice Holmes delivered the [448] opinion of the court:

This is a bill to prevent the city of New York from completing the levy of a tax and thereby creating a cloud upon the plaintiff's title. The plaintiff owns lots numbered 592, 594, and 596 on Seventh avenue, subject to mortgages for \$70,000 and \$45,000, given by him. The premises have been valued, as the first step toward taxation, at \$160,000, and it is alleged upon information and belief that this valuation makes no deduction for the mortgages. The ground of the bill, so far as it is before us, is that the tax, if completed, will be contrary to the 14th Amendment. Some criticism might be made and was made on the form of the allegations, but we will take them as presenting what we believe they were intended to present,—the question whether, consistently with the Constitution of the United States, a man owning land subject to a mortgage can be taxed for the full value of the land, while, at the same time, the mortgage debt is not deducted from his personal estate. A demurrer to the bill was sustained by the courts below.

The plaintiff has many difficulties in his way. In the first place, the mode of taxation is of long standing, and, upon questions of constitutional law, the long-settled habits of the community play a part as well as grammar and logic. If we should assume that, economically speaking, the present system really taxes two persons for the same thing, the fact that the system has been in force for a very long time is of itself a strong reason against the belief that it has been overthrown by the 14th Amendment, and for leaving any improvement that may be desired to the legislature.

The weight of the plaintiff's argument is that he is taxed for what he does not own. The bill seems to have been drawn on the dominant notion of a right attached specifically to the mortgaged property,—that is to say, the notion that the property represents so many units of value, from which the mortgage subtracts so many, leaving only the remainder subject to be taxed; and this is the plaintiff's view. But there is a subordinate ⁴⁴⁹ averment that the plaintiff has not been assessed for taxes in respect of personal property, and the allegation seems to convey, by indirection, that no deduction of the mortgage debt has been made from personal property, and to admit that such a deduction would have set the city right. As to the former notion, it will be observed that the mortgages were given by the plaintiff, and therefore charged him, as well as his land. If he should die, by the law of New York his personal property would have to exonerate the realty, so far as it would go. If he lives, and remains solvent, the chances are that he will pay the mortgages out of personalty. Therefore, the true deduction is not the amount of the mortgages, but the speculative chance that the land may have to be sold for the debt,—a chance that would be insured at different rates to different persons. The other theory regards the mortgage debt as a deduction from total riches, to be compensated by an allowance to them indifferently, either in the valuation of the land or by a deduction from personal estate. And this logically leads to the conclusion that no scheme of taxation is constitutional that does not make allowance for all obligations and debts,—a conclusion that the plaintiff seems to accept, while he does not make it plain that he does not receive, both in law and in fact, such an allowance by a deduction of debts from personal estate.

It cannot matter to the plaintiff's argument whether the obligation is directed to a specific object or to the whole mass of objects owned by the party bound. In the one case, as much as in the other, the obligation will take certain units of value from his riches when, under the compulsion of the law, it is performed. But it is an amazing proposition of constitutional law that the law cannot fix its eye on tangibles alone and tax them by present ownership without regard to obligations that, when performed, would make some of them change hands; for instance, that, under the 14th Amendment, a man having a thousand sheep as his only property could not be taxed for their full value without allowance for an unsecured debt of \$5,000, even if his creditors should be left untaxed, ⁴⁵⁰—a matter that hardly would concern ^{53 L. ed.}

him. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; *People ex rel. Bijur v. Barker*, 155 N. Y. 330, 333, 49 N. E. 940. Undoubtedly he would be taxed for more than he owned if his total riches were computed on the footing that the law would keep its promise and make him pay, and that what would be done should be treated as done. If he owned other property, still there would be the chance that the sheep might be seized on execution, and, as we have said, the liability of the mortgaged land is no more, although the chance may be greater. It is a sufficient answer to say that you cannot carry a constitution out with mathematical nicety to logical extremes. If you could, we never should have heard of the police power. And this is still more true of taxation, which, in most communities, is a long way off from a logical and coherent theory. And it may perhaps be doubted whether there is even a logical objection to the sovereign power giving notice to all persons who may acquire property within its domain that, when it comes to tax, it will not look beyond the tangible thing, and that those who buy it must buy it subject to that risk.

The plaintiff's contention that the mortgage must be deducted from the land, whether the mortgage is taxed or not, stated a little differently, is that he was entitled to an apportionment of the tax to his interest, and that, if the title to a lot is split up, the government cannot tax it as a whole. To this we cannot agree, although it should be mentioned that the Greater New York charter permits the owner of any interest to redeem it separately. § 920. We have assumed so far that the tax on this real estate is a debt that might be collected by a personal suit against the plaintiff. As a matter of fact, it is not collected in that way, and we gather from what was said and admitted at the argument that it is doubtful at least whether such an action would lie. See *Durant v. Albany County*, 26 Wend. 66; *Rochester v. Gleichauf*, 40 Misc. 446, 82 N. Y. Supp. 750. Suppose that the tax law should operate only *in rem*, against a lot defined by the limits ^{[451} of a separate title, and should simply give notice by sufficient means to all the world that it would be sold unless, within a certain time, some party in interest should see fit to pay a certain sum. Notwithstanding the position of the plaintiff, it cannot be doubted that such a proceeding would be as valid as the imposition of a personal liability upon individuals according to their

interest. See *Witherspoon v. Duncan*, 4 Wall. 210, 217, 18 L. ed. 339, 342; *Castillo v. McConnico*, 168 U. S. 674, 681, 682, 42 L. ed. 622, 625, 18 Sup. Ct. Rep. 229. But the notion of a proceeding *in rem* is at the bottom of the usual tax on land, even where, as in Massachusetts, there is a personal liability superadded. This is shown by the doctrine that a valid tax sale cuts off all titles and starts a new one. *Hefner v. Northwestern Mut. L. Ins. Co.* 123 U. S. 747, 751, 31 L. ed. 309, 311, 8 Sup. Ct. Rep. 337; *Emery v. Boston Terminal Co.* 178 Mass. 172, 184, 86 Am. St. Rep. 473, 59 N. E. 763. Of course, there is no question of allowances or deductions upon a proceeding *in rem*. All interests are proceeded against at once.

If there is no personal liability in New York, the levy of a tax is a proceeding *in rem*, whatever requirements may be made for notice by naming parties in interest, and even if naming them is a condition to the validity of the tax. Indeed, it may be assumed that primarily it is such a proceeding in any event, and, as a proceeding *in rem*, might be sustained, even if the personal liability failed. A tax on special interests is not unknown (*Baltimore Shipbuilding & Dry Dock Co. v. Baltimore*, 195 U. S. 375, 381, 49 L. ed. 242, 244, 25 Sup. Ct. Rep. 50), but the usual course is to tax the land as a whole, and that we understand to be the way in New York. "In all cases the assessment shall be deemed as against the real property itself, and the property itself shall be holden and liable to sale for any tax levied upon it." Laws of 1902, chap. 171, § 1. See Greater New York charter of 1901, §§ 1017, 1027.

More might be said, but we will add only that while in order to meet the plaintiff's arguments we have taken his bill as presenting the question that we believe it was intended to present, the assumption hardly could be made if our opinion otherwise was on his side. It does not appear that he has [452] not received *an allowance for his mortgage debt except by a conjectural inference. Among the matters that we do not consider is whether the plaintiff has any remedy except proceedings for an abatement, when he admits that he was liable to a tax, and disputes only the amount.

Judgment affirmed.

ALONZO BAILEY, Plff. in Err.,

v.

STATE OF ALABAMA.

(See S. C. Reporter's ed. 452-459.)

Error to state court — questions reviewable.

Questions respecting the validity, under

U. S. Const., 13th and 14th Amendments, of the provision of Ala. Gen. Acts 1907, p. 636, creating a presumption of criminal intent from the refusal of an employee to perform service without refunding money or property obtained from his employer, are not open on a writ of error from the Federal Supreme Court to review a judgment of the highest court of the state, affirming the refusal of an inferior court to discharge the accused on habeas corpus, where all that appears from the record is that the accused is held to await trial on a charge of having obtained money from his employer under a written contract, with intent to defraud. [For other cases, see Appeal and Error, 2070-2256, in Digest Sup. Ct. 1908.]

[No. 538.]

Submitted November 12, 1908. Decided December 21, 1908.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the Montgomery City Court, in that state, denying relief by habeas corpus. Affirmed.

See same case below (Ala.) 48 So. 498.

The facts are stated in the opinion.

Mr. Edward S. Watts argued the cause, and, with Messrs. Troy, Watts, & Letcher, filed a brief for plaintiff in error.

Mr. Fred S. Ball also argued the cause and filed a brief for plaintiff in error.

Mr. Alexander M. Garber argued the cause, and, with Mr. Thomas W. Martin, filed a brief for defendant in error.

Attorney General Bonaparte (by special leave) argued the cause and, with Mr. Robert A. Howard, filed a brief as *amicus curiæ*.

Mr. Justice Holmes delivered the opinion of the court:

This is a writ of error to reverse a judgment of the supreme *court of [453 Alabama (Ala.) 48 So. 498, affirming a judgment of a judge of the Montgomery city court, which denied a discharge on habeas corpus to the plaintiff in error. At the hearing on the writ in the city court it appeared that, after a preliminary trial before a justice of the peace, the plaintiff in error was committed for detention on a charge of obtaining \$15 under a contract in writing, with intent to injure or defraud his employer. At this stage the writ was issued.

If the supreme court had affirmed the denial of the discharge on the ground that the

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

proper course was to raise the objections relied upon at the trial of the principal case on the merits, and to take the question up by writ of error, it would have adopted the rule that prevails in this court, and there would be nothing to be said. But the supreme court of the state dealt with the objections, and, as the matter is one of local procedure, it is not to be criticized for taking a different course. The unsatisfactoriness of such attempts to take a short cut will appear, however, we think, in a moment.

We gather from the opinion of the supreme court that the plaintiff in error is proceeded against under a law of 1907 (General Acts 1907, p. 636), amending the Code of 1896, § 4730. This section of the Code made it an offense punishable like larceny to enter into a contract in writing for service with intent to injure or defraud the employer, and, after thereby obtaining money or personal property from such employer, with such intent, without just cause, and without refunding the money or paying for the property, to refuse to perform the service. The amendment, embodying and enlarging an earlier one, makes the refusal or failure without just cause *prima facie* evidence of the intent; makes the penalty a fine in double the damage suffered, one half to go to the party injured, and creates a similar offense with regard to persons making contracts in writing "for the rent of land." It is contended that the statute as it now stands is unconstitutional under the 13th and 14th Amendments. The presumption is said to be artificial, and not 454] drawn from the facts of life. *When coupled with the local rule that the party cannot testify to his actual intent, it is said practically to make a crime out of a mere departure from service, which, it is said, and it seems to have been conceded by the supreme court of Alabama, could not be done.

The trouble in dealing with this contention is due to the meager facts on which this case comes before us at this stage. If the principal case had been tried it is imaginable that it might appear that a certain class in the community was mainly affected, and that the usual course of events, including the consequences in case of inability to pay the fines, was such that, in view of its operation and intent, the whole statute ought to be held void. It may be, although presumptions of intent from somewhat remote subsequent conduct are not unknown to the common law (*Com. v. Rubin*, 165 Mass. 453, 43 N. E. 200), that the amendment creates a presumption that cannot be upheld. But we cannot deal with these questions now. All that appears from the record with regard to the foundation

of the case against him is that the plaintiff in error is held on a charge of having obtained money under a written contract with intent to defraud. There is no doubt that such conduct may be made a crime. It may be questioned whether we ought to assume that the proceeding is under the statute, although it is admitted on all hands. But, if we do assume it, there is nothing as yet to show that the section of the Code, apart from the amendments, is bad. The amendments are separable, as is sufficiently shown by the fact that the rest of the enactment originally stood without them. When the case comes to trial it may be that the prosecution will not rely upon the statutory presumption, but will exhibit satisfactory proof of a fraudulent scheme, so that the validity of the addition to the statute will not come into question at all. It is true that it appears that the plaintiff in error was held for trial on the statutory evidence, and with no other proof of fraudulent intent. But, if that evidence was insufficient, it hardly will be contended that this court should require the state courts to * release all persons held for trial. [455] where, in its opinion, the evidence fails to show probable cause. We repeat, the trouble with the whole case is that it is brought here prematurely by an attempt to take a short cut. And, as the supreme court of the state would have been warranted in denying the writ on that ground, perhaps we have done a work of supererogation in giving further reasons for affirming its judgment.

Judgment affirmed.

Mr. Justice Harlan, dissenting:

The plaintiff in error, Bailey, was arrested and held for trial on the charge of having obtained from his employer, with the intent to injure him, the sum of \$15. Having been taken into custody, he sued out a writ of habeas corpus from a subordinate court of Alabama, alleging that the statute under which he was arrested and deprived of his liberty was in violation of the Constitution of the United States.

The statute of Alabama referred to is as follows: "6845.—Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than \$300, one half of said fine to go to the county and one

half to the party injured; and any person who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on 456]conviction, be *punished by a fine in double the damage suffered by the injured party, but not more than \$300, one half of said fine to go to the county and one half to the party injured. And the refusal of any person who enters into such contract to perform such act or service, or to cultivate such lands, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord, or to defraud him." Ala. Code 1907.

It appears that, at the hearing of the application for habeas corpus, the accused contended that the statute was in violation (1) of the 14th Amendment of the Constitution of the United States, in that it deprived him of his liberty without due process of law and denied him the equal protection of the laws; (2) of the 13th Amendment, in that its effect was to subject him to involuntary servitude (not as a punishment for crime) if he failed to pay a debt preferred against him.

These contentions were overruled, and, the discharge of the accused having been refused, he prosecuted an appeal to the supreme court of Alabama. That court considered upon its merits every question presented by the record, and affirmed the order under which the accused was held in custody. From that order the case was brought here by Bailey from that court upon writ of error granted by its chief justice.

Speaking generally, the statute has been assailed by the accused, as well as by the Attorney General of the United States (who, with the consent of this court, has filed a brief as *amicus curiæ*), as establishing and maintaining, and as intended to establish and maintain, as to laborers or employees in Alabama, a system of peonage, in violation of the Constitution and the laws of the United States. The statute of Alabama, the Attorney General contends, is in violation of the act of Congress of March 2d, 1867, chap. 187, 14 Stat. at L. 546, now § 1990 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1266), which provides that "all acts, laws, resolutions, orders, regulations, or usages of the territory of New

Mexico, or of any other territory or state, . . . by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or *indirect-[457]ly, the voluntary or involuntary service or labor of any persons as peons in liquidation of any debt or obligation, or otherwise, are declared null and void."

The supreme court of Alabama, by its final order, overruled the objections which the accused urged, on constitutional grounds, against the statute, and refused to direct his discharge from custody. If that statute is repugnant to the Constitution and laws of the United States it is void, and the accused is deprived of his liberty in violation of Federal law. That everyone will admit. But this court refuses, although the case is before it upon writ of error, regularly sued out by the defendant, to consider and determine that question. It affirms the judgment of the state court and leaves the accused in custody upon the ground—if I correctly interpret the opinion—that he took a "short cut" when seeking, upon habeas corpus, to be discharged from custody in advance of his trial. If the accused, in advance of his trial, had sought a discharge on a writ of habeas corpus sued out from a *circuit court of the United States*, that might have been deemed a "short cut." For it is well established that, "in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution," the courts of the United States will not, except in certain cases of urgency, and in advance of his trial, discharge, upon habeas corpus, one who is alleged to be held in custody by the state, in violation of the Constitution or the laws of the United States. *Ex parte Royall*, 117 U. S. 241, 251, 29 L. ed. 868, 871, 6 Sup. Ct. Rep. 734; *Minnesota v. Brundage*, 180 U. S. 499, 501, 45 L. ed. 639, 640, 21 Sup. Ct. Rep. 455, and the authorities there cited. But whether the accused, in seeking his discharge by the state court, adopted a mode of procedure authorized by the local law, was for the Alabama courts, not for this court, to determine. The state court recognized the proceeding by habeas corpus to be in accordance with the local law; for the supreme court of Alabama, *without[458] even intimating that the accused took a "short cut," or pursued the wrong method to obtain his discharge, entertained his appeal

and passed upon the constitutionality of the statute under which he was held in custody. As the state court, by its final order, held that the detention of the accused by the state authorities was not inconsistent with any privilege secured by the Constitution or laws of the United States, he was entitled, *of right*, to bring the case here upon writ of error and have this court determine the question, distinctly raised, whether the statute of Alabama, as applied to his case, did not infringe privileges belonging to him under the Constitution and laws of the United States. We say, of right, because § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), expressly authorizes a writ of error to re-examine the final judgment of the highest court of a state, which denies a title, right, privilege, or immunity, specially set up or claimed under the United States. This is a right of great value. I submit that this court cannot properly refuse or fail to meet the constitutional question decided by the state court and plainly raised by the present writ of error for its consideration. Such refusal or failure cannot, I submit, be justified except on the ground that an order of the highest court of a state, rendered on a formal appeal, which affirms that the accused is not held in custody in violation of the Constitution and laws of the United States, is not a *final judgment* within the meaning of § 709,—a proposition which this court does not announce, and which I cannot believe it will ever announce. The course pursued in the disposition of this case by the court has not, so far as I am aware, any precedent in its history. If it was the right and duty of the state court to determine by its final order whether the accused was constitutionally deprived of his liberty or was subjected to involuntary servitude or labor, not in punishment for crime, but really in liquidation of a debt, it is then the right, and, I think, the duty, of this court, upon the present writ of error, regularly brought by the accused, to re-examine that judgment, and decide the question whether he is deprived 459] of his liberty *in violation of the Constitution or laws of the United States. It is a curious condition of things if this court must remain silent when the question comes before it regularly, whether the final judgment of the highest court of a state does not deprive the citizen of rights secured to him by the supreme law of the land.

For the reasons stated I dissent from the opinion and judgment of the court.

Mr. Justice Day also dissented.

53 L. ed.

LILLIAN S. BUTLER, Plff. in Err.,
v.

JOHN D. FRAZEE.

(See S. C. Reporter's ed. 459-468.)

Master and servant — assumption of risk.

An experienced operator of full age and intelligence must be deemed, as a matter of law, to assume the risk of injury because of the excessive height above the feed board at which the finger-guard rail of a laundry mangle is adjusted, where she has worked for some months at this machine, during all of which time the guard rail has remained in the same position.

[For other cases, see Master and Servant, II. b, in Digest Sup. Ct. 1908.]

[No. 36.]

Argued December 3, 1908. Decided December 21, 1908.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, entered upon a directed verdict in favor of defendant in an action to recover damages for personal injuries. Affirmed.

See same case below, 25 App. D. C. 392. The facts are stated in the opinion.

Mr. John C. Gittings argued the cause, and, with Mr. Justin Morrill Chamberlin, filed a brief for plaintiff in error:

The court below erred in holding, as matter of law, that plaintiff in error had assumed the risk.

Texas & P. R. Co. v. Swearingen, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164.

Whether a guard rail attached to a mangle for the purpose of protecting the hand of the operator from being caught and drawn into the machine was properly attached and placed in position is a question for the court or jury.

Fronk v. J. H. Evans City Steam Laundry Co. 70 Neb. 75, 96 N. W. 1053; Stager v. Troy Laundry Co. 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645.

NOTE.—On servant's assumption of risk—see notes to O'Maley v. South Boston Gas-light Co. 47 L.R.A. 161; Southern P. Co. v. Seley, 38 L. ed. U. S. 391; and Chesapeake & O. R. Co. v. Hennessey, 38 C. C. A. 314.

Assumption of risk of injury from defective laundry machinery, where danger is imperfectly appreciated.

In harmony with BUTLER v. FRAZEE is Counter v. Union Laundry Co. 34 Mont. 590, 87 Pac. 973, where the assumption of the

Mr. Leonard J. Mather argued the cause, and, with Mr. Charles A. Keigwin, filed a brief for defendant in error:

The defects complained of were open and obvious to the plaintiff in error, who, giving no notice thereof, thereby assumed them.

Hayzel v. Columbia R. Co. 19 App. D. C. 369; Ciriack v. Merchants' Woolen Co. 151 Mass. 152, 6 L.R.A. 733, 21 Am. St. Rep. 438, 23 N. E. 829; Connolly v. Eldredge, 160 Mass. 566, 36 N. E. 469; Berger v. St. Paul, M. & M. R. Co. 39 Minn. 78, 38 N. W. 814; Texas & P. R. Co. v. Archibald, 170 U. S. 672, 42 L. ed. 1191, 18 Sup. Ct. Rep. 777; Hough v. Texas & P. R. Co. 100 U. S. 224, 25 L. ed. 617; Tuttle v. Detroit, G. H. & M. R. Co. 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; Way v. Illinois C. R. Co. 40 Iowa, 341; Murphy v. Rockwell Engineering Co. 70 N. J. L. 374, 57 Atl. 444; Schofield v. Chicago, M. & St. P. R. Co. 114 U. S. 615, 29 L. ed. 224, 5 Sup. Ct. Rep. 1125; Kohn v. McNulta, 147 U. S. 241, 37 L. ed. 152, 13 Sup. Ct. Rep. 298; District of Columbia v. McElligott, 117 U. S. 621, 29 L. ed. 946, 6 Sup. Ct. Rep. 884; Richardson v. Cooper, 88 Ill. 270; Shearm. & Redf. Neg. § 209a; Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. 286; Ogley v. Miles, 139 N. Y. 458, 34 N. E. 1059; Gaudet v. Stansfield, 182 Mass. 451, 65 N. E. 850; Hoyle v. Excelsior Steam Laundry Co. 95 Ga. 34, 21 S. E. 1001; Blom v. Yellowstone Park Asso. 86 Minn. 237, 90 N. W. 397; Keenan v. Waters, 181 Pa. 247, 37 Atl. 342; Jones v.

Roberts, 57 Ill. App. 56; Hanson v. Hammell, 107 Iowa, 171, 77 N. W. 839; Crowley v. Pacific Mills, 148 Mass. 228, 19 N. E. 344; Greif Bros. v. Brown, 7 Kan. App. 394, 51 Pac. 926.

That she herself says that she had no reason to suppose that the finger-guard rail had been adjusted so high as that it would permit her hands going underneath is meaningless; for she was an intelligent, capable, and experienced young woman.

Northern C. R. Co. v. Medairy, 86 Md. 168, 37 Atl. 796; Northern P. R. Co. v. Freeman, 174 U. S. 379, 384, 43 L. ed. 1014, 1016, 19 Sup. Ct. Rep. 763.

Even where the master has neglected to provide safeguards required by statute, the servant cannot recover if he used the machine in its unprotected condition and could see the danger.

Knisley v. Pratt, 148 N. Y. 372, 32 L.R.A. 367, 42 N. E. 986; Keenan v. Edison Electric Illuminating Co. 159 Mass. 379, 34 N. E. 366.

Mr. Justice Moody delivered the opinion of the court:

The plaintiff in error brought an action against the defendant *in error in the [462] supreme court of the District of Columbia, in which she sought to recover damages for injuries suffered by her while in the defendant's employ. The injuries were incurred while the plaintiff was operating a mangle in the defendant's steam laundry. The function of the machine was to iron and dry clothes by drawing them between a

risk as a matter of law was imputed to an experienced operator of full age, who was injured because the guard rail on a laundry mangle was bent or sprung, permitting her hand to pass under and be caught in the roller, she having testified that she was aware of the defect and knew the danger.

The same ruling was made in Daffron v. Majestic Laundry Co. 41 Wash. 65, 82 Pac. 1089, where an experienced operator had her hand entangled and pulled over the top of the guard, and between the feed roller and cylinder, there having been a bona fide effort on the part of the employer to comply with the factory act, a violation of which would have prevented him from availing himself of the defense of assumed risk.

Assumption of the risk as matter of law was also imputed in Kupkofski v. John S. Spiegel Co. 135 Mich. 7, 97 N. W. 48, to an intelligent girl, seventeen years old, who had worked in a laundry a year, and about two weeks on the machine by which she was injured, and whose hand was caught under the roller of a shirt-bosom ironer which was operating jerkily by reason of a loose driving belt, the condition being open to observation and known to her.

But, in a very similar case, the question

of assumed risk was held to be one for the jury where an experienced operator of an ironing machine had her hand drawn in between the roller and the ironing table or board, which she was endeavoring to steady and prevent from going too far, although she knew that the machine was running in an unsteady and jerky manner, and that the mechanism for the automatic return of the board was out of order, but had but an imperfect knowledge of the construction of the machine, the known defects in which did not indicate the possibility of the accident which actually happened. Tuckett v. American Steam & Hand Laundry, 30 Utah, 273, 4 L.R.A.(N.S.) 990, 116 Am. St. Rep. 832, 84 Pac. 500. Distinguishing Kupkofski v. John S. Spiegel Co., supra, the court said: "So far as the question of assumed risk is concerned, there is an all-important difference between the facts in the Michigan case and in the case at bar. In the former case the plaintiff observed the precise defect that caused the injury. She knew that the belt was loose, and that, when the friction became unusual, the machine would slow down, and, as the belt moved again to perform its office, the machine would start up again, so that she

cylinder and a series of rollers. The cylinder was of steel, 4 feet in diameter and 8 feet long and heated by steam. Above and in contact with it were five rollers. When in motion the cylinder and the rollers revolved inwardly. In front of the cylinder and closely fitted to it was a feed board, 12 to 15 inches wide and 8 feet long. It was the duty of the operator of the machine to spread the damp article to be ironed upon the feed board and push it forward until it touched the cylinder, by whose motion it was drawn upward to the point of engagement between the cylinder and the first roller, thereby being drawn through between the cylinder and the rollers. For the safety of the operator the machine was equipped with a finger guard, which was a bar of steel 8 feet long, 3 inches wide, and $\frac{1}{8}$ of an inch thick, extending from side to side of the machine, and about 4 inches distant from the revolving cylinder. The guard was painted red. It was adjustable and could be set at a height above the feed board of from $\frac{1}{4}$ of an inch to 4 inches, depending upon the thickness of the clothes to be ironed. On this mangle the guard had always been adjusted at a height of $1\frac{1}{2}$ inches above the feed board. The various parts of the machine described and their relation to each other and the mode of operation were in plain view of the operator. The plaintiff was twenty-two years of age, apparently of full intelligence, and before entering the employ of the defendant had had two years' experience in the operation of mangles in other establishments. She

testified that those mangles were equipped with finger guards, which prevented the operator's hands from coming into contact with the steam cylinder, and that she had never known of any injury happening to an operator by contact with the cylinder. [463] She received no instructions or warning of any danger. When she was set to work upon the mangle in October, 1902, the feed board was loose, thereby permitting clothing occasionally to drop between its edge and the steam cylinder. This condition continued unchanged until the time of the plaintiff's injury, and it was not reported or complained of by her. In the following December she was injured. The only testimony as to how the injury occurred was given by the plaintiff herself, and was stated in the bill of exceptions as follows:

A. Why, the morning of the accident nearly every piece we put in the mangle, Miss Cumberland's end would go in before mine and I would have to push, and my hand caught on. . . . A. The morning of the accident nearly every piece would catch on Sidney's side before it would catch on mine; and the table cloth would take my hand right on up with it. It dropped down between the board and the cylinder, and when it caught, it carried my hand right on up with it. . . . A. Well, the linen would drop down between the board and the cylinder and you had to push it up.

Q. Do you mean us to understand that you put your hand deliberately inside this

knew exactly what to expect when the machine stopped. On the contrary, in the case at bar, the plaintiff only knew that the machine ran in a jerky, unsteady fashion. There was no defect apparent to her, like a loose belt, which indicated in any manner that the machine would, at any time, run faster than ever before. In the former case the court could well say that the plaintiff should have realized the danger,—that she was not ignorant of it,—whereas, in the present case, it is impossible for the court to so say."

So, in *Stager v. Troy Laundry Co.* 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645, which is signally like *BUTLER V. FRAZEE* in its facts, a servant operating a mangle in a laundry was held not to have assumed, as a matter of law, the risk that her hand might pass under the guard rail into the rollers, where such rail was so adjusted by the employer as to afford some protection, the employee was forbidden to interfere with the adjustment, and it was not obvious that such adjustment was improper.

And in *Bradford v. Taylor*, 85 Miss. 409, 37 So. 812, an experienced laundry hand who was, however, a novice in the operation of machinery, and was ignorant of, and with-

out experience in the use of, the particular defective machine, was held not to have assumed, as matter of law, the risk of injury, while cleaning an ironing machine, because of the absence of a fender in front of the roller.

An operator of mature years and some experience was also held, in *Thomas v. Excter, H. & A. Street R. Co.* 73 N. H. 1, 58 Atl. 838, not to have assumed, as matter of law, the risk of injury from a sudden swaying of the mangle towards her, owing, among other things, to defective gearings and insufficiency of the machine's supports, where there was no evidence tending to show that she was aware of the absence of a suitable foundation for the machine, or of the state of repair of the gearing and axle boxes, or of the effect of these several conditions upon the running of the machine, the vibrations in the machine and the irregularity in the motion of the cylinders which she had noticed in her prior experience with it not having been of such magnitude as to direct her attention to the causes, or to warn her of the possibility of a considerable swaying of the machine, or of any danger arising specially from the vibrations and irregularity.

finger guard and down into the space between the feed board and the cylinder?

A. No, sir.

Q. How did the linen drop?

A. The linen instead of going in would drop down between the board and the cylinder and you would push it up, and the young lady working on the other side, hers would catch before mine.

Q. You had to get hold of the end in some way to push it up?

A. No, sir; you had to push it up the feed board.

Q. If the edge of the linen you were feeding had dropped down between the feed board and the cylinder, how could you push it up?

A. You could push it up and it would come down wrinkled.

Q. If it had dropped down between the feed board and the cylinder, how could you push it up?

A. It dropped down between the feed board and the cylinder, and when you pushed it up and it came out of the mangle it would come out wrinkled.

Q. You did not hold the table cloth as it 464] fed into *the machine?

A. Yes, I had hold of the table cloth.

Q. You pushed the table cloth over the feed board; but you could not catch hold of it, as a matter of fact?

A. I had hold of the table cloth and was pushing it up and it dropped. And this day it was worse; every piece we put in, it dropped down and we had to push it up; and as I pushed it up in some way or other it took my hand with it.

Q. You say it was getting worse?

A. Yes. We had to sprinkle the clothes every day, and this day we had to sprinkle the clothes more than ever.

Q. And that is the only day you put your hand inside the finger guard?

A. Yes.

Q. Why did you put your hand inside then?

A. I didn't put my hand inside. The table cloth pulled it in. My hand was on the table cloth pushing it up, and the table cloth caught and it caught my hand with it.

Q. On this particular occasion even you didn't push your hand inside the finger guard?

A. No, sir; I didn't put my hand under the finger guard until the table cloth pulled it under.

Q. So the table cloth had hold of your hand before your hand had gotten past the finger guard?

A. The table cloth dropped and I gave it another push to make it catch, and after it dropped it caught it on the cylinder and carried my hand right with it.

Q. So that your hand had gone past the finger guard before the table cloth caught it and carried it into the mangle?

A. The table cloth took my hand right along with it.

Q. What I want to find out is the exact time that this table cloth became wrapped around your hand in such a way as to take it into that mangle?

A. The table cloth dropped. Sidney's end had gone in and my end had dropped, and I pushed it and it caught. As soon as the table cloth — it caught, and, after it caught, in some way it took my hand right up with it.

Q. Where did it drop? Between the feed board and the cylinder?

A. Between the feed board and the cylinder.

Q. And it was not until after it dropped that your hand was caught?

A. It dropped between the feed board and the cylinder, and I had my hand on the feed board to make it catch, and my hand caught and went right up with it.

*The plaintiff offered the testimony[465 of expert witnesses, who said that no kind of laundry work required the finger guard to be more than $\frac{1}{2}$ an inch above the feed board. Apart from the extent of the injuries, this was all the evidence tending to sustain plaintiff's cause of action. The presiding judge directed a verdict to be returned for the defendant. Upon exceptions this ruling was sustained by the court of appeals, and the case was brought here by writ of error.

The evidence tended to show that, in one respect, at least, the machine operated by the plaintiff was out of repair. The feed board was loose, thereby permitting the fabric to be ironed sometimes to drop between it and the steam cylinder. How far this was a cause contributing to the injury does not clearly appear, and at the bar it was not relied upon as the cause of the plaintiff's injury. This was the prudent attitude, because the ill-repair of the machine in this respect, and the effect upon its operation, were in existence from the first and well known to the plaintiff, and she failed to report or complain of the defect to her employer. *Washington & G. R. Co. v. McDade*, 135 U. S. 554, 570, 34 L. ed. 235, 241, 10 Sup. Ct. Rep. 1044. The single ground upon which the plaintiff's right to recover was rested was that the guard rail was adjusted at an excessive height, so that it would permit the plaintiff's hand to be drawn between it and the feed board up to the point of engagement between the revolving cylinder and rollers. The judgment of the court below went against the plain-

ti^o, upon the theory that she assumed the risk of this danger, and that is the question to be considered. One who understands and appreciates the permanent conditions of machinery, premises, and the like, and the danger which arises therefrom, or, by the reasonable use of his senses, having in view his age, intelligence, and experience, ought to have understood and appreciated them, and voluntarily undertakes to work under those conditions and to expose himself to those dangers, cannot recover against his employer for the resulting injuries. Upon that state of facts the law declares that he assumes the risk. The rule is too well settled to warrant an *extensive discussion of it or an attempt to analyze the different reasons upon which it has been held to be justified. The rule of assumption of risk has been thought by many a hard one when applied to the complicated conditions of modern industry, so largely conducted by the aid of machinery propelled by irresistible and merciless mechanical power, and the criticism frequently has been made that the imperative need of employment leaves to the workman no real freedom of choice, such as the rule assumes. That these considerations have had an influence is shown by the notorious unwillingness of juries to apply the rule, and by the legislative modifications of it which, from time to time, have been made, as, for instance, by Congress in the safety appliance law. *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407. But the common law in this regard has not been modified in the District of Columbia, and we have no other duty than to enforce it. No question has been made in the case at bar that the rule prevails and is relevant to the facts of this case. The contention, however, is that, as the plaintiff testified in substance that she did not know and appreciate the danger which she was encountering, that testimony, with the other facts in the case, raised an issue for the jury, and that it could not be said, as matter of law, that the risk had been assumed. This contention is sustained by a well-considered case. *Stager v. Troy Laundry Co.* 38 Or. 480, 53 L.R.A. 459, 63 Pac. 645. See *Frunk v. J. H. Evans City Steam Laundry Co.* 70 Neb. 75, 96 N. W. 1053.

Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate, and assume the risk of it. *Texas & P. R. Co. v. Swearingen*, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164; *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 53 L. ed.

464. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But *where[467 the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence, and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, and cases there cited. The case at bar falls within this class.

The plaintiff was a person of mature years, intelligent, and of adequate experience. She had worked for some months upon this particular machine, and during that time it was always in exactly the same condition in which it was upon the day of the injury. The elements out of which the danger arose were plainly visible to her. The employer had no duty, statutory or otherwise, to use a rail to guard against so obvious a danger as that arising out of two cylinders in contact with each other and seen to be revolving inwardly. *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286. We see nothing in the manner of the adjustment of the guard rail which constituted an allurements or was calculated to blind the plaintiff to the danger. The adjustment of the parts of the machine was continually before her eyes. The danger of being drawn between the cylinder and the rollers by contact with the cylinder was illustrated to her every minute of the day by the drawing in of the clothes to be ironed by contact with the revolving cylinder. The distance between the guard rail and the feed board was constant, and its relation to the thickness of her hand was apparent. She must have understood that if her hand became inextricably entangled with the clothes, as seems from the rather vague testimony of the plaintiff was the case here, it would be drawn between the cylinder and receive the injuries which unhappily occurred. *We[468 think that it must be said, as matter of law, that she voluntarily assumed the risk of the danger. *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114, 7 Sup.

Ct. Rep. 1166; *Crowley v. Pacific Mills*, 148 Mass. 228, 19 N. E. 344; *Gleason v. New York & N. E. R. Co.* 159 Mass. 68, 34 N. E. 79; *Connolly v. Eldredge*, 160 Mass. 566, 36 N. E. 469; *Lemoine v. Aldrich*, 177 Mass. 89, 58 N. E. 178; *Burke v. Davis*, 191 Mass. 20, 4 L.R.A.(N.S.) 971, 114 Am. St. Rep. 591, 76 N. E. 1039.

Judgment affirmed.

PEOPLE OF THE STATE OF NEW YORK
EX REL. ABRAHAM KOPEL, Plff. in
Err.,

v.

THEODORE A. BINGHAM, Police Commissioner of the City of New York.

(See S. C. Reporter's ed. 468-476.)

Extradition — requisition by governor of Porto Rico.

1. Precisely the same power to issue a requisition for the return of a fugitive criminal as is possessed under U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, by the governor of any organized territory, is given the governor of Porto Rico by the provisions of the Foraker act of April 12, 1900 (31 Stat. at L. 80, chap. 191), § 14, that the laws of the United States not locally inapplicable shall be in force and effect in Porto Rico, and of § 17, that the governor of Porto Rico shall have all the powers of governors of the territories of the United States that are not locally inapplicable.

Extradition — fugitive criminals from Porto Rico.

2. Porto Rico is a territory, within the meaning of the provision of U. S. Rev. Stat. § 5278, authorizing the executive authority of any state or territory to make requisition for the extradition of fugitive criminals.

[No. 167.]

Argued October 26, 1908. Decided January 4, 1909.

IN ERROR to the Supreme Court of the State of New York to review a judgment entered pursuant to the mandate of the Court of Appeals of that state, which had affirmed a judgment of the Appellate Division of the Supreme Court in the First Department, affirming a judgment of the Supreme Court in and for the County of New York, dismissing a writ of habeas corpus. Affirmed.

See same case below in Appellate Division, 117 App. Div. 411, 102 N. Y. Supp. 878; in Court of Appeals, 189 N. Y. 124, 81 N. E. 773.

The facts are stated in the opinion.

Mr. Alfred R. Page argued the cause, and, with Messrs. Page & Booth, filed a brief for plaintiff in error:

Extradition between states, territories, and countries subject to the jurisdiction of the United States depends solely on the provisions of the Constitution of the United States and the acts of Congress.

People ex rel. Corkran v. Hyatt, 172 N. Y. 183, 60 L.R.A. 774, 92 Am. St. Rep. 706, 64 N. E. 825, affirmed in 188 U. S. 691, 47 L. ed. 657, 23 Sup. Ct. Rep. 456.

Porto Rico is not a territory of the United States.

Re Lane, 135 U. S. 443-447, 34 L. ed. 219-221, 10 Sup. Ct. Rep. 760; *Ex parte Morgan*, 20 Fed. 304; *People ex rel. Kopel v. Bingham*, 189 N. Y. 125, 81 N. E. 773.

In the territories of the United States the residents are citizens of the United States, and entitled to all the protection and guaranties of the Constitution of the United States.

Thompson v. Utah, 170 U. S. 343, 346, 42 L. ed. 1061, 1065, 18 Sup. Ct. Rep. 620.

The constitutional safeguards do not extend, *ex proprio vigore*, to the people of the island of Porto Rico.

Dorr v. United States, 195 U. S. 138-143, 49 L. ed. 128-130, 24 Sup. Ct. Rep. 808, 1 A. & E. Ann. Cas. 697.

The United States internal revenue laws do not apply.

Goetze v. United States, 103 Fed. 79; *Downes v. Bidwell*, 182 U. S. 244, 279, 45 L. ed. 1088, 1103, 21 Sup. Ct. Rep. 770.

In addition to states and territories, it is a well-recognized fact that there exists territory occupied by and under the jurisdiction of the United States which is not covered by either the designation of a state or territory.

Downes v. Bidwell, supra; *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787; *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 A. & E. Ann. Cas. 697.

The states and territories are communities of people who are citizens of the United States, and who enjoy the rights and perform the duties of citizens.

Ex parte Morgan, 20 Fed. 306.

Mr. Alfred R. Page also filed a separate brief for plaintiff in error:

A criminal statute cannot be extended by construction or implication. The accused must be brought within the express provisions of the law.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *Mackin v. United States*, 117 U. S. 348, 29 L. ed. 909, 6 Sup. Ct. Rep. 777; *Sarlls v. United States*, 152

U. S. 570-576, 38 L. ed. 556-558, 14 Sup. Ct. Rep. 720; *France v. United States*, 164 U. S. 676-683, 41 L. ed. 595-597, 17 Sup. Ct. Rep. 219; *United States v. Harris*, 177 U. S. 305, 310, 44 L. ed. 780, 782, 20 Sup. Ct. Rep. 609.

Porto Rico, in an international sense, is domestic territory of the United States because it is subject to the jurisdiction and control thereof.

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743.

It is foreign to the United States in a domestic sense, because the island has not been incorporated into the United States, but is merely appurtenant thereto as a possession.

Downes v. Bidwell, 182 U. S. 244, 341, 342, 45 L. ed. 1088, 1127, 1128, 21 Sup. Ct. Rep. 770.

Mr. Robert C. Taylor argued the cause, and, with Mr. Robert S. Johnstone, filed a brief for defendant in error:

The power to extradite fugitive criminals as between a state and a territory is as complete as between one state and another.

Ex parte Reggel, 114 U. S. 642, 29 L. ed. 250, 5 Sup. Ct. Rep. 1148.

The power of Congress to provide for the surrender of fugitives from justice as between a state and a territory was derived not from the extradition clause of the Constitution, but from the clause which provides that "the Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

2 Moore, Extradition, § 535.

Porto Rico was described as a "territory" by the treaty of Paris.

Ortega v. Lara, 202 U. S. 339, 342, 50 L. ed. 1055, 1056, 26 Sup. Ct. Rep. 707; *Downes v. Bidwell*, 182 U. S. 339, 340, 45 L. ed. 1126, 1127, 21 Sup. Ct. Rep. 770.

The effect of the ratification of the treaty was to make the island "territory of the United States, although not an organized territory in the technical sense of the word." The "organization" of the territory was subsequently effected by the Foraker act.

De Lima v. Bidwell, 182 U. S. 196, 45 L. ed. 1056, 21 Sup. Ct. Rep. 743.

Porto Rico has been described as a "territory" by government officials.

23 Ops. Atty. Gen. pp. 634-636.

Porto Rico has been repeatedly referred to as a "territory" in the opinions of this court.

De Lima v. Bidwell, 182 U. S. 1, 45 L. ed. 1041, 21 Sup. Ct. Rep. 743; *Goetze v. United States*, 182 U. S. 221, 45 L. ed. 1065, 21 Sup. Ct. Rep. 742; *Dooley v. United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762; *Armstrong v. United States*, 182 U. S. 243, 45 L. ed. 1086, 21 Sup. Ct. Rep. 827; *Downes v. Bidwell*, 182 U. S. 244, 45 L. ed. 1088, 21 Sup. Ct. Rep. 770; *Dooley v. United States*, 183 U. S. 151, 46 L. ed. 128, 22 Sup. Ct. Rep. 62; *Fourteen Diamond Rings v. United States (The Diamond Rings)*, 183 U. S. 176, 46 L. ed. 138, 22 Sup. Ct. Rep. 59; *Gonzales v. Williams*, 192 U. S. 1, 48 L. ed. 317, 24 Sup. Ct. Rep. 177; *Kepner v. United States*, 195 U. S. 100, 49 L. ed. 114, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655; *Dorr v. United States*, 195 U. S. 138, 49 L. ed. 128, 24 Sup. Ct. Rep. 808, 1 A. & E. Ann. Cas. 697; *Rasmussen v. United States*, 197 U. S. 516, 49 L. ed. 862, 25 Sup. Ct. Rep. 514; *Perez v. Fernandez*, 202 U. S. 80, 50 L. ed. 942, 26 Sup. Ct. Rep. 561; *Ortega v. Lara*, 202 U. S. 339, 50 L. ed. 1055, 26 Sup. Ct. Rep. 707; *Garrozi v. Dastas*, 204 U. S. 64, 51 L. ed. 369, 27 Sup. Ct. Rep. 224; *Pearcy v. Stranahan*, 205 U. S. 257, 51 L. ed. 793, 27 Sup. Ct. Rep. 345; *Romeu v. Todd*, 206 U. S. 358, 51 L. ed. 1093, 27 Sup. Ct. Rep. 724; *United States v. Heinszen*, 206 U. S. 370, 51 L. ed. 1098, 27 Sup. Ct. Rep. 742, 11 A. & E. Ann. Cas. 688; *Garzot v. Rios de Rubio*, 209 U. S. 283, 52 L. ed. 794, 28 Sup. Ct. Rep. 548.

If it should be argued that this consistent and persistent description of Porto Rico as a "territory" does not amount to an adjudication, nevertheless it bespeaks a practical interpretation of the word by public officers—executive, legislative, and judicial—who have been required to construe it. Such a practical construction by public officers is given great weight by the courts.

Burrow-Giles Lithographic Co. v. Sarony, 111 U. S. 53, 28 L. ed. 349, 4 Sup. Ct. Rep. 279; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Downes v. Bidwell*, 182 U. S. 244, 286, 45 L. ed. 1088, 1106, 21 Sup. Ct. Rep. 770.

Porto Rico is an "organized" territory of the United States.

Ex parte Morgan, 20 Fed. 305; *Re Lane*, 135 U. S. 443, 34 L. ed. 219, 10 Sup. Ct. Rep. 760; 28 Am. & Eng. Enc. Law, 2d ed. p. 57; *Gonzales v. Williams*, 192 U. S. 15, 48 L. ed. 322, 24 Sup. Ct. Rep. 177.

Even if Porto Rico is not technically a "territory," yet the Foraker act, §§ 14, 17, justify Kopel's extradition.

Re Kopel, 148 Fed. 508.

Mr. Chief Justice Fuller delivered the opinion of the court:

September 11, 1906, Kopel was taken into custody by defendant in error, Bingham,

who is the police commissioner of the city of New York. The arrest was made in pursuance of a rendition warrant issued by the governor of the state of New York, which recited that Kopel was charged with having committed embezzlement in Porto Rico; that he had fled therefrom and taken refuge in New York; and that his return had been lawfully demanded by the governor of Porto Rico.

Kopel thereupon sued out a writ of habeas corpus from the supreme court of the [472]state of New York. Bingham made *return to the writ, and set up the rendition warrant as his authority for detaining the prisoner. Kopel demurred to the return as insufficient in law, and that the governor's warrant had been issued without authority, etc. The matter coming on at special term before Truax, J., the demurrer was overruled and the writ dismissed, and the police commissioner directed to deliver Kopel to the agent of Porto Rico, to be conveyed back to Porto Rico.

From this order Kopel appealed to the appellate division of the supreme court in the first department, and the order of Judge Truax was unanimously affirmed.

Kopel then appealed to the court of appeals, which affirmed the order below. The record was remitted to the supreme court, to be proceeded upon according to law, and thereupon the order of the court of appeals was made the order of the supreme court, whereby it was ordered that the original order of the supreme court, which had been affirmed, should be enforced and carried into execution and effect. To this order, upon the remittitur, this writ of error is addressed.

The questions involved are whether the governor of Porto Rico had power and authority to make a requisition upon the governor of the state of New York for the arrest and surrender of the fugitive criminal of Porto Rico who had taken refuge in the state of New York, and whether the governor of the state of New York had power and authority to honor such requisition and to issue his rendition warrant for the arrest and surrender of such fugitive.

Section 5278 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3597) reads as follows:

"Whenever the executive authority of any state or territory demands any person as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crimes, certified as authentic by the gover-

nor or chief magistrate of the state or territory from whence the *person so[473 charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to the agent of such authority appointed to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear."

By § 827 of the Code of Criminal Procedure of New York it is provided:

"It shall be the duty of the governor, in all cases where, by virtue of a requisition made upon him by the governor of another state or territory, any citizen, inhabitant, or temporary resident of this state is to be arrested as a fugitive from justice . . . to issue and transmit a warrant for such purpose to the sheriff of the proper county . . . (except in the city and county of New York, where such warrant shall only be issued to the superintendent or any inspector of police) . . . Before any officer to whom such warrant shall be directed or intrusted shall deliver the person arrested into the custody of the agent or agents named in the warrant of the governor of this state, such officer must, unless the same be waived, as hereinafter stated, take the prisoner or prisoners before a judge of the supreme court or a county judge, who shall, in open court, if in session, otherwise at chambers, inform the prisoner or prisoners of the cause of his or their arrest," and that he or they may have a writ of habeas corpus upon filing an affidavit to the effect that he or they are not the person or persons mentioned in said requisition.

By § 14 of the organic act of Porto Rico, commonly called the Foraker act, it is provided that "the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal revenue laws," etc. 31 Stat. at L. 80, chap. 191.

Section 17 provides that the governor "shall, at all times, faithfully execute the laws, and he shall in that behalf have *all the powers of governors of the[474 territories of the United States that are not locally inapplicable."

Among the powers of governors of territories of the United States is the authority to demand the rendition of fugitives from justice under § 5278 of the Revised Statutes, and we concur with the courts below in the conclusion that the governor of Porto Rico has precisely the same power as

that possessed by the governor of any organized territory to issue a requisition for the return of a fugitive criminal. People ex rel. Kopel v. Bingham, 189 N. Y. 124, 81 N. E. 773, affirming 117 App. Div. 411, 102 N. Y. Supp. 878. It was so held by Judge Hough, of the district court of the United States for the southern district of New York, in passing upon a similar application by the same relator. Re Kopel, 148 Fed. 505.

Subdivision 2 of § 2 of article 4 of the Federal Constitution refers in terms to the states only, but the act of Congress of February 12, 1793 [1 Stat. at L. 302, chap. 7, U. S. Comp. Stat. 1901, p. 3597], carried forward into § 5278 of the Revised Statutes, made provision for the demand and surrender of fugitives by the governors of the territories as well as of the states; and it was long ago held that the power to extradite fugitive criminals, as between state and territory, is as complete as between one state and another. Ex parte Reggel, 114 U. S. 642, 650, 29 L. ed. 250, 252, 5 Sup. Ct. Rep. 1148. If § 5278 does not apply, no other statute does. And as to §§ 14 and 17 of the Foraker act, no contention is made that they are locally inapplicable, except as it is argued that § 5278 of the Revised Statutes is not applicable at all, because Porto Rico is not a "territory," as that word is used therein. We quite agree with Judge Hough that "to allege that the only existing law under which a Porto Rican fugitive from justice can be returned thereto from the United States is 'locally inapplicable' would be making a jest of justice."

It is impossible to hold that Porto Rico was not intended to have power to reclaim fugitives from its justice, and that it was intended to be created an asylum for fugitives from the United States.

In the case of Ex parte Morgan, 20 Fed. 475]298, 305, the* question involved was the right of the governor of Arkansas to honor a requisition for the surrender of a fugitive criminal, received from the principal chief of the Cherokee Nation, and the court, in holding that the governor was not authorized to honor such a requisition, for the reason that the chief of the Cherokee Nation was not the executive authority of any "state" or "territory," inasmuch as the Cherokee Nation or Indian territory was not an organized government, with an executive, legislative, and judicial system of its own, but was exclusively under the jurisdiction of the United States, defined a territory within the meaning of the extradition statute as follows:

"A portion of the country not included within the limits of any state, and not yet admitted as a state into the Union, but or-

ganized under the laws of Congress with a separate legislature, under a territorial governor and other officers appointed by the President and Senate of the United States."

In the case of Re Lane, 135 U. S. 443, 34 L. ed. 219, 10 Sup. Ct. Rep. 760, the accused was charged with the commission of an offense "within that part of the Indian territory commonly known as Oklahoma." He was tried and convicted upon an indictment, found under an act of Congress which excepted the "territories" from its operation; and it was claimed that Oklahoma, which was then a part of the Indian territory, was a territory, and came within the exemption of the act. But the court, Miller, J., said:

"But we think the words 'except the territories' have reference exclusively to that system of organized government, long existing within the United States, by which certain regions of the country have been erected into civil governments. These governments have an executive, a legislative, and a judicial system. They have the powers which all these departments of government have exercised, which are conferred upon them by act of Congress, and their legislative acts are subject to the disapproval of the Congress of the United States. They are not, in any sense, independent governments; they have no Senators in Congress and no Representatives in the lower *house of that body, except what are [476 called 'Delegates,' with limited functions. Yet they exercise nearly all the powers of government, under what are generally called 'organic acts,' passed by Congress, conferring such powers on them. It is this class of governments, long known by the name of 'territories,' that the act of Congress excepts from the operation of this statute, while it extends it to all other places over which the United States have exclusive jurisdiction.

"Oklahoma was not of this class of territories. It had no legislative body. It had no government. It had no established or organized system of government for the control of the people within its limits, as the territories of the United States have and have always had. We are therefore of opinion that the objection taken on this point by the counsel for prisoner is unsound."

Oklahoma was given a territorial government by the act of May 2, 1890 (26 Stat. at L. 81, chap. 182, § 1).

In Gonzales v. Williams, 192 U. S. 15, 48 L. ed. 322, 24 Sup. Ct. Rep. 177, the court unanimously held that a citizen of Porto Rico was not an alien immigrant, and, among other things, an opinion of Attorney General Knox, relating to a Porto Rican

named Molinas, was quoted from as follows:

"He [*i. e.*, Molinas] is also clearly a Porto Rican; that is to say, a permanent inhabitant of that island, which was also turned over by Spain to the United States. As his country became a domestic country, and ceased to be a foreign country within the meaning of the tariff act above referred to [30 Stat. at L. 151, 203, chap. 11, U. S. Comp. Stat. 1901, pp. 1626, 1690], and has now been fully organized as a country of the United States by the Foraker act, it seems to me that he has become an American, notwithstanding such supposed omission."

It may be justly asserted that Porto Rico is a completely organized territory, although not a territory incorporated into the United States, and that there is no reason why Porto Rico should not be held to be such a territory as is comprised in § 5278.

Order affirmed.

477] *LUCIUS H. BEERS et al., Executors of Franklin B. Lord, Deceased, et al.,
v.

MARTIN H. GLYNN, Comptroller of the State of New York, Deft. in Err.

(See S. C. Reporter's ed. 477-485.)

Constitutional law — equal protection of the laws — inheritance tax.

The equal protection of the laws is not denied by the imposition of the inheritance tax provided for by N. Y. Laws 1887, chap. 713, upon certain bequests of personalty by a nonresident decedent owning both real and personal property within the state because, under that statute, as construed by the state courts, the tax could not be collected if the only property belonging to the decedent situated within the state was personalty.

[For other cases, see Constitutional Law, 328-335, in Digest Sup. Ct. 1908.]

[No. 45.]

Argued December 9, 1908. Decided January 4, 1909.

IN ERROR to the Surrogate's Court of the County of New York in the State of New York to review a judgment entered pursuant to the mandate of the Court of

NOTE.—As to constitutional equality of privileges, immunities, and protection—see note to Louisville Safety Vault & T. Co. v. Louisville & N. R. Co. 14 L.R.A. 579.

As to taxes on succession and collateral inheritance—see notes to Re Howe, 2 L.R.A. 825; Wallace v. Myers, 4 L.R.A. 171; Com. v. Ferguson, 10 L.R.A. 240; Re Romaine, 12 L.R.A. 401; and Magoun v. Illinois Trust & Sav. Bank, 42 L. ed. U. S. 1037.

Appeals of that state, which affirmed a judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department, which affirmed in part and reversed in part an order of the Surrogate's Court, imposing a collateral inheritance tax. Affirmed.

See same case below in Appellate Division, 111 App. Div. 152, 97 N. Y. Supp. 553; in Court of Appeals, 186 N. Y. 549, 79 N. E. 1110.

The facts are stated in the opinion.

Mr. Lucius H. Beers argued the cause and filed a brief for plaintiffs in error:

The act of 1887 did not authorize any tribunal or officer to assess the tax on property of nonresident decedents except in cases where the nonresident had owned land in New York.

Re Embury, 19 App. Div. 214, 45 N. Y. Supp. 881, affirmed in 154 N. Y. 746, 49 N. E. 1096.

Such being the provision of the act, it follows, under familiar decisions of this court, that the act was unconstitutional with respect to the large class of nonresident decedents who did not own real estate, because it sought to deprive the persons interested in such estates of their property without due process of law.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 710, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Spencer v. Merchant, 125 U. S. 345, 355, 356, 31 L. ed. 763, 767, 768, 8 Sup. Ct. Rep. 921; Palmer v. McMahon, 133 U. S. 660, 669, 33 L. ed. 772, 776, 10 Sup. Ct. Rep. 324; Lent v. Tillson, 140 U. S. 316, 328, 35 L. ed. 419, 425, 11 Sup. Ct. Rep. 825; Fallbrook Irrig. Dist. v. Bradley, 164 U. S. 112, 157, 41 L. ed. 369, 388, 17 Sup. Ct. Rep. 56; Bauman v. Ross, 167 U. S. 548, 590, 42 L. ed. 270, 288, 17 Sup. Ct. Rep. 966; Carson v. Brockton Sewerage Comrs. 182 U. S. 398, 401, 45 L. ed. 1151, 1153, 21 Sup. Ct. Rep. 860.

The tax was special.

Re Enston (People v. Sherwood) 113 N. Y. 174, 3 L.R.A. 464, 21 N. E. 87; Re Vassar, 127 N. Y. 1, 27 N. E. 394; Re Stewart, 131 N. Y. 274, 14 L.R.A. 836, 30 N. E. 184; Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; Re Fayerweather, 143 N. Y. 114, 38 N. E. 278.

The principles by which the equality clause of the 14th Amendment is to be applied have been repeatedly declared.

Minnesota Iron Co. v. Kline, 199 U. S. 593, 598, 50 L. ed. 322, 325, 26 Sup. Ct. Rep. 159; Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 232, 237, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; Walston v. Nevin, 128 U. S. 578, 582, 32 L. ed. 544, 546, 9 Sup. Ct. Rep. 192; Minneapolis & St. L. R. Co.

v. Beckwith, 129 U. S. 26, 29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; *St. John v. New York*, 201 U. S. 633, 636, 50 L. ed. 896, 898, 26 Sup. Ct. Rep. 554, 5 A. & E. Ann. Cas. 909.

If the classification is upheld, it must be because it rests upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *Walston v. Nevin*, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Re New York*, 190 N. Y. 360, 16 L.R.A.(N.S.) 335, 83 N. E. 299; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 736; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609.

The classification does not meet the simple, primary test of reasonableness.

Cooley, Const. Lim. 7th ed. p. 705; *State v. Endom*, 23 La. Ann. 663; *State v. South Carolina R. Co.* 4 S. C. 376; *Sims v. Jackson Parish*, 22 La. Ann. 440; *Hamilton v. Wilson*, 61 Kan. 511, 48 L.R.A. 238, 59 Pac. 1069; *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849; *Re New York*, 190 N. Y. 350, 16 L.R.A.(N.S.) 335, 83 N. E. 299.

Mr. D. Cady Herrick argued the cause and filed a brief for defendant in error:

The power of the legislature of the state of New York to impose an inheritance tax upon personal property within the state of New York belonging to nonresidents has been upheld both by the courts of New York and this court.

Re Romaine, 127 N. Y. 83, 12 L.R.A. 401, 27 N. E. 759; *Re Whiting*, 150 N. Y. 29, 34 L.R.A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; *Eidman v. Martinez*, 184 U. S. 582, 46 L. ed. 700, 22 Sup. Ct. Rep. 515.

This court has held that the 14th Amendment in no wise undertakes to control the power of a state to determine by what process legal rights may be asserted or legal obligations be enforced, provided the method of procedure adopted for these purposes gives reasonable notice, and affords fair opportunity to be heard before the issues are decided.

53 L. ed.

Iowa C. R. Co. v. Iowa, 160 U. S. 393, 40 L. ed. 469, 16 Sup. Ct. Rep. 344.

Whenever, by the laws of the state or by state authority, a tax or assessment is imposed upon property for the public use, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceedings in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law.

Davidson v. New Orleans, 96 U. S. 104, 24 L. ed. 619; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 157, 41 L. ed. 388, 17 Sup. Ct. Rep. 56; *Leigh v. Green*, 193 U. S. 87, 48 L. ed. 626, 24 Sup. Ct. Rep. 390.

Due process of law has been afforded litigants when they have had an opportunity to question the validity or the amount of an assessment or charge before the amount thereof is finally determined, or at any subsequent proceedings to enforce its collection, or at any time before final judgment is entered.

Gallup v. Schmidt, 183 U. S. 300-307, 46 L. ed. 207-213, 22 Sup. Ct. Rep. 162; *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; *Central R. Co. v. Wright*, 207 U. S. 127-138, 52 L. ed. 134-141, 28 Sup. Ct. Rep. 47.

The statute itself provides the same proceedings as to the personal property of residents and nonresidents. In the proceedings themselves the plaintiffs in error have been accorded the same rights and privileges as residents of the state, and cannot claim that they have not received the equal protection of the law.

Eldridge v. Trezevant, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 345.

The state may, if it chooses, entirely exempt certain classes of property from any taxation at all. It may impose different specific taxes upon different pursuits in life; it may make different rates upon different properties; it may tax real estate and personal property in different manners; it may tax physical property only, and not tax securities; it may allow deductions from taxes of indebtedness, or not allow them. These are all within the discretion of the state legislature.

Bell's Gap R. Co. v. Pennsylvania, 134 U. S. 236, 238, 33 L. ed. 894, 895, 10 Sup. Ct. Rep. 533.

Diversity of taxation, both in respect to the amount imposed and the various species of property selected, either from bearing its burden or for being exempt from it, is not inconsistent with a perfect uniformity and

equality of taxation in the proper sense of those terms.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 351, 35 L. ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250.

Whatever the reason may have been, whether wise or unwise, unless it was a mere arbitrary discrimination against a class, as such, it was a matter resting solely in the discretion of the legislature whether it would or would not make such exemption.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 287-299, 42 L. ed. 1040-1044, 18 Sup. Ct. Rep. 594; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533; *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* 199 U. S. 1, 47, 50 L. ed. 65, 79, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381.

Inequality of taxation presents no question for review under the 14th Amendment of the Constitution.

Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; *Travelers' Ins. Co. v. Connecticut*, 185 U. S. 372, 46 L. ed. 954, 22 Sup. Ct. Rep. 673.

The plaintiffs in error cannot assert the alleged defect in the law, because not affected by it.

Cooley, Const. Lim. 7th ed. 232; *Lee v. New Jersey*, 207 U. S. 67, 52 L. ed. 106, 28 Sup. Ct. Rep. 22; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188.

Mr. Justice **Brewer** delivered the opinion of the court:

The question presented in this case is the validity of a collateral inheritance tax on certain property bequeathed to plaintiffs in error by Emily M. Lord, deceased. The testatrix and her husband had lived for many years at Morristown, New Jersey. She died there January 18, 1892. At the time of her death she owned real estate situate in the state of New York, and certain personal property on deposit in a safe deposit company in the city of New York. The inheritance tax was claimed under chap. 713, of the Laws of the State of New York for 1887, entitled, "An Act to Amend Chap. 483 of the Laws of 1885, Entitled, 'An Act to Tax Gifts, Legacies, and Collateral Inheritances in Certain Cases.'"

That act has twenty-six sections. It is sufficient, however, to refer to a part of § 1 and § 15:

"Sec. 1. After the passage of this act all property which shall pass by will or by the intestate laws of this state, from any person

who may die seised or possessed of the same while a resident of this state, or if such decedent was not a resident of this state at the time of death, which property, or any part thereof, shall be within this state, . . . shall be and is *subject to a [482 tax of \$5 on every \$100 of the clear market value of such property."

"Sec. 15. The surrogate's court in the county in which the real property is situate of a decedent who was not a resident of the state, or in the county of which the decedent was a resident at the time of his death, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this act, and the surrogate first acquiring jurisdiction hereunder shall retain the same, to the exclusion of every other."

It appears that the husband of the testatrix died in Morristown only ten days before his wife, but, as he owned no real estate situate in the state of New York, no inheritance tax was collected from his estate. In claiming the equal protection of the law under the 14th Amendment, counsel for plaintiffs in error, after pointing to the discrimination between the two cases, contend that—

"The act of 1887, in so far as it applied to the property of nonresidents, was not capable of verbal separation as between provisions relating to the property of nonresidents who owned land in the state and provisions relating to the property of nonresidents who did not own land in the state, nor can the legislature have intended that it should apply to the former and not to the latter. Being unconstitutional under the 14th Amendment as to the property of such nonresidents as did not own land in New York, in that it takes their property without due process of law, it was therefore unconstitutional as to the property of all nonresidents."

Also that—

"The imposition of a tax under the act of 1887 on the property bequeathed to these plaintiffs in error cannot be made without such a discrimination as will deny to them the equal protection of the laws."

We do not understand that the court of appeals of the state of New York has decided that the state has no power to collect an inheritance tax where the only property belonging *to the decedent situate [483 within the state of New York is personalty, but simply that no provision has been made for reaching such a case.

Both parties refer to *Re Embury*, 19 App. Div. 214, 45 N. Y. Supp. 881, which was decided in June, 1897, by the first department, and affirmed by the court of appeals on the authority of the opinion of the appellate

division (154 N. Y. 746, 49 N. E. 1096). In that case it appears from the opinion in the appellate division that Philip Embury was a citizen and resident of New Jersey, and died at West Orange, in that state, after the passage of the act of 1887. He had no real estate in New York, but only certain personal property. He left a will, which was duly probated in the county of his residence, and thereupon the executors withdrew the personal property from New York to New Jersey, and settled up the estate in accordance with the terms of the will. The opinion, after referring to § 15 of the act of 1887, said (pp. 216, 217):

"The statute, therefore, only conferred on the surrogate jurisdiction in the case of such nonresident decedents as should die seized of real estate within the surrogate's county. . . . In other words, the statute of 1885, as amended by the act of 1887, declared such of Embury's property as was in New York taxable, but omitted to give the surrogate's court jurisdiction to impose the tax,—a situation to which an expression of the court of appeals in *Re Stewart*, 131 N. Y. 284, 14 L.R.A. 836, 30 N. E. 184, is applicable: 'It is not enough for the legislature to declare that such interests are taxable. If no mode is provided for assessing and collecting the tax, the law is imperfect and cannot, as to such interests, be executed.' A tax cannot be legally imposed unless the statute, in addition to creating the tax, provided for an officer or tribunal who shall appraise and assess the property on notice to the owner. *Stuart v. Palmer*, 74 N. Y. 188, 30 Am. Rep. 289; *Remsen v. Wheeler*, 105 N. Y. 575, 12 N. E. 564. The principle decided in the cases cited applies to the transfer tax as well as to assessments for public improvements. *Re McPherson*, 104 N. Y. 321, 58 Am. Rep. 502, 10 N. E. 685. . . . It is apparent, 484]therefore, *that when the executors took the deposits and the bank stock out of the state for distribution, no tax had been imposed upon such property, and there was no method provided by law by which a tax could legally be imposed upon it. What they did they had not only the right, but it was their duty, to do. The legal title to the property in this state vested in them as the personal representatives of their testator by force of the laws of New Jersey. *Re Bronson*, 150 N. Y. 1, 34 L.R.A. 238, 55 Am. St. Rep. 632, 44 N. E. 707. They were bound to take possession of it and make distribution according to the decree of the court having jurisdiction of the estate. Had a tax been imposed on the property, or had a statute providing for its imposition been in force, it would have been their duty to have paid it or to have requested the

imposition of the tax, as the case might be, before removing the property."

Subsequently the court of appeals, in *Re Fitch*, 160 N. Y. 87, 90, 54 N. E. 701, 702, said, referring to the Embury Case, that it "held by an affirmance on the opinion below . . . that while the statute declared such of Embury's property to be taxable as was situated in the city of New York, nevertheless, as it omitted to authorize the surrogate to impose the tax, the order made by that officer was without jurisdiction."

Under this condition an inheritance tax may be collected where the decedent owns both personal and real property within the state of New York, and not where the only property belonging to the decedent situate within the state is personalty. But though the operation of the statutes creates a difference, this, even if intentional, is not of itself sufficient to invalidate the tax. The power of the state in respect to the matter of taxation is very broad, at least, so far as the Federal Constitution is concerned. It may exempt certain property from taxation while all other is subjected thereto. It may tax one class of property by one method of procedure and another by a different method. *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 238, 33 L. ed. 892, 895, 10 Sup. Ct. Rep. 533; *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 464, 42 L. ed. 236, 237, 17 Sup. Ct. Rep. 829; **Travellers' Ins. Co.* [485 *v. Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673; *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459. The right of exemption has been applied to succession taxes (*Magon v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 299, 42 L. ed. 1037, 1044, 18 Sup. Ct. Rep. 594, 600), in which this court said:

"Nor do the exemptions of the statute render its operation unequal within the meaning of the 14th Amendment. 'The right to make exemptions is involved in the right to select the subjects of taxation and apportion the public burdens among them, and must consequently be understood to exist in the lawmaking power wherever it has not in terms been taken away. To some extent it must exist always, for the selection of subjects of taxation is, of itself, an exemption of what is not selected.' *Cooley*, Taxn. 200. See also the remarks of Mr. Justice Bradley in *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 33 L. ed. 892, 10 Sup. Ct. Rep. 533."

Indeed, it may be laid down as a general rule that mere inequalities or exemptions in the matter of state taxation are not forbidden by the Federal Constitution.

There is no error in the rulings of the courts of the state of New York, and the judgment is affirmed.

LOUIS KNOP and Joseph L. Rock, Individually and as Gaugers of Coal and Coke, Appts.,

v.

MONONGAHELA RIVER CONSOLIDATED COAL & COKE COMPANY.

(See S. C. Reporter's ed. 485-488.)

Direct appeal from circuit court — validity of state statute.

1. The contention that, properly construed, the provisions of La. Acts 1904, p. 201, for gauging coal, apply to sales by weight and measurement, and, if so construed, violate the Federal Constitution, does not present a Federal question which will sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891 (26 Stat. at L. 826, 827, chap. 517, U. S. Comp. Stat. 1901, pp. 488, 549), § 5, from a decree of a Federal circuit court enjoining the state gaugers from proceeding under the state statute except as to coal sold or intended for sale by boat or barge load or some aliquot part thereof, where the statute, construed as applying to boat and barge loads, has been declared valid by the Federal Supreme Court, and appellee does not contend that the statute is invalid, but only that it is inapplicable to the facts.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Direct appeal from circuit court — construction or application of Federal Constitution.

2. The construction or application of the Federal Constitution is not involved so as to sustain a direct appeal to the Federal Supreme Court under the act of March 3, 1891, § 5, from a decree of a circuit court enjoining state gaugers from proceeding under La. Acts 1904, p. 201, to gauge coal except as to coal sold or intended for sale by boat or barge loads or some aliquot part thereof, unless there is a question as to the relation between some provision of the Federal Constitution and the state statute. [For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 449.]

Argued December 18, 1908. Decided January 4, 1909.

APPÉAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree enjoining state gaugers from gauging coal except where

sold or intended for sale by boat or barge load or some aliquot part thereof. Dismissed for want of jurisdiction.

Statement by Mr. Justice Brewer:

The appellants are gaugers of coal and coke, appointed by the state of Louisiana. The appellee is a corporation organized under the laws of Pennsylvania, engaged in mining bituminous coal outside the state of Louisiana and transporting it to that and other states for sale. The transportation to Louisiana is in coal boats or barges. For some years the sales were largely in bulk by the boat or barge load, but within a year or two prior to the commencement of this suit, in consequence of the introduction and general use of fuel oil, the sale in boat or barge loads had been reduced to some thirty-five or forty loads per annum, although the appellee was transporting to Louisiana from 800 to 1,000 loaded boats and barges. By far the bulk of the sales were thus by barrel or weight, and not by boat or barge load, and the amount of each sale was fixed and determined by actual measurement or weighing at the time of delivery to the purchaser.

An act was passed by the state of Louisiana, in 1888, in respecting to gauging. Laws 1888, chap. 147, p. 207. The validity of this statute was challenged in the state courts, but sustained by the supreme court. *State v. Pittsburg & S. Coal Co.* 41 La. Ann. 465, 6 So. 220. That court, refusing a rehearing, said (p. 473):

"Nothing in this application shakes our conviction of the correctness of our interpretation of the statute as making the gauging of coal boats and barges, before sale, compulsory. We may remark, however, that the act applies exclusively to sales of boat loads or barge loads of coal, and not to sales of a particular number of barrels of coal from a boat or barge."

The case was brought to this court and the ruling of the supreme court of Louisiana sustained, it appearing that the sales were "to dealers, planters, and other purchasers, but in no quantity less than a boat or barge load." Subsequent legislation *was had [487 in Louisiana. Acts 1894, page 172, act 137; Acts 1902, page 81, being an amendment of the act of 1894, and Acts 1904, page 201, an amendment of the act of 1888. The only difference between the later legislation and the act of 1888 which is material is that, in the act of 1888, § 8, it is provided "no boat load of coal or coke shall be sold in this city or state until it has been inspected, as provided for by this act;" while § 3 of the act of 1904 reads, "no boat load of coal or coke, nor any part thereof, shall be delivered to the purchaser thereof, whether the sale was

NOTE.—On direct review in Federal Supreme Court of judgments of circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

made within or without the state, until it has been inspected, as provided for in this act."

On December 10, 1906, the appellee filed its bill in the circuit court of the United States for the eastern district of Louisiana to restrain the gaugers of coal from proceeding under the acts except as to coal sold or intended for sale by boat or barge load. On June 11, 1908, a decree was entered for the plaintiff, in accordance with the prayer of the bill, the court, in its opinion, saying:

"The title of the act of 1902, and of the act of 1904, is 'An Act to Compel the Weighing or Gauging in the State of all Bituminous or Anthracite Coal or Coke Sold in Louisiana by Boat, Barge, or Car Load.' The act of 1904, § 8, reads, 'No boat load of coal or coke, or any part thereof, shall be delivered to the purchaser;' and in the next sentence reads, 'And any person, partnership, firm, or corporation who shall sell or deliver in this state a boat load or a barge load of coal or coke, or any part thereof.' Construing the word 'part' with reference to the object of the statute and with reference to the words that immediately precede it, I do not see how there can be any doubt that the part meant is an aliquot fraction of a load."

From this decree of the circuit court the appellants appealed directly to this court.

Mr. E. Howard McCaleb, Jr., argued the cause, and, with Mr. Walter Guion, filed a brief for appellants.

Mr. Charles S. Rice argued the cause and filed a brief for appellee.

488] *Mr. Justice Brewer delivered the opinion of the court:

An appeal was taken under § 5 of the act creating the circuit court of appeals. 26 Stat. at L. 826, 827, chap. 517, U. S. Comp. Stat. 1901, pp. 488, 549. The mere construction of a state statute does not of itself present a Federal question. But the contention of appellants is that the circuit court improperly construed the act of 1904; that, correctly construed, it applies not merely to sales by boat or barge load, or some aliquot part thereof, but also to sales by weight or measurement; and that, under such construction, a question is presented of a conflict between it and the Federal Constitution.

But the difficulty with this contention is, first, that the statute construed, as applied to boat and barge loads, has been declared valid by this court; and, further, that there is no claim by the appellee of any invalidity in the statute, but only of its inapplicability

to the facts. In the face of the decision of this court and the claim of the appellee, it is difficult to see how there can be any question of a conflict between the legislation and the Federal Constitution. After a final decision, it is going too far to hold that there still remains an undecided question, and that when we have held that a statute of a state is valid there remains a controversy as to its validity, and this is emphatically true when neither party challenges that decision. Nor, for like reason, does there appear any ground for holding that there is a question as to the construction or application of the Constitution. While in § 10 of article 1 of the Federal Constitution there is a recognition of the power of the state to pass inspection laws, yet, to justify a holding that the application of the Federal Constitution is involved, there should be a question as to the relation between some constitutional provision and the state statute.

Under these circumstances we are of opinion that this court has no jurisdiction, and the appeal must be dismissed.

*JOSEPH A. LEMIEUX, Plff. in Err., [489
v.

JAMES M. YOUNG, Trustee.

(See S. C. Reporter's ed. 489-496.)

Constitutional law — due process of law — police power — regulating sales in bulk.

1. Due process of law is not denied retail dealers by the provisions of Conn. Gen. Laws, §§ 4868, 4869, avoiding, as against creditors, sales by such dealers of their entire stock at a single transaction, and not in the regular course of business, unless notice of intention to make such sale be recorded seven days before its consummation, but such statute is a valid exercise of the police power of the state.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — police power — regulating sales in bulk.

2. Retail dealers are not denied the equal protection of the laws by the provisions of Conn. Gen. Laws, §§ 4868, 4869, avoiding, as against creditors, sales by such dealers

NOTE.—Validity of statutes regulating sales in bulk.

Statutes regulating the sale of an entire stock of merchandise or a large part thereof at a single transaction, not in the regular course of business, exist in a large number of states. Their validity has not passed unchallenged, though perhaps the weight of authority upholds the constitutionality of such legislation. The statutes of the different states differ somewhat in their provi-

of their entire stock at a single transaction, and not in the regular course of business, unless notice of intention to make such sale be recorded seven days before its consummation, but such statute is a valid exercise of the police power of the state.

[For other cases, see Constitutional Law, IV. a, 5, in Digest Sup. Ct. 1908.]

[No. 48.]

Argued December 9, 1908. Decided January 4, 1909.

IN ERROR to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment of the Superior Court of New London County, in that state, in favor of plaintiff in an action by a trustee in bankruptcy to replevy a stock of goods sold in bulk. Affirmed.

See same case below, 79 Conn. 434, 65 Atl. 436, 600, 8 A. & E. Ann. Cas. 452.

The facts are stated in the opinion.

Messrs. John J. Phelan and Charles F. Thayer argued the cause and filed a brief for plaintiff in error:

The amended statute interferes not only with the liberty and property of the vendor, but its provisions are inexcusably oppressive upon him, the vendee, inasmuch as the alleged protection of the vendor's creditors may, in a measure, appear publicly worthy, whilst in his case there appears no sufficient excuse or good reason for imposing a purchase prohibition that interferes and hinders him from trading with, and lawfully acquiring from, a retail dealer property he could un-

restrictedly acquire from any other person than a retail dealer.

Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; State v. Goodwill, 33 W. Va. 179, 6 L.R.A. 621, 25 Am. St. Rep. 863, 10 S. E. 285.

A statutory device in aid of wholesale dealers as a class, in the collection of accounts from their customers, is not a public necessity.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302.

No legislative enactment can impute a crime under the guise of police power to any person whilst pursuing the exercise of a constitutional right.

People ex rel. Tyröler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1006; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Com. v. Perry, 155 Mass. 117, 14 L.R.A. 325, 31 Am. St. Rep. 533, 28 N. E. 1126; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; State v. Goodwill, supra; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; State v. Missouri Tie & Timber Co. 181 Mo. 536, 65 L.R.A. 588, 103 Am. St. Rep. 614, 80 S. W. 933, 2 A. & E. Ann. Cas. 119; Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; State v. Dalton, 22 R. I.

sions, but such differences do not account for the diversity of opinion as to their validity.

In several of the states the statutes require that an inventory be made a specified time before the sale, that certain inquiries be made of the seller by the purchaser respecting the former's creditors, and that a notice be given them of the proposed sale. The constitutionality of statutes of such character has been upheld as against attacks founded chiefly on the idea that rights of liberty or property were infringed or that the enactments amount to class legislation. John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; Spurr v. Travis, 145 Mich. 721, 116 Am. St. Rep. 330, 108 N. W. 1090, 9 A. & E. Ann. Cas. 250; Musselman Grocer Co. v. Kidd, D. & P. Co. 151 Mich. 478, 115 N. W. 409; Thorpe v. Pennock Mercantile Co. 99 Minn. 22, 108 N. W. 940, 9 A. & E. Ann. Cas. 229; Neas v. Borches, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

Similar statutes have been declared unconstitutional in New York and Illinois. Wright v. Hart, 182 N. Y. 330, 2 L.R.A. (N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; Off v. Morehead, 235 Ill. 40, 85 N. E. 264.

The Ohio and Utah statutes are of the same general character, but, in addition, penalize failure to comply with their provisions. These statutes are held to infringe rights of liberty and property, and, in addition, to be objectionable as class legislation. Re Davis, 10 Am. Bankr. Rep. 189; Miller v. Crawford, 70 Ohio St. 207, 71 N. E. 631, 1 A. & E. Ann. Cas. 558; Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 A. & E. Ann. Cas. 550.

The inclusion of a penalty clause in the Oklahoma statute did not, however, render that act unconstitutional. Williams v. Fourth Nat. Bank, 15 Okla. 477, 2 L.R.A. (N.S.) 334, 82 Pac. 496, 6 A. & E. Ann. Cas. 970.

It should be noticed that the Oklahoma and Massachusetts statutes and perhaps those of other states expressly except from their operations judicial sales and sales by personal representatives and other like officers, while the failure of the Utah statute to make any such exception was unfavorably commented upon by the Utah supreme court in passing upon its validity.

The Pennsylvania statute omits the requirement as to the inventory, and its validity has been sustained in Wilson v. Ed-

77, 48 L.R.A. 775, 84 Am. St. Rep. 818, 46 Atl. 234; *People ex rel. Cossey v. Grout*, 179 N. Y. 417, 72 N. E. 464, 1 A. & E. Ann. Cas. 39.

A class of cases exists which appear to involve the precise principles upon which our statute is based.

Block v. Schwartz, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 A. & E. Ann. Cas. 550; *Wright v. Hart*, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50.

Various cases may be cited in opposition to these authorities, but, on an examination, it will be found that they are either based on statutes different in their effect, or else the constitutional question was not raised, or the constitutional provisions which were considered were different from those on which we rely, or the cases were not well considered.

McDaniels v. J. J. Connelly Shoe Co. 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37; *John P. Squire & Co. v. Tellier*, 118 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 2 L.R.A.(N.S.) 344, 82 Pac. 496, 6 A. & E. Ann. Cas. 970; *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277.

The amended statute violates § 1 of the 14th Amendment to the Constitution of the United States because it denies to the plaintiff in error, as the vendee of said Hendrick, and to persons placed in a position similar to that of the plaintiff in error, the equal

wards, 32 Pa. Super. Ct. 295, and *Feingold v. Steinberg*, 33 Pa. Super. Ct. 39.

Even where a statute, in addition to requiring the purchaser to secure a list of the seller's creditors, compels the purchaser to see that the purchase money is applied to the payment of their claims, and makes the furnishing of a false list perjury, it has been sustained as against the objection that it deprives persons of their property without due process of law and is class legislation. *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37.

And the same objections have unsuccessfully been urged against the validity of Ga. act 1903, p. 92, which avoids sales in bulk as to creditors unless the purchaser ascertains the creditors of the seller and gives them notice of the proposed sale, and makes it a misdemeanor for the vendor knowingly or wilfully to furnish the purchaser with a false statement, or fail to include the names of all his creditors in the statement furnished. *Jaques & T. Co. v. Carstarphen Warehouse Co. (Ga.)* 62 S. E. 82.

The Indiana statute makes the usual requirements as to inventory, ascertaining the seller's creditors, and giving them notice of the proposed sale, but confines the protection 53 L. ed.

protection of the laws of Connecticut, and abridges their respective privileges and immunities as citizens of the United States.

Barbier v. Connolly, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Ruhrstrat v. People*, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; *Gulf C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 159, 41 L. ed. 666, 669, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Re Pell*, 171 N. Y. 48, 57 L.R.A. 540, 89 Am. St. Rep. 791, 63 N. E. 789; *People ex rel. McPike v. Van DeCarr*, 178 N. Y. 425, 66 L.R.A. 189, 102 Am. St. Rep. 516, 70 N. E. 965; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Block v. Schwartz*, supra; *Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 A. & E. Ann. Cas. 558.

Mr. Donald G. Perkins argued the cause and filed a brief for defendant in error:

The need or wisdom of such legislation is a matter of legislative discretion, and this court will not consider that question.

Statutes upon the same subject, but with much more rigorous and burdensome conditions, have been held to be constitutional.

John P. Squire & Co. v. Tellier, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312.

The fact that property may be destroyed through the enforcement of a statute, and

of the act to creditors of the seller who have sold goods or loaned money for the continuance of the business and makes the purchaser liable to pay their claims in case of noncompliance with the statute. This statute was held unconstitutional in *McKinster v. Sager*, 163 Ind. 671, 68 L.R.A. 273, 106 Am. St. Rep. 268, 72 N. E. 854, as denying other creditors the equal protection of the laws.

The Connecticut statute, the validity of which is sustained in *LEMIEUX v. YOUNG*, has also been upheld in *Re Paulis*, 144 Fed. 472.

An earlier Connecticut statute only required a sale to be acknowledged and recorded within one day after the sale. This statute was upheld in *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277.

The Illinois statute held invalid makes sales in violation of its provisions only presumptively fraudulent, while the Georgia, Massachusetts, Michigan, Pennsylvania, and Washington statutes whose validity is upheld makes such sales absolutely void, which effectually disposes of the suggestion which might be drawn from *Thorpe v. Pennock Mercantile Co.* 99 Minn. 22, 108 N. W. 940, 9 A. & E. Ann. Cas. 229, that the cases might be distinguished on that line.

the right of contract either prohibited or restricted, is not decisive on the question of constitutionality.

Frisbie v. United States, 157 U. S. 165, 39 L. ed. 658, 15 Sup. Ct. Rep. 658; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Booth v. Illinois*, 184 U. S. 429, 46 L. ed. 626, 22 Sup. Ct. Rep. 425; *Otis v. Parker*, 187 U. S. 606, 47 L. ed. 323, 23 Sup. Ct. Rep. 168; *Jacobson v. Massachusetts*, 197 U. S. 27, 49 L. ed. 650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Ah Sin v. Wittman*, 198 U. S. 500, 49 L. ed. 1142, 25 Sup. Ct. Rep. 756; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 318, 50 L. ed. 209, 26 Sup. Ct. Rep. 100.

Legislative acts under the police power must necessarily be oppressive, work hardships, and either interfere with or destroy rights of property and the right to contract, and the only principle upon which this court will act and declare a statute unconstitutional is when the court can reach and is forced to the conclusion that the statute enacted professedly to protect the public morals has no real or substantial relation to that object, but is a clear, unmistakable infringement of rights secured by the fundamental law.

California Reduction Co. v. Sanitary Reduction Works, supra; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 471, 24 L. ed. 527-530; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Lawton v. Steele*, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124; *Jacobson v. Massachusetts*, 197 U. S. 11, 27, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765.

And even in considering this question, the benefit of the doubt is always given to the constitutionality of the statute.

Otis v. Parker, 187 U. S. 608, 47 L. ed. 327, 23 Sup. Ct. Rep. 168.

Mr. Justice White delivered the opinion of the court:

Whether the following provisions of the general laws of Connecticut are repugnant to the 14th Amendment because wanting in due process of law and denying the equal protection of the laws is the question for decision:

"Sec. 4868, as amended by chapter 92 of the public acts of Connecticut of 1903. No person who makes it his business to buy commodities and sell the same in small quantities, for the purpose of making a profit, shall, at a single transaction, and not in the regular course of business, sell, assign, or deliver the whole, or a large part

of his stock in trade, unless he shall, not less than seven days previous to such sale, assignment, or delivery, cause to be recorded in the town clerk's office in the town in which such vendor conducts his said business, a notice of his intention to make such sale, assignment, or delivery, which notice shall be in writing, describing in general terms the property to be so sold, assigned, or delivered, and all conditions of such sale, assignment, or delivery, and the parties thereto.

"Sec. 4869. All such sales, assignments, or deliveries of commodities which shall be made without the formalities required by the provisions of § 4868 shall be void as against *all persons who were creditors[492 of the vendor at the time of such transaction."

The controversy thus arose. Philip E. Hendrick conducted a retail drug store at Taftville, Connecticut. While engaged in such business, in August, 1904, he sold his stock in bulk to Joseph A. Lemieux, his clerk, for a small cash payment and his personal negotiable notes. The sale was made without compliance with the requirements of the statute above quoted. Subsequently Hendricks was adjudicated a bankrupt, and the trustee of his estate commenced this action against Lemieux and replevied the stock of goods. Among other grounds the trustee based his right to recover upon the noncompliance with the statutory requirements in question. In the trial one of the grounds upon which Lemieux relied was the assertion that the statute was void for repugnancy to the 14th Amendment to the Constitution of the United States, because wanting in due process of law and denying the equal protection of the laws. The trial court adjudged in favor of the trustee, and his action in so doing was affirmed by the supreme court of errors of Connecticut, to which the case was taken on appeal. 79 Conn. 434, 65 Atl. 436, 600, 8 A. & E. Ann. Cas. 452. The cause was then brought to this court.

The supreme court of errors, in upholding the validity of the statute, decided that the subject with which it dealt was within the police power of the state, as the statute alone sought to regulate the manner of disposing of a stock in trade outside of the regular course of business, by methods which, if uncontrolled, were often resorted to for the consummation of fraud, to the injury of innocent creditors. In considering whether the requirements of the statute were so onerous and restrictive as to be repugnant to the 14th Amendment, the court said:

"It does not seem to us, either from a consideration of the requirements them-

selves of the act, or of the facts of the case before us, that the restrictions placed by the legislature upon sales of the kind in question are such as will cause such serious inconvenience to those affected by them 493] as will amount to any *unconstitutional deprivation of property. A retail dealer who owes no debts may lawfully sell his entire stock without giving the required notice. One who is indebted may make a valid sale without such notice, by paying his debts, even after the sale is made. Insolvent and fraudulent vendors are those who will be chiefly affected by the act, and it is for the protection of creditors against sales by them of their entire stock at a single transaction, and not in the regular course of business, that its provisions are aimed. It is, of course, possible that an honest and solvent retail dealer might, in consequence of the required notice before the sale, lose an opportunity of selling his business, or suffer some loss from the delay of a sale, occasioned by the giving of such notice. But a 'possible application to extreme cases' is not the test of the reasonableness of public rules and regulations. *Com. v. Plaisted*, 148 Mass. 375, 382, 2 L.R.A. 142, 12 Am. St. Rep. 566, 19 N. E. 224. 'The essential quality of the police power as a governmental agency is that it imposes upon persons and property burdens designed to promote the safety and welfare of the general public.' *Chicago, B. & Q. R. Co. v. State*, 47 Neb. 549, 564, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624."

That the court below was right in holding that the subject with which the statute dealt was within the lawful scope of the police authority of the state, we think is too clear to require discussion. As pointed out by Vann, J., in a dissenting opinion delivered by him in *Wright v. Hart*, 182 N. Y. 350, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263, the subject has been, with great unanimity, considered not only to be within the police power, but as requiring an exertion of such power. He said:

"Twenty states, as well as the Federal government in the District of Columbia, have similar statutes, some with provisions more stringent than our own, and all aimed at the suppression of an evil that is thus shown to be almost universal. California: Civil Code, § 3440, as amended March 10, 1903 (Stat. 1903, chap. 100, p. 111). Colorado: Sess. Laws 1903, chap. 110, p. 225. Connecticut: Pub. Acts 1903, chap. 72, p. 49. Delaware: Laws 1903, chap. 387, p. 748. District of Columbia: 33 Stat. at L. 555, 494]*chap. 1809; Acts 58th Cong. April 28, 1904. Georgia: Laws 1903, p. 92, No. 457. Idaho: Laws 1903, p. 11, H. B. 18. Indiana: Acts 1903, chap. 153, p. 276. Kentucky: 53 L. ed.

Acts 1904, chap. 22, p. 72. Louisiana: Acts 1896, p. 137, No. 94. Maryland: Laws 1900, chap. 579, p. 907. Massachusetts: Acts and Resolves 1903, chap. 415, p. 389. Minnesota: Gen. Laws 1899, chap. 291, p. 357. Ohio: Laws 1902, p. 96, H. B. 334. Oklahoma: Sess. Laws 1903, chap. 30, p. 249. Oregon: Bellinger & C. Anno. Codes & Statutes, chap. 7, p. 1479. Tennessee: Acts 1901, chap. 133, p. 234. Utah: Laws 1901, chap. 67, p. 67. Virginia: Acts approved January 2, 1904; Acts 1902-1904, chap. 554, p. 884. [Va. Code 1904, p. 1217, § 2460a]. Washington: Laws 1901, chap. 109, p. 222. Wisconsin: Laws 1901, chap. 463, p. 684. A statute with the same object attained by a similar remedy has been held valid by the highest courts in Massachusetts, Connecticut, Tennessee, and Washington. *John P. Squire & Co. v. Tellier*, 185 Mass. 18, 102 Am. St. Rep. 322, 69 N. E. 312; *Walp v. Mooar*, 76 Conn. 515, 57 Atl. 277; *Neas v. Borches*, 109 Tenn. 398, 97 Am. St. Rep. 851, 71 S. W. 50; *McDaniels v. J. J. Connelly Shoe Co.* 30 Wash. 549, 60 L.R.A. 947, 94 Am. St. Rep. 889, 71 Pac. 37. An act declaring such sales presumptively fraudulent was assumed to be valid by the courts of last resort in Wisconsin and Maryland. *Fisher v. Herrmann*, 118 Wis. 424, 95 N. W. 392; *Hart v. Roney*, 93 Md. 432, 49 Atl. 661. On the other hand, a statute with more exacting conditions was held unconstitutional in Ohio (*Miller v. Crawford*, 70 Ohio St. 207, 71 N. E. 631, 1 A. & E. Ann. Cas. 558), and a similar act met the same fate in Utah, where a violation of the statute was made a crime (*Block v. Schwartz*, 27 Utah, 387, 65 L.R.A. 308, 101 Am. St. Rep. 971, 76 Pac. 22, 1 A. & E. Ann. Cas. 550)."

To the cases thus cited may be added *Williams v. Fourth Nat. Bank*, 15 Okla. 477, 2 L.R.A.(N.S.) 334, 82 Pac. 496, 6 A. & E. Ann. Cas. 970, where a statute was sustained, which made sales in bulk presumptively fraudulent when the requirements of the statute were not observed.

The argument here, however, does not deny all power to pass a statute regulating the subject in question, but principally insists that the conditions exacted by this particular statute are so arbitrary and onerous as to cause the law to be repugnant to the 14th Amendment. To support this view in many forms of statement it is reiterated that the conditions *imposed by the 495 statute so fetter the power to contract for the purchase and sale of property of the character described in the statute as to deprive of property without due process of law; and, moreover, because the conditions apply only to retail dealers, it is urged that the necessary effect of the statute is, as to such dealers, to give rise to a denial of the

equal protection of the laws. We think it is unnecessary to follow in detail the elaborate argument by which it is sought to sustain these propositions. Their want of merit is demonstrated by the reasoning by which the court below sustained the statute, as partially shown by the excerpt which we have previously quoted from the opinion announced below. Indeed, the court below, in its opinion, pointed out that the statute did not cause sales which were made without compliance with its requirements to be absolutely void, but made them simply voidable, at the instance of those who were creditors at the time the sales were made. Moreover, the unsoundness of the contentions is additionally shown by the number of cases in state courts of last resort, sustaining statutes of a similar nature, which we need not here cite, as they are referred to in the excerpt heretofore made from the opinion of Vann, J., in *Wright v. Hart*, supra.

Much support in argument was sought to be deduced from the opinion in *Wright v. Hart*; *Miller v. Crawford*; and *Block v. Schwartz*,—supra. It is true that in those cases statutes dealing with the subject with which the one before us is concerned were decided to be unconstitutional. But we think it is unnecessary to analyze the cases or to intimate any opinion as to the persuasiveness of the reasoning by which the conclusion expressed in them was sustained. This is said because it is apparent from the most casual inspection of the opinions in the cases in question that the statutes there considered contained conditions of a much more onerous and restrictive character than those which are found in the statute before us.

As the subject to which the statute relates [496] was clearly *within the police powers of the state, the statute cannot be held to be repugnant to the due process clause of the 14th Amendment, because of the nature or character of the regulations which the statute embodies, unless it clearly appears that those regulations are so beyond all reasonable relation to the subject to which they are applied as to amount to mere arbitrary usurpation of power. *Booth v. Illinois*, 184 U. S. 425, 46 L. ed. 623, 22 Sup. Ct. Rep. 425. This, we think, is clearly not the case. So, also, as the statute makes a classification based upon a reasonable distinction, and one which, as we have seen, has been generally applied in the exertion of the police power over the subject, there is no foundation for the proposition that the result of the enforcement of the statute will be to deny the equal protection of the laws.

Affirmed.

ALEXANDRE MILLER, Plff. in Err.,

v.

NEW ORLEANS ACID & FERTILIZER
COMPANY et al.

(See S. C. Reporter's ed. 496-507.)

Error to state court — Federal question — decision on non-Federal ground.

1. The decision of the highest state court that a trustee of a bankrupt partnership can avoid a preference under the state law arising out of a sale by an individual partner of his individual property, and that such preference may be avoided without previously ascertaining the existence of creditors of the individual estate, does not rest upon a non-Federal ground broad enough to sustain the judgment, so as to defeat the appellate jurisdiction of the Federal Supreme Court, because the state court applied the state law in testing the existence of the preference.

[For other cases, see *Appeal and Error*, 1465-1528, in *Digest Sup. Ct.* 1908.]

Bankruptcy — avoiding preference under state law — continuing pending suit.

2. A pending action brought by creditors of an insolvent partnership to avoid, as an unlawful preference, a sale by an individual partner of his individual property, may be prosecuted to final judgment by the trustee in bankruptcy of the partnership estate, even although the cause of action arose from the state law, and the application of that law is essential to secure the relief sought, provided only that such trustee is properly authorized, conformably to the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 67, subd. f, empowering a court of bankruptcy to direct the trustee to preserve liens for the benefit of the bankrupt estate.

[For other cases, see *Bankruptcy*, VIII., in *Digest Sup. Ct.* 1908.]

Bankruptcy — avoiding preference under state laws — partnership and individual assets.

3. Establishing the existence of other individual creditors is not essential to the prosecution by the trustee of a bankrupt partnership of a pending suit to avoid, as constituting a preference under the state law, a sale by an individual partner of his individual property, where, under such law, partnership and individual creditors have a coequal right to payment out of his individual estate, although, if the preferred creditor proves to be the only individual creditor, he will be entitled, by way of distribution under the bankrupt act of July 1,

NOTE.—On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

1898, § 5, subd. f, to have the full amount paid in by him returned.

[For other cases, see *Bankruptcy*, VIII., in *Digest Sup. Ct. 1908.*]

[No. 32.]

Argued December 1, 1908. Decided January 4, 1909.

IN ERROR to the Supreme Court of the State of Louisiana to review a judgment which, reversing a judgment of the Sixteenth Judicial District Court for the Parish of St. Landry, in that state, held invalid, as constituting a preference under the state laws, certain sales by an individual member of a bankrupt partnership of his individual property. Affirmed.

See same case below, 117 La. 821, 42 So. 329.

The facts are stated in the opinion.

Mr. E. B. Dubutsson argued the cause and filed a brief for plaintiff in error:

From the time when the trustee intervened in the lower court, down to the final decree of the supreme court, this was an action to set aside a preference by and on behalf of a trustee in bankruptcy, and the controversy should have been determined by the United States bankruptcy law, and not by the state law.

Sturges v. Crowninshield, 4 Wheat. 196, 4 L. ed. 548; *Gibbons v. Ogden*, 9 Wheat. 210, 211, 6 L. ed. 73, 74; *Sinnot v. Davenport*, 22 How. 242, 243, 16 L. ed. 247; *Es-canaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 683, 27 L. ed. 445, 2 Sup. Ct. Rep. 185; *Jacobson v. Massachusetts*, 197 U. S. 23, 49 L. ed. 649, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765.

A Federal question was raised by plaintiff in error and decided adversely to him.

Armstrong v. Athens County, 16 Pet. 285, 10 L. ed. 966; *Grand Gulf R. & Bkg. Co. v. Marshall*, 12 How. 167, 13 L. ed. 939; *Cousin v. Labatut*, 19 How. 207, 15 L. ed. 604; *Graham v. Bayne*, 18 How. 61, 15 L. ed. 266; *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 177, 180, 47 L. ed. 765, 768, 23 Sup. Ct. Rep. 487; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *Nutt v. Knut*, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216; *Reetor v. City Deposit Bank Co.* 200 U. S. 405, 411, 413, 50 L. ed. 527, 529, 530, 26 Sup. Ct. Rep. 289.

Mr. William J. Sandoz argued the cause, and, with Mr. G. L. Dupre, filed a brief for defendant in error:

The writ should be dismissed for want of jurisdiction, because the asserted Federal question (the provisions of the bankrupt law as to the right of individual creditors

to be first paid out of individual assets) was not raised in the trial court by any pleading or exception, nor was the question properly raised in the state supreme court.

Claassen v. United States, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169; 2 Cyc. Law & Proc. p. 661; *Taylor, Jurisdiction*, §§ 244, 248; *Holmgren v. Werner*, 51 La. Ann. 1476, 26 So. 384; *Abat v. Michel*, 1 Mart. N. S. 240; 2 Cyc. Law & Proc. pp. 662, 664, 669-671, 676, g; *Butler v. Gage*, 138 U. S. 52, 34 L. ed. 869, 11 Sup. Ct. Rep. 235; *Clark v. Pennsylvania*, 128 U. S. 395, 32 L. ed. 487, 9 Sup. Ct. Rep. 113; *Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 103, 42 L. ed. 677, 18 Sup. Ct. Rep. 260.

The writ should be dismissed for want of jurisdiction for the further reason that where the highest court of a state having jurisdiction of a subject decided a Federal question in rendering a judgment, and also decides against the plaintiff in error upon an independent ground not involving a Federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the Federal question.

Kennebec & P. R. Co. v. Portland & K. R. Co. 14 Wall. 23, 20 L. ed. 850; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; *Taylor, Jurisdiction*, § 240.

The decision of a state court as to what should be deemed a fraudulent conveyance by a bankrupt does not present any Federal question; nor does the application by the court of the evidence in reaching that decision raise one.

McKenna v. Simpson, 129 U. S. 511, 32 L. ed. 773, 9 Sup. Ct. Rep. 365.

The provisions of the bankrupt law cannot be applied to a suit to set aside as fraudulent a conveyance by an insolvent to one of his creditors under the provisions of a state law, filed three months prior to the adjudication in bankruptcy.

5 Cyc. Law & Proc. p. 346, note 58.

Mr. Justice White delivered the opinion of the court:

The law of Louisiana considers the property of the debtor as the common pledge of all his creditors. Civil Code, 1969. As a general rule, therefore, it contemplates an equality of right in all creditors as to all the property of the debtor, existing at the time an obligation against the debtor arises, unless a creditor, as the result of some lawful contract, or from the particular nature of the debt to which the law gives a preference, has acquired a higher and privileged right to payment than that which belongs to the general mass of creditors. Civil Code, 1968. Under that law the cred-

itors of a partnership are preferred as to the partnership assets over the individual creditors of the members of the firm. Civil Code, 2823. This privilege does not, however, conversely exist, since it has been held from an early day in that state that individual creditors of members of the firm have no preference on the individual assets of the estate of the members of a firm, and therefore the partnership creditors and the individual creditors have a concurrent right to payment out of the individual estates. *Morgan v. His Creditors*, 8 Mart. N. S. 599, 20 Am. Dec. 262; *Flower v. Their Creditors*, 3 La. Ann. 189.

As a result of the common pledge which all creditors are presumed to have upon the property of their debtors, the law of Louisiana gives to every creditor an action to revoke any contract made in fraud of their 498]common right of pledge. Civil *Code, 1970-1977. As a consequence it is permissible to attack, even collaterally, any mere fraudulent and simulated (that is, fictitious and unreal) transfer of his property by a debtor. See authorities collected in 2 Hennen's Digest, *verbo* "Obligations," 7, p. 1031. This right, however, even in case of bad faith, does not enable a creditor to avoid a real contract of a debtor unless the act has operated to the injury and prejudice of creditors who were such at the time the act sought to be revoked was done. Civil Code, 1937. Every contract, however, is deemed to have been in fraud of creditors and prejudicial to their rights "when the obligee knew that the obligor was in insolvent circumstances, and when such contract gives to the obligee, if he be a creditor, any advantage over other creditors of the obligor." Civil Code, 1984. From this rule are excepted sales of property or other contracts made in the usual course of business, and all payments of a just debt in money. Civil Code, 1986. But this exception does not include the giving "in payment to one creditor, to the prejudice of the others, any other thing than the sum of money due." Civil Code, 2658.

In 1903 the commercial firm of O. Guillory & Company, composed of Olivrel Guillory, Olivrel E. Guillory, and Ambrois Lafleur, carried on business in the state of Louisiana. In 1904 the senior member, Olivrel Guillory, sold various parcels of real estate, which were his individual property, as follows: One sale to J. A. Fontenot, another to Alexandre Miller, and a third to John A. and Samuel Haas. All these sales were, apparently, on their face not susceptible of being assailed by creditors, because in form they were embraced within the excepted class to which we have referred.

On February 2, 1905, three corporations—which, for the sake of brevity, we shall designate as the wooden ware, the fertilizing, and the elevator companies—sued in a state district court the firm of O. Guillory & Company, the senior member, O. Guillory, individually, and the purchasers at the respective sales above mentioned. As to the first company, the cause of action was based upon an alleged open account for the purchase *price of goods sold to the firm[499 prior to the making of the sales by the senior partner of his individual property above mentioned. As to the two other corporations, the action was based upon notes held by the corporations, signed by the individual members of the firm, and averred to have been given for the price of merchandise bought, also prior to said sales, from the corporations by the firm, it being alleged that the notes signed by the individual members had been received by the corporations as cumulative, and not in any wise as a novation of the firm obligation to pay the price of the goods by it bought. The sales were attacked as fraudulent simulations, or, if not unreal, as subject to be revoked, because they were made at a time when the firm was notoriously embarrassed or insolvent, to the knowledge of the purchasers, and were not within the excepted class, because they were, in substance, not what they purported to be, but were givings in payment of the individual property of O. Guillory in order to prefer the purchasers.

The prayer was for a judgment for the amount of the debts, for a revocation of the sales, for a direction that they be sold by judicial decree to pay the judgments to be rendered, the payments to be made by preference out of the proceeds arising from the sale.

The cause was put at issue by general denials filed for the firm, for O. Guillory individually, and for the purchasers. Before trial, in consequence of an adjudication in bankruptcy as to Guillory & Company, made on April 28, 1905, a petition was filed in the cause by W. J. Sandoz, alleging himself to be "the duly appointed and qualified trustee of the bankrupt estate of O. Guillory & Company." It was alleged that "since the institution of this suit the said O. Guillory & Company have made application for and been adjudged bankrupts in the district court of the United States for the western district of Louisiana." And it was further averred that, under the bankrupt law of the United States, "the trustee succeeds to the rights of the creditors who may have brought actions to annul any transactions affecting the property of the bank-[500 rupts, and the law makes it his duty to prosecute the same for the benefit of the said bank-

rupt estate in his capacity as trustee." The prayer of the petition was that Sandoz, as trustee, "be made a party plaintiff in this suit and duly authorized to prosecute the same to final judgment for the benefit of said bankrupt estate of O. Guillory & Company." The state court, after notice to the parties, entered an order substituting Sandoz as party plaintiff in his capacity "as trustee of the estate of O. Guillory & Company" . . . with authority to prosecute the same to final judgment for the benefit of said bankrupt estate."

Sandoz, trustee, was thereafter the sole plaintiff, and prosecuted an appeal to the supreme court to reverse a judgment of the trial court sustaining the sales. The supreme court, for reasons given in an elaborate opinion, held the sale to Fontenot to have been simulated, and sustained the validity of the Haas and Miller sales. It was found that Olivrel Guillory had made the sales of his individual property principally for the purpose of assisting the firm, which was embarrassed as the result of a decline in the price of cotton held by the firm; that, at the time, Guillory had no individual debts whatever, except one of \$3,000, due to Miller, and another of \$6,000, which was assumed and provided for in the Haas sale. Granting a rehearing asked by trustee Sandoz, a different conclusion was reached as to the Miller sale. The court found that, when that sale was made, Guillory owed Miller \$3,000, and although the price of \$7,500 was actually paid to Guillory, yet, as immediately after the sale Guillory had paid the three thousand dollar debt which he owed to Miller, "the transaction was an indirect preference of the son-in-law (Miller) over other creditors by a disguised giving in payment." 117 La. 821, 42 So. 329. This writ of error sued out by Miller was allowed by the chief justice of the state court.

By the assignments of error it is contended, first, that the court erred in testing, at the instance of Sandoz, trustee, the 501] validity of the sale to Miller by the state law instead of by the bankrupt law of the United States, which was alone controlling; second, under the bankrupt law of the United States the court erred in holding that the transfer by Guillory of his individual property to pay Miller, his individual creditor, was revocable, although there was no other individual creditor to be prejudiced thereby; and, third, that, in any event, the court erred in holding that prejudice could have resulted under the bankrupt law to individual creditors by the sale to Miller without ascertaining whether there were such creditors who could have been prejudiced. In other words, that the court erred

in decreeing the sale to Miller to the extent of \$3,000 to be revocable as a prejudicial preference, and, at the same time, relegating to the bankruptcy court the determination of whether there were any individual creditors who could have been prejudiced; thus decreeing a preference and yet declining to determine a question which was essential to be ascertained before a preference could be adjudged.

Our jurisdiction is challenged, first, because it is urged no Federal question was set up or claimed in the trial court, and therefore no such question was cognizable by the supreme court; second, because no Federal question was raised in or decided by the supreme court; third, even if incidentally a Federal question may have been passed upon below, nevertheless the court based its conclusions upon a non-Federal ground, broad enough to sustain its judgment. The first question is involved in the second, because, if the court below decided a Federal question, we may not decline to review its action in so doing upon the assumption that the court transcended its powers under the state law by passing on a question which it had no right to examine, because not raised in the trial court. The second contention embraces an irrelevant element,—that is, that no Federal question was raised in the court below,—since, if such a question was expressly decided by the court, our duty to review may likewise not be avoided by assuming that the court decided a question not raised in the cause.

*The proposition, therefore, reduces[502 itself to this: Did the court below expressly decide a Federal question adversely to the plaintiff in error?

In its opinion on the rehearing the court said:

"The trustee in bankruptcy was, on his own petition, made a party plaintiff, and was authorized by order of court to prosecute the suit to final judgment for the benefit of the bankrupt estate. Neither the capacity of the trustee nor his right to stand in judgment have been questioned. It is argued, however, by counsel for Miller, that the partnership alone was adjudged a bankrupt, and not the members as individuals, and that, as Miller, under the bankrupt act of 1898 [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418], is entitled to be paid by preference over partnership creditors out of the net proceeds of the individual estate of O. Guillory, plaintiffs were not prejudiced by the payment of the note held by Miller out of the individual assets of the debtor. The answer to this contention is that the petition of the bankrupt shows that O. Guillory filed schedules of his individual debts and of his individual

property. 'Where a firm goes into bankruptcy, it is a proceeding against each and every member; and both the firm and individual assets must be administered in bankruptcy.' Collier Bankr. p. 60. Hence, all rights of preference must be determined by the court having jurisdiction of the insolvency."

In view of the statement that no question was raised "as to the capacity of the trustee and his right to stand in judgment," and the fact that the record does not contain the full proceedings had in the bankruptcy court, and the further fact that no question as to the capacity of the trustee is raised in the assignment of errors, we take it that the intimation made by the court concerning the effect of the adjudication of a firm as being also an adjudication of the individual estates of the members was but a method of reasoning resorted to by the court to sustain its decision concerning the right of the trustee to avail of the state law under the circumstances of the case, irrespective of the rule as to preferences provided in the 503]bankrupt *law, and, further, to support its conclusion that it was its duty to abstain from determining whether there were individual creditors who were prejudiced, and to remit that question to the court in which the bankruptcy proceedings were pending.

But thus limiting the passage referred to, it nevertheless results that the court below both considered and necessarily decided two distinct Federal questions: First, the right of the trustee to avoid a preference under the state law, although it was contended that the exertion of such power was in conflict with the bankrupt law; and, second, that the preference might be avoided under the state law at the instance of the trustee without establishing that there were creditors of the individual estate. So far as the third contention concerning jurisdiction, it is apparent from what we have just said that it is without merit. While it is true that the court applied the state law in testing the existence of the preference, such application of that law is obviously not alone broad enough to sustain its conclusion that the trustee, under the bankrupt law, had the right to avail of the preference under the state law, and this is also true concerning the ruling that there was power to determine the preference under the state law without previously ascertaining the existence under the bankrupt act of individual creditors.

We come, then, to the merits. Eliminating, as we have done, the expressions of the court below as to the effect of the adjudication in bankruptcy of the partnership upon the estates of the individual members, we need not approach the very grave question

which would arise for consideration if that subject had been decided by the court below. *Re Stokes*, 106 Fed. 312; *Dickas v. Barnes*, 5 L.R.A.(N.S.) 654, 72 C. C. A. 261, 140 Fed. 849; *Re Bertenshaw*, 157 Fed. 363.

While § 5 of the bankrupt act expressly authorizes an adjudication in bankruptcy against a firm, the controlling provisions following are the direct antithesis of the rule prevailing in the state of Louisiana.

Thus, subdivision f of § 5 commands that "the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net[504] proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts." To enforce these provisions the act compels (subdiv. d) the keeping of separate accounts of the partnership property and of the property belonging to the individual partners; the payment (subdiv. e) of the bankrupt expenses as to the partnership and as to the individual property proportionately; and permits (subdiv. g) the proof of the claim of the partnership estate against the individual estate, and *vice versa*, and directs the marshaling of the assets of the partnership estate and the individual estates, "so as to prevent preferences and secure the equitable distribution of the property of the several estates."

Now, by § 60 of the bankruptcy law, as amended by the act of 1903 [32 Stat. at L. 799, chap. 487, § 13, U. S. Comp. Stat. Supp. 1907, p. 1031], it is provided that a person shall be deemed to have given a preference "if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition, and before the adjudication, . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." It is obvious that if, at the time of the alleged preferential transfer to Miller, there were no other creditors of the individual estate of Guillory than Miller, under the rule laid down by the bankrupt act, the transfer to him of assets of the individual estate, in payment of an individual debt, did not constitute a preference. That it might have constituted a preference under the state law results from the difference in the classification made by the state law, on the one hand, and the bankruptcy law on the other. So, also, it is evident, having regard to the separation between the part-

nership and individual estates made by the bankrupt act and the method of distribution of those estates, *that, if there were no individual creditors, and the sum paid to Miller was returned to the estate as a preference, it would be his right to at once receive back, by way of distribution, that which he was obliged to pay in upon the theory that it was a preference.

The questions, then, to be decided, are these: 1st, was the trustee authorized by the bankrupt law to avoid the sale to Miller to the extent of the \$3,000 which constituted the giving in payment under the state law? And, 2d, if so, was it incumbent on the trustee, under the bankrupt act, to such recovery to show the existence of individual creditors at the time the giving in payment to Miller took place, who were prejudiced thereby; and, if not, was the trustee obliged to show the existence of individual creditors at the time of the adjudication in bankruptcy, who would be prejudiced in the distribution of the bankrupt estate if the giving in payment to Miller was not annulled?

As the suit by the creditors was brought within four months before the adjudication in bankruptcy, their right to a lien or preference arising from the suit was annulled by the provisions of subdivision f of § 67 of the bankrupt law. But that section authorized the trustee, with the authority of the court, upon due notice, to preserve liens arising from pending suits for the benefit of the bankrupt estate, and to prosecute the suits to the end for the accomplishment of that purpose. *First Nat. Bank v. Staake*, 202 U. S. 141, 50 L. ed. 967, 26 Sup. Ct. Rep. 580. It is inferable that the parties proceeded upon the erroneous conception that the state court, where the suit was pending, was competent to authorize the trustee; but, as no question on that subject was made below or is here raised, we may not reverse the judgment in favor of the trustee because of the absence of authority from the bankrupt court, when presumably the want of authority would have been supplied had its absence been challenged. Assuming, therefore, that the trustee was properly authorized, it follows that he was entitled to preserve and enforce the privilege or lien which arose in favor of the creditors, 506] *resulting from their pending action, even although the cause of action arose from the state law, and the application of that law was essential to secure the relief sought. To the accomplishment of this end the bankrupt law was cumulative and did not abrogate the state law. See *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. ed. 790, 25 Sup. Ct. Rep. 443.

Undoubtedly, the trustee, in prosecuting

the suit to judgment, was obliged to prove the existence of the facts which were essential under the state law, since, to hold otherwise, would be but to decide that he could recover without proof of his right to do so. But as, under the state law, creditors of the partnership had a coequal right to payment with the individual creditors of a member of the firm out of his individual estate, it follows that, even if there had been no individual creditor but Miller, recovery was justified because of the prejudice suffered by the partnership creditors as the result of the giving in payment made by Guilory to Miller. In view of the distinction between the estates of partnerships and the estates of the members of the firm, which is made by the bankrupt law, and the method of distribution for which that law provides, of course the trustee will hold the fund as an asset of the estate of the individual member, and primarily for the benefit of his creditors. Although, on proof of the claims against such individual estate, if it be that Miller is the only individual creditor, he will be entitled, by way of distribution, to the full amount paid in by him because of the method of distribution ordained by the bankrupt law, that fact does not establish that there was a necessity, in order to avoid the preference under the state law, to make proof that, at the time of the alleged giving in payment, there were other individual creditors who were prejudiced. While the power in the state court to pass on the question of preference involved the duty of deciding whether, at the time of the assailed transaction, there were creditors to be prejudiced, that duty did not involve ascertaining what creditors at the time of the adjudication in bankruptcy, were entitled to participate in the distribution. The one was within the province of the state court for the purpose 507 of the case before it; the other was a different question, depending on independent considerations exclusively cognizable in the bankruptcy court. The state court was, therefore, right in so deciding.

Affirmed.

UNITED STATES, Plff. in Err.,

v.

EDGAR M. BIGGS, Charles H. Freeman, Charles D. McPhee, and John J. McGinnity.

(See S. C. Reporter's ed. 507-522.)

Appeal — in criminal case — review on behalf of government.

1. Interpretation is included in the term

NOTE.—On the right of the state to appeal in a criminal case—see note to *People ex rel. Hodson v. Miner*, 19 L.R.A. 342.

"construction," as used in the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. 1901, p. 209), authorizing a writ of error on behalf of the government from the Federal Supreme Court to review the judgment of a district or circuit court sustaining a demurrer to an indictment when based upon the construction of the statute upon which such indictment is founded.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Appeal — by government in criminal case — scope of review.

2. The action of the court below as to the mere construction of the indictment is not open to review on the writ of error authorized by the act of March 2, 1907, on behalf of the government, to review a judgment of a district or circuit court sustaining a demurrer to an indictment on the ground of the construction of the statute upon which the indictment is founded.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

Public lands — timber and stone lands — agreement to convey after patent.

3. An entryman who has made an application under the timber and stone act of June 3, 1878 (20 Stat. at L. 89, chap. 151, U. S. Comp. Stat. 1901, p. 1545), as amended by the act of Aug. 4, 1892 (27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1545), in good faith, and for his exclusive use and benefit, is not prohibited from subsequently agreeing to convey the land covered by his application to another, and to perfect his entry for the purpose, after patent, of fulfilling his contract, by the provision of the statute forbidding an entryman or applicant from making an application ostensibly in his own name, but in reality for, and on behalf of, another.

[For other cases, see Public Lands, I. f, 2, in Digest Sup. Ct. 1908.]

Conspiracy — to defraud United States.

4. A conspiracy to induce entrymen who have made application under the timber and stone act of June 3, 1878, as amended by the act of Aug. 4, 1892, to agree to convey after patent, is not one to defraud the United States "in any manner or for any purpose," within the meaning of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, since the former statute not only does not expressly prohibit an entryman from making such an agreement, but impliedly sanctions it.

[For other cases, see Conspiracy, II., in Digest Sup. Ct. 1908.]

Appeal — by government in criminal case — scope of review.

5. Every question of the character referred to in the act of March 2, 1907, authorizing a writ of error on behalf of the government from the Federal Supreme Court, to review certain judgments of the Federal district and circuit courts in criminal cases, need not be decided by the Supreme Court when, by the decision of one of such questions, the case is completely dis-

posed of and the other questions have become irrelevant.

[For other cases, see Appeal and Error, I. e, in Digest Sup. Ct. 1908.]

[No. 289.]

Argued December 16, 17, 1908. Decided January 4, 1909.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment sustaining a demurrer to an indictment charging a conspiracy to defraud the United States. Affirmed.

See same case below, 157 Fed. 264.

The facts are stated in the opinion.

Solicitor General Hoyt and Attorney General Bonaparte argued the cause, and, with Mr. Edwin W. Lawrence, filed a brief for plaintiff in error:

The words "make entries" include the making of applications.

Chotard v. Pope, 12 Wheat. 586, 6 L. ed. 737; Dealy v. United States, 152 U. S. 539, 545, 38 L. ed. 545, 547, 14 Sup. Ct. Rep. 680; Standard Dict. "Entry;" Century Dict. "Entry."

When the conspiracy was formed no application had been made for the lands which were to be obtained. In order to carry out the conspiracy it would, therefore, be necessary to have applications made. It follows that when defendants conspired to procure others to "make entries," as charged, they necessarily contemplated the making of applications. Reasonable implications from facts clearly charged may be indulged in to ascertain the true meaning of an indictment.

United States v. Mills, 7 Pet. 138, 8 L. ed. 636; Rosen v. United States, 161 U. S. 30, 33, 40 L. ed. 606, 607, 16 Sup. Ct. Rep. 434, 480; Clement v. United States, 79 C. C. A. 243, 149 Fed. 305; Potter v. United States, 155 U. S. 438, 448, 39 L. ed. 214, 15 Sup. Ct. Rep. 144; Ex parte Pierce, 155 Fed. 665.

A conspiracy to defraud is sufficiently charged, although the conspiracy did not embrace the making of false and fraudulent applications.

United States v. Budd, 144 U. S. 154, 163, 36 L. ed. 384, 387, 12 Sup. Ct. Rep. 575; United States v. Trinidad Coal & Coking Co. 137 U. S. 160, 34 L. ed. 640, 11 Sup. Ct. Rep. 57.

The end, fraud, being unlawful, it was unnecessary to set out in these indictments, in detail, the means of indirection contemplated by the conspiracies.

Dealy v. United States, 152 U. S. 539, 543, 38 L. ed. 545, 546, 14 Sup. Ct. Rep. 680; Burton v. United States, 202 U. S. 344, 372, 50 L. ed. 1057, 1067, 26 Sup. Ct.

Rep. 688, 6 A. & E. Ann. Cas. 362; Thomas v. United States, 17 L.R.A.(N.S.) 720, 84 C. C. A. 477, 156 Fed. 906; United States v. Grunberg, 131 Fed. 137; Thomas v. People, 113 Ill. 531; People v. Bird, 126 Mich. 631, 86 N. W. 127.

Messrs. Clyde C. Dawson and Charles J. Hughes, Jr., argued the cause and filed a brief for defendants in error:

The courts have long distinguished between "interpretation" and "construction."

Bloomer v. Todd, 3 Wash. Terr. 612, 1 L.R.A. 111, 19 Pac. 138; Morris Aqueduct v. Jones, 36 N. J. L. 206; State ex rel. Hastings v. Smith, 35 Neb. 22, 16 L.R.A. 791, 52 N. W. 700; People ex rel. Twenty-third Street R. Co. v. Tax Comrs. 95 N. Y. 559.

There is no room for construction where the statute is unambiguous.

Deane v. State, 159 Ind. 313, 64 N.E. 916; Terre Haute & L. R. Co. v. Erdel, 158 Ind. 347, 62 N. E. 706; Lewis's Sutherland, Stat. Constr. § 366; McCluskey v. Cromwell, 11 N. Y. 601; People ex rel. Wood v. Sands, 102 Cal. 16, 36 Pac. 404; Gilbert v. Dutruit, 91 Wis. 665, 65 N. W. 511; Swarts v. Siegel, 54 C. C. A. 405, 117 Fed. 13; State v. Duggan, 15 R. I. 403, 6 Atl. 787; United States v. Hartwell, 6 Wall. 385, 396, 18 L. ed. 830, 832; Lake County v. Rollins, 130 U. S. 662, 670, 671, 32 L. ed. 1060, 1063, 1064, 9 Sup. Ct. Rep. 651; Yerke v. United States, 173 U. S. 439, 442, 43 L. ed. 760, 761, 19 Sup. Ct. Rep. 441; Hamilton v. Rathbone, 175 U. S. 414, 421, 44 L. ed. 219, 222, 20 Sup. Ct. Rep. 155; Webber v. St. Paul City R. Co. 38 C. C. A. 84, 97 Fed. 140; Johnson v. Southern P. Co. 54 C. C. A. 511, 117 Fed. 462; United States v. Fisher, 2 Craneh, 358, 399, 2 L. ed. 304, 318; United States v. Wiltberger, 5 Wheat. 76, 96, 5 L. ed. 37, 42.

Lord Denman's antithesis that a criminal conspiracy consisted in the combination for accomplishing an unlawful end or lawful end by unlawful means (R. v. Jones, 4 Barn. & Ad. 345) was not intended by him as a definition of what combinations are criminal.

R. v. Peck, 9 Ad. & El. 686.

And it, while misleading, may only be justified by using the words "unlawful" and "unlawfully" as synonyms for "criminal" and "criminally."

Mulcahy v. R. L. R. 3 H. L. 317; 3 Greenl. Ev. § 90a, conspiracy; Wright, Criminal Conspiracies & Agreements, § 14, p. 48; Pettibone v. United States, 148 U. S. 197, 203, 37 L. ed. 419, 422, 13 Sup. Ct. Rep. 542; United States v. Cruikshank, 92 U. S. 542, 558, 23 L. ed. 588, 593; Quinn v. Leathem [1901] A. C. 529.

If the defendants herein persuaded various proper and competent persons to make

entries of timber lands, even furnishing the money with which such entries were to be made, on a promise that thereby they could realize a profit in the future, but carefully avoiding every form of agreement to purchase the property until after the application, or, at most, the entries were complete, and then showing the parties how they might make the expected profit by selling the lands, they would not be guilty under this statute.

United States v. Budd, 144 U. S. 154, 163, 36 L. ed. 384, 387, 12 Sup. Ct. Rep. 575; Olson v. United States, 67 C. C. A. 21, 133 Fed. 852; Ex parte Black, 147 Fed. 832; Van Gesner v. United States, 82 C. C. A. 180, 153 Fed. 46.

The only thing which the Congress of the United States attempted to prevent is the making of contracts before the making of applications to purchase, whereby the entryman binds himself to convey the title which he shall require from the government to some other person.

Hussey v. Smith, 99 U. S. 20, 25 L. ed. 314; Lamb v. Davenport, 18 Wall. 307, 314, 21 L. ed. 759, 761; Gaines v. Molen, 30 Fed. 29; Southerland v. Whittington, 46 Ark. 289; Arnold v. Christy, 4 Ariz. 19, 33 Pac. 619; McKennon v. Winn, 1 Okla. 327, 22 L.R.A. 501, 33 Pac. 582; Snow v. Flannery, 10 Iowa, 323, 77 Am. Dec. 120; Lipscomb v. Nichols, 6 Colo. 294; Fideleer v. Norton, 4 Dak. 258, 30 N. W. 135, 32 N. W. 57; Myers v. Croft, 13 Wall. 291, 296, 297, 20 L. ed. 562, 563; Adams v. Church, 193 U. S. 510, 515-517, 48 L. ed. 769, 771, 772, 24 Sup. Ct. Rep. 517; Williamson v. United States, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163, 177.

The making of false representations, if alleged, in violation of a Land-Department regulation imposing on the entryman a condition not contained in the law, would constitute no offense.

Williamson v. United States, supra; United States v. Eaton, 144 U. S. 677, 687, 688, 36 L. ed. 591, 594, 12 Sup. Ct. Rep. 764; United States v. Maid, 116 Fed. 650; United States v. Blasingame, 116 Fed. 654; Anchor v. Howe, 50 Fed. 366; United States v. Howard, 37 Fed. 666; Hoover v. Salling, 49 C. C. A. 26, 110 Fed. 43; United States v. Manion, 44 Fed. 801; United States v. Hoover, 133 Fed. 950; United States v. Matthews, 146 Fed. 306; United States v. United Verde Copper Co. 196 U. S. 207, 49 L. ed. 449, 25 Sup. Ct. Rep. 222.

Mr. Justice White delivered the opinion of the court:

It is adequate to an understanding of the questions which are here necessary to be decided in general terms to say that the

indictment against the defendants in error charged them with conspiracy in violation of the 2d clause of § 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676), which makes it criminal to conspire to defraud the United States "in any manner or for any purpose." The means by which it was contemplated that the United States should be defrauded was charged in the indictment to have been the unlawful obtaining by purchase under the timber and stone act of public land of the United States in excess of the quantity authorized by law to be acquired. The timber and stone act, when originally enacted, in June, 1878, related solely to public lands within particular states. 20 Stat. at L. chap. 151, p. 89, U. S. Comp. Stat. 1901, p. 1545. In 1892, however, that act was amended by striking out the designation of particular states, thus causing the act to apply to "surveyed public lands of the United States within the public-land states." 27 Stat. at L. 348, chap. 375, U. S. Comp. Stat. 1901, p. 1545. As it is essential to have that act in mind we excerpt from the opinion of the court below a succinct but comprehensive and accurate statement of its provisions:

"This act in its 1st section specifies the qualifications of purchasers or entrymen thereunder, and limits the amount of land which each may acquire to 160 acres. The 2d section provides that the applicant, at the time of his application, shall file a written statement in duplicate under oath with the register, describing the land which he desires to purchase and its quality, that he has made no other application under this act, and that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit, and that he has not, directly or 515] indirectly, made any agreement or *contract in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself. It then provides that, if he swears falsely, he shall be guilty of perjury and forfeit the money which he paid for said lands, and all right and title to the same, and any grant or conveyance which he may have made, except in the hands of bona fide purchasers, shall be null and void. The 3d section provides that, on the filing of the applicant's statement, the register shall post a notice of the application in his office for a period of sixty days, and that the applicant shall publish the same notice in a newspaper nearest the location of the premises for a like period of time, and after the expiration of said sixty days, if no adverse claim shall have been

filed, the party desiring to purchase shall furnish to the register of the land office satisfactory evidence, 'first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper, as herein required; secondly, that the land is of the character contemplated in this act, unoccupied, and without improvements,' etc., 'and, upon payment to the proper officer of the purchase money of said land, together with the fees of the register and receiver,' etc., 'the applicant may be permitted to enter said land,' and a patent shall issue thereon. It further provides that any person having a valid claim to any portion of the land may object in writing to the issuance of the patent, and evidence shall be taken thereon as to the merits of said objection." [157 Fed. 266.]

The indictment contained one count, supported by averments of fourteen overt acts.

The accused after moving to quash on the ground of the illegality of the organization of the grand jury, demurred to the indictment on a number of technical grounds, and upon the contentions that the facts stated in the indictment were insufficient to charge an offense within any statute of the United States, and that, as the indictment had not been found *within three years of the com-[516 mission of the acts therein alleged, the right to prosecute for the same was barred by the statute of limitations. The court held the indictment stated no offense against the United States, and, sustaining the demurrer upon that ground, discharged the accused without day. It was also held that, if the indictment was construed as embracing but one offense, the three years' bar of the statute of limitations was controlling; but that, if it were held that the indictment stated more than one offense, thus saving one of the offenses from the operation of the statute of limitations, the indictment would be void for duplicity.

The reasons which caused the court to reach the conclusions just stated were expounded in an opinion. Therein, in order to determine whether the indictment stated an offense against the United States, the court came first to construe it in the light of the provisions of the timber and stone act. In doing so the court said:

"We find that the indictment sets in where the 2d section of the timber and stone act leaves off. It charges that the purpose of the conspiracy was to 'hire and under agreements' with entrymen have them pay for the lands with moneys of the corporation and have them make entries. It does not charge the date on which such hiring and agreements to make entries were to be made, nor that the entrymen were hired to make applications, nor that said

hiring and agreements were prior to any application. The indictment appears to attempt to challenge some acts done by the entrymen under the provisions of § 3 of said act, to wit: The hiring of and agreement with entrymen (who had made application before that under § 2 of the act) to make entries and pay for the lands with moneys furnished by the corporation. . . . But it is said the indictment charges a violation of § 1 of the act in the acquisition of more land by the corporation than there limited. When it comes to that, the indictment does not charge that the several entrymen 517] were disqualified as such, *nor that, when they made application, they had outstanding contracts to sell, or were then acting under agreements or hire for said defendants or said corporation. A compliance with the timber and stone act, by the entrymen, in both its spirit and letter, prior to and at time of application, is not challenged by the indictment."

Having thus construed the indictment, it was then considered whether any offense was therein stated against the United States. In deciding that no offense was stated, it was held that, although it were conceded that the timber and stone act prohibited an entryman or applicant from making an application ostensibly in his own name, but in reality for and on behalf of another, that, if an applicant or entryman made an application in good faith, for his own exclusive use and benefit, the statute contained no prohibition, express or implied, against the right of the entryman, after his application, and before the final action thereon, to sell to another the claim to the land which had arisen from his application. It was therefore decided that such applicant was at liberty to contract with another to convey the land covered by the application and to perfect his entry for the purpose of fulfilling his contract to convey the land after patent. In reaching this conclusion the court was controlled by the decision in *Adams v. Church*, 193 U. S. 510, 48 L. ed. 769, 24 Sup. Ct. Rep. 512, giving a like construction to the timber culture act of June 14, 1878 (chap. 190, 20 Stat. at L. 113). Having thus decided that the indictment as construed charged the doing of no unlawful act, but simply the exercise of a lawful act, not in any way prohibited, but, on the contrary, impliedly sanctioned, by the statute, it was decided that, under no possible construction, could the acts charged constitute an unlawful conspiracy within the 2d clause of § 5440, Rev. Stat. And for additional reasons expressed in the opinion the conclusions of the court concerning the bar of the statute of limitations and the duplicity of the indictment, if it were so

construed as to save it from the statute, were fully expressed.

*This writ of error, direct from this [518 court, is prosecuted by the United States under the authority of the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209).

Our right to review the decision below is questioned by the defendants in error on the ground, first, that the court below did not construe, but simply interpreted, § 5440, Rev. Stat., and the provisions of the timber and stone act; and, second, because, although it applied the bar of the statute of limitations, the court did not do so by way of sustaining a plea in bar, but simply incidentally passed upon that question in deciding the demurrer.

The want of merit in the first contention is established by *United States v. Keitel*, No. 286 of this term, 211 U. S. 370, ante, 230, 29 Sup. Ct. Rep. 123.

As therefore we have, in any event, jurisdiction to review the action of the trial court in construing the timber and stone act and in fixing the meaning of § 5440, Rev. Stat., in the light of that construction, we presently pass the consideration of the ruling made by the court in respect to the statute of limitations. We do this because, if it be found that the court below was right in its conclusions as to the construction of the timber and stone act and of § 5440, Rev. Stat., its judgment quashing the indictment will be sustained, and its action concerning the statute of limitations will become irrelevant, and will not require examination, unless it be our duty under the act of 1907, which we shall also hereafter consider, to pass upon that question, although its decision will have become wholly unnecessary.

It is also settled by *United States v. Keitel*, supra, that the right given to the United States to obtain a direct review from this court of the rulings of the lower court on the subjects embraced within the statute of 1907 does not give authority to revise the action of the court below as to the mere construction of an indictment, and therefore, in the exercise of our power to review on this record, we must accept the construction of the indictment made by the lower court, and test its construction of the statute in that aspect.

*While not questioning this general [519 rule, the United States insists that the case here presented is an exception to that rule, because of the contention that the construction given by the court below to the indictment was but the necessary result of the misconstruction which the court applied to the timber and stone act, and hence that a review of the construction given to the

indictment is necessarily involved in the determination of the correctness of the construction given by the court to the statute. Conceding the premise, for the sake of argument, the deduction by which it is sought to apply it to the case in hand is, we think, without foundation. It proceeds upon a subtle separation of particular words or phrases in the indictment from the context of that pleading, and the affixing to the words thus separated a penetrating, but, nevertheless, too narrow, significance for the purpose of establishing the proposition relied upon. On the contrary, we think the conclusion cannot be escaped that the construction given by the court below to the indictment was the result merely of the analysis which the court made of the indictment as an entirety, of its appreciation of the nature and character of the acts therein referred to, and of the overt acts alleged, the whole read in the light of the elementary canons of construction applicable to criminal pleadings, and elucidated, as the court expressly stated, by the entire absence of anything in the indictment tending to show that the pleader contemplated alleging the existence of any conspiracy to induce the making of applications to purchase.

Coming to consider the construction given by the court to the timber and stone act as applied to the allegations of the indictment, as interpreted by the court, the correctness of the construction given by the court below to the statute is established beyond controversy by the decision in *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163, announced since the decision below was rendered.

The *Williamson Case* was a prosecution for a conspiracy in violation of § 544Q, Rev. 520] Stat., to procure the commission of *the crime of subornation of perjury by causing certain affidavits to be made for the purpose of acquiring land under the timber and stone act. At the trial, over exceptions, affidavits as to the bona fides of a number of applicants and of the purpose of each, in making his application, to acquire only for himself, were offered in evidence, and like affidavits which were required by the rules and regulations of the Land Department at the time of the final entry were also offered in evidence. The government insisted that the papers were admissible because the indictment charged a conspiracy to suborn perjury, not only at the time of the application to purchase, but also in the subsequent stage of making the final entry; and that, even if this were not the case, the affidavits made after application were admissible for the purpose of showing the motive which existed at the

time the application was made. It was decided that the indictment only charged subornation of perjury at the time of the application. Passing on the alleged contention as to motive, it was held that, in view of the requirements as to an affidavit exacted by the statute to be made at the time of the application, as to the bona fides of the applicant and his intention to buy for himself alone, and the absence of any such requirement in the statute as to the final entry, that the prohibition of the statute applied only to the condition of things existing at the time of the application to purchase, and did not restrict an entryman, after said application was made, from agreeing to convey to another, and perfecting his entry for the purpose, after patent, of transferring the land in order to perform his contract. It was, therefore, held, that the affidavits made at the final stage of the transaction were not admissible to show motive at the time of the applications to purchase, and that any requirements contained in the rules and regulations of the Land Department making an affidavit essential to show bona fides, etc., at the final stage, were *ultra vires* and void. In passing upon the subject the ruling to the like effect concerning the timber culture act, made in *Adams v. Church*, supra, was *reiterated and approved, [521 and declared to be applicable to the timber and stone act, despite immaterial differences in the phraseology of the two acts. The court, after approvingly referring to *Adams v. Church*, and after reviewing the timber and stone act, and calling attention to the entire omission of all requirement that statement as to the purpose and intention of the entryman should be made at the date of the final step in the acquisition of the land, said (p. 460): "Indeed, we cannot perceive how, under the statute, if an applicant has, in good faith, complied with the requirements of the 2d section of the act, and, pending the publication of notice, has contracted to convey, after patent, his rights in the land, his so doing could operate to forfeit his right."

It is insisted by the government that, however conclusive may be this ruling as to the power of the applicant to sell after application and to perfect his entry for the purpose of enabling him to perform such contract, that such ruling does not conclude the contention that a conspiracy formed to induce an entryman who has made his application to purchase subsequently to agree to convey his interest in the land would be a violation of the statute. But we are constrained to say that this is a mere distinction without a difference. The effect of the ruling in the *Williamson Case*

was to hold that the prohibition of the statute only applied to the period of original application, and ceased to restrain the power of the entryman to sell to another and perfect his entry for the purpose of transferring the title after patent. This being concluded by the decision in the Williamson Case, the distinction now sought to be made comes to this,—that it is unlawful under the statute to conspire to have that done which the statute did not prohibit, and, on the contrary, by implication recognized could be lawfully done without prejudice or injury to the United States in any manner whatever. This also serves to demonstrate that no error was committed by the court below in holding that, under § 5440, Rev. Stat., the acts charged in the indictment could not possibly have 522] constituted a defrauding *of the United States in any manner or for any purpose within the intendment of that section.

It remains only to notice the ruling of the court below as to the bar of the statute of limitations. While the act of 1907 gives authority to come directly here to obtain a review of the construction of a statute under the circumstances which the act enumerates, and also authorizes us to review a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," we consider that the power given is coincident with the purpose for which it was conferred; that is, to have determined, in a case within the statute, the question whether or not the government is entitled to further prosecute the case, and therefore does not, of course, call upon us to decide every question of the character referred to in the statute, when, by the decision of one of such questions, the case is completely disposed of and the other questions have become so irrelevant as to cause it to be, in our opinion, unnecessary to consider and determine them. Of course, under these circumstances, we intimate no opinion whatever concerning the correctness of the construction adopted by the court below in respect to the statute of limitations.

Affirmed.

UNITED STATES, Plff. in Err.,
v.

ALEXANDER T. SULLENBERGER, James S. Hatcher, Ellis M. Hampton, et al.

(See S. C. Reporter's ed. 522-525.)

This case is governed by the decision in United States v. Biggs, ante, 305.

[No. 290.]

Argued December 16, 17, 1908. Decided January 4, 1909.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment quashing an indictment for a conspiracy to defraud the United States. Affirmed.

Solicitor General Hoyt and Attorney General Bonaparte argued the cause, and, with Mr. Edwin W. Lawrence, filed a brief for plaintiff in error. For their contentions, see their brief as reported in United States v. Biggs, ante, 305.

Mr. Edmund F. Richardson argued the cause, and, with Mr. Horace N. Hawkins, filed a brief for defendants in error.

Mr. Justice White delivered the opinion of the court:

In this case the United States seeks the reversal of the action of the court below in quashing an indictment, the writ of error being prosecuted directly from this court upon the assumption that the case comes within the act of March 2, 1907. [34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209.] The indictment charged a conspiracy in violation of § 5440, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3676), to unlawfully acquire land of the United States under the timber and stone act. The court gave to the indictment the same construction which it affixed to the indictment in the case of United States v. Biggs, No. 289 [211 U. S. 507, ante, 305, 29 Sup. Ct. Rep. 181], which we have just decided, and applied the same principles which it expounded in the opinion in that case. Disregarding mere immaterial differences in the form of the pleadings, *this case is [525 like the Biggs Case, and is disposed of by the opinion which we have just announced in that case.

Affirmed.

UNITED STATES, Plff. in Err.,
v.

CHARLES H. FREEMAN, Edgar M. Biggs, and Welch W. Nossaman.

(See S. C. Reporter's ed. 525.)

This case is governed by the decision in United States v. Biggs, ante, 305.

[No. 288.]

Argued December 16, 17, 1908. Decided January 4, 1909.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment quashing an indictment for a conspiracy to defraud the United States. Affirmed.

Solicitor General Hoyt and Attorney General Bonaparte argued the cause, and, with Mr. Edwin W. Lawrence, filed a brief for plaintiff in error.

Messrs. Clyde C. Dawson and Charles J. Hughes, Jr., argued the cause and filed a brief for defendants in error.

For contentions of counsel, see their briefs as reported in *United States v. Biggs*, ante, 305.

Mr. Justice White delivered the opinion of the court:

In this case the court below quashed an indictment, and a writ of error direct from this court is prosecuted on behalf of the United States, upon the theory by which it prosecuted the writ in the case of *United States v. Biggs*, No. 289, just decided. [211 U. S. 507, ante, 305, 29 Sup. Ct. Rep. 181] the case presented by the record, omitting references to irrelevant distinctions in the form of the pleadings is like that in the *Biggs* Case, and is controlled and disposed of by the opinion just announced therein. Affirmed.

ALBERT H. RUSCH, Plff. in Err.,
v.

JOHN DUNCAN LAND & MINING COMPANY.

(See S. C. Reporter's ed. 526-529.)

Constitutional law — due process of law — equal protection of the laws — tax titles.

The grantee in a tax deed cannot claim to have been denied due process of law or the equal protection of the laws by Mich. Pub. Laws 1897, act No. 229, requiring the giving of notice to the original owners in order to cut off the right of redemption, on the theory that, by the proceedings under the tax laws, the state acquired an absolute title, which it conveyed by the tax deed, and that the statute operated to divest such title and transfer it to another, where the highest state court holds that, whatever

NOTE.—As to what constitutes due process of law—see notes to *Kuntz v. Sumption*, 2 L.R.A. 655; *People v. O'Brien*, 2 L.R.A. 255; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

On due process of law in tax proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

title the state held, it sold only an interest which was subject to redemption.

[For other cases, see *Constitutional Law*, IV. a, 4; IV. b, 6, in *Digest Sup. Ct.* 1908.]

[No. 53.]

Argued December 14, 1908. Decided January 4, 1909.

IN ERROR to the Supreme Court of the State of Michigan to review a decree which reversed a decree of the Circuit Court of Gogebic County, in that state, dismissing the bill in a suit to remove a cloud on title caused by a tax deed. Affirmed.

The facts are stated in the opinion.

Mr. O. H. Reed argued the cause, and, with Mr. E. C. Chapin, filed a brief for plaintiff in error.

Mr. J. F. Carey argued the cause, and, with Mr. C. C. Lancaster, filed a brief for defendant in error.

Mr. Justice McKenna delivered the opinion of the court:

This is a bill in equity, brought by defendant in error, hereinafter called the land and mining company, against plaintiff in error, in the circuit court for the county of Gogebic, state of Michigan, to remove a cloud from the title to certain lands, caused by a tax deed held by plaintiff in error, and to compel a reconveyance to that company of the land described therein.

The foundation of the suit and the questions in it depend upon the tax laws of the state.

The bill alleged that the land and mining company was the owner in fee simple of the lands, and that Albert H. Rusch, the plaintiff in error here, held a tax deed therefor, issued by the auditor general of the state, for delinquent taxes for the years 1889 to 1901, both inclusive, for which plaintiff in error paid the sum of \$648.74. That the deed was issued after the provisions of act No. 229 of the Laws of 1897 went into effect, and that the notice given by plaintiff in error to the owners of the land of the sale to him did not comply with the provisions of the tax law. It was alleged that plaintiff in error claimed absolute title to the land by virtue of the tax deed and the notice which he claimed to have served upon the then owners of the lands, because the six months allowed for redemption had expired and no redemption had been made. An offer by the land and mining company to refund the amount paid by plaintiff in error, with the percentage and costs required by the laws, is alleged.

The answer of plaintiff in error admitted certain of the allegations of the bill, denied others, and set up, with a recitation of cir-

cumstances, the sufficiency of the notice to cut off the right of redemption of the owners of the lands. And it alleged that the act No. 229 of the Public Laws of 1897, with the amendments thereto, violated certain sections of the Constitution of the state of Michigan and the 14th Amendment of the Constitution of the United States.

After proofs taken, the circuit court dismissed the bill. The court held that the notice given by plaintiff in error to the predecessors in title of the land and mining company of the sale of the lands for taxes and the issuing of deeds therefor was sufficient, under the statute, to cut off the right of redemption, and considered that, in view of such holding, it was not necessary to pass on the constitutionality of act No. 229. The supreme court of the state, however, decided that the notice was insufficient and reversed the decree of the circuit court. Plaintiff in error then sued out this writ of error, asserting jurisdiction in this court, because he contends a question under the 14th Amendment of the Constitution of the United States is presented.

It will be observed that the circuit court held that the notice of the tax sale was sufficient and that the supreme court decided that it was insufficient. Of course, the decision of the supreme court is determinative, and equally, of course, if there is nothing else in the case but a matter of statutory construction, we have nothing to do with it. And that such is the case a brief statement will demonstrate.

528] *In August, 1902, plaintiff in error purchased from the state, under the provision of its statutes, tax titles to the lands involved in this case, receiving two deeds therefor, one conveying a portion of the lands and the other conveying the remainder. Each deed contained the following proviso: "Provided, however, that this indenture is subject to the relevant conditions imposed by act No. 229 of the Public Acts of 1897, as amended." That act requires the grantee in a tax deed, before instituting proceedings to obtain possession, to serve upon the original owner, as shown by the records in the office of the register of deeds, a notice, giving such original owner a period of six months from the time of service of the notice in which he may redeem the property by paying to the owner of the tax title the amount invested therein, and 100 per cent in addition thereto, and the further sum of \$5 for each description of land contained in the tax deed. Plaintiff in error attempted to give that notice, and its sufficiency constituted the controversy in the state courts.

The trial court held it sufficient, as we have seen; the supreme court held it insufficient. The decision of the supreme
53 L. ed.

court would seem to settle the meaning of the statute, and, to get rid of the effect of the decision, plaintiff in error attacks the constitutionality of the statute. He is put thereby in the dilemma of attacking the law upon which he relies for title. The argument by which this anomaly is sought to be sustained is somewhat involved, but, as we understand it, its ultimate reliance is the contention that, by the proceedings under the tax laws, the state acquired the absolute title to the lands, and conveyed that title to plaintiff in error, and that the aim of act No. 229 is to divest such title and transfer it to another; and therefore it is further contended the property of the plaintiff in error is taken without due process of law. There is also a contention, based upon the construction of the laws, that they are unequal in their operation.

If the title was taken subject to redemption, it cannot be said to be divested without due process of law if redemption *was[529 exercised according to law. And how redemption should be exercised and how it could be cut off depended upon the provisions of the statute; and, therefore, the best answer to the assumption of plaintiff in error, that he acquired an indefeasible title, is the answer given by the supreme court of the state, whose province it is to pronounce the meaning of the statutes of the state without question by this court. The court said: "The deeds which the defendant received from the state are expressly made subject to the relevant conditions imposed by act No. 229, Public Acts of 1897, as amended. Whatever the title which the state held, it sold to defendant [plaintiff in error] an interest in the lands which was liable to be divested." And the court sustained the bill and ordered a decree to be entered in accordance with its prayer.

Judgment affirmed.

OSCAR REID, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 529-539.)

Error to district court — amount in dispute.

The limitation with reference to the amount in dispute, prescribed by the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 754), for appeals from or writs of error to a Federal district court sitting as a court of claims,

NOTE.—On direct review in Federal Supreme Court of judgments of circuit or district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

remains in force, notwithstanding the provision of the circuit courts of appeals act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 14, that "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding §§ 5 and 6 of this act are hereby repealed." [For other cases, see Appeal and Error, I. 1, 4, in Digest Sup. Ct. 1908.]

[No. 552.]

Argued December 11, 14, 1908. Decided January 4, 1909.

IN ERROR to the District Court of the United States for the Southern District of New York to review a judgment dismissing a suit against the United States for pay alleged to be due to the petitioner as an enlisted man in the regular Army. Dismissed for want of jurisdiction.

See same case below, 161 Fed. 469.

The facts are stated in the opinion.

Mr. Chase Mellen argued the cause, and, with Mr. Francis Woodbridge, filed a brief for plaintiff in error.

Solicitor General Hoyt argued the cause and filed a brief for defendant in error.

Mr. George B. Davis, Judge-Advocate-General of United States Army, filed a brief as *amicus curiæ*.

Mr. Justice Holmes delivered the opinion of the court:

This is a suit for \$122.26, alleged to be due to the plaintiff in error as an enlisted man in the regular Army from November 16, 1906, to July 18, 1907, when his term of service expired. The plaintiff in error was one of the members of Companies B, C, and D, of the First Battalion of the Twenty-fifth United States Infantry, who were discharged without honor by order of the President on the forme^d date, without trial, after certain disturbances in Brownsville, Texas, in which the order averred members of those companies to have participated. The petition alleges that the plaintiff in error had no part in the disturbance and no knowledge as to who was concerned in it, and denies the power of the President to make such a discharge. The answer, after certain preliminaries, suggests for a second defense that the district court has no jurisdiction, by reason of the act of March 3, 1887, chap. 359, § 2, 24 Stat. at L. 505, as amended by the act of June 27, 1898, chap. 503, § 2, 30 Stat. at L. 494, U. S. Comp. Stat. 1901, p. 753, which provides that the jurisdiction conferred "shall not extend to cases brought to recover fees, salary, or compensation for official serv-

ices of officers of the United States," etc. For a third defense the answer alleges the investigations that were made, the reported impossibility of identifying the culprits unless the soldiers would take it in hand or turn state's evidence, the President's belief that the crimes under consideration were committed by a considerable group of the members of the regiment, and that the greater part of the regiment must know who were the guilty men, and the issuing of the order in consequence, not as a punishment, but for the good of the service; and affirms that it was in accordance with precedent. The third defense was demurred to, the demurrer was sustained, the petition was dismissed on the merits, and this writ of error was brought.

*As the case comes here on the merits, [537 and not on a certificate under the act of March 3, 1891, chap. 517, § 5, 26 Stat. at L. 827, U. S. Comp. Stat. 1901, p. 549, the first question that we have to consider is the jurisdiction of this court; and, on this point, without going further, we must yield to the argument submitted, although not urged, on behalf of the United States. The jurisdiction of the district court is derived from the act of March 3, 1887, chap. 359, § 3, 24 Stat. at L. 505, U. S. Comp. Stat. 1901, p. 754, by which it is made concurrent with that of the court of claims when the amount of the claim does not exceed \$1,000, and that of the circuit court is made concurrent for amounts between one thousand and ten thousand dollars. By § 4, the right of appeal "shall be governed by the law now in force," and by § 9, the plaintiff or the United States, in any suit brought under the provisions of the act, "shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made." This meant the same right of appeal as was given from the court of claims (*United States v. Davis*, 131 U. S. 36, 33 L. ed. 93, 9 Sup. Ct. Rep. 657); so that it hardly admits of doubt that, when that statute went into effect, an appeal or writ of error under it by a claimant demanding less than \$3,000 would have been dismissed. Rev. Stat. § 707, U. S. Comp. Stat. 1901, p. 574. See *Strong v. United States*, 40 Fed. 183.

The real question is whether this limitation is done away with or qualified by the act of March 3, 1891, chap. 517, §§ 5, 6, and 14, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488. By § 14, "all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed." By § 5, writs of error may be taken from the district courts di-

rect to this court when the jurisdiction of the court is in issue, the question of jurisdiction alone being certified; in which case no other question is open. *United States v. Larkin*, 208 U. S. 333, 340, 52 L. ed. 517, 520, 28 Sup. Ct. Rep. 417. That clause does not apply here. The only other clauses of § 5 that are or could be relied upon are, "in any case that involves the construction or application of the Constitution of the United States." "In any case in which the constitutionality of any law of the United States . . . is drawn in question." The latter may be dismissed as having no bearing, although it was mentioned, so that the possible application of § 5, and the consequent inference that the former limitations on the right to come to this court are repealed, so far as this case is concerned, depend on the suggestion in the petition that, by his discharge, the plaintiff was deprived of his property without due process of law.

We shall not discuss that suggestion, because we are of opinion that, in any event, the repealing words that we have quoted do not apply to the special jurisdiction of the district court sitting as a court of claims. Suits against the United States can be maintained, of course, only by permission of the United States, and in the manner and subject to the restrictions that it may see fit to impose. *Kawananakoa v. Polyblank*, 205 U. S. 349, 353, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526. It has given a restricted permission, and has created a pattern jurisdiction in the court of claims, with a limited appeal. The right to take up cases from that court by writ of error still is limited as heretofore. It would not be expected that a different rule would be laid down for other courts that, for convenience, are allowed to take its place, when originally the rule was the same. It does not seem to us that Congress has done so unlikely a thing. The act of March 3, 1891, chap. 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488, is dealing with general, not special, jurisdiction. It has been decided in some cases of special jurisdiction that there is an implied exception to almost equally broad words in the same act. *United States v. Dalcour*, 203 U. S. 408, 51 L. ed. 248, 27 Sup. Ct. Rep. 58. Congress, when its mind was directed to the specific question, determined for all courts what the amount must be before the grace of the sovereign power would grant more than one hearing. It has not changed that amount for the usual case. A change looking to the ordinary business of the courts should not be held to embrace that, merely on the strength of words general enough to include it, when the policy of the repealing

law, and the policy of the law alleged to be repealed, have such different directions, and when it appears that the general policy of the latter still is maintained. The limitation with reference to amount unquestionably remains in force for the district court in cases outside of the act of 1891, § 5, as well as for the court of claims. In our opinion, the act of 1891, § 5, was not intended to create exceptions, when no such exceptions exist for the court of claims.

We observe that the plaintiff in error gives a hint at dissatisfaction with the government for raising this point. But jurisdiction is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority, and it is no part of the defendant's duty to help in obtaining an unauthorized judgment by surprise.

Writ of error dismissed.

JOHN McLEAN, Plff. in Err.,
v.

STATE OF ARKANSAS.

(See S. C. Reporter's ed. 539-552.)

Constitutional law — liberty of contract — police power.

1. The liberty of contract secured by U. S. Const., 14th Amend., against state invasion, is not infringed by the provision of Ark. Acts 1905, chap. 219, § 1, under which miners employed at quantity rates are prevented from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine, but such statute is a valid exercise of the police power.

[For other cases, see Constitutional Law, 605-607, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification.

2. The exemption of coal mines not employing ten or more men from the operation of Ark. Acts 1905, chap. 219, § 1, under which miners employed at quantity rates are prevented from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally pro-

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

As to the constitutionality of statutes restricting contracts and business—see note to *State v. Loomis*, 21 L.R.A. 789.

duced in the mine, does not render such statute invalid under U. S. Const., 14th Amend., as denying the equal protection of the laws.

[For other cases, see Constitutional Law, 340-342, in Digest Sup. Ct. 1908.]

[No. 29.]

Argued and submitted November 30, 1908.

Decided January 4, 1909.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a conviction in the Circuit Court of Sebastian County, in that state, for screening coal before it has been weighed and credited to the miner sending it to the surface. Affirmed.

See same case below, 81 Ark. 304, 98 S. W. 729, 11 A. & E. Ann. Cas. 72.

The facts are stated in the opinion.

Mr. Daniel B. Holmes argued the cause and filed a brief for plaintiff in error:

The act violates the Fourteenth Amendment to the Constitution by restricting the right to contract, by taking property without due process of law, by unlawful discrimination, and by denying to certain operators and workers in coal mines the right of civil liberty and the pursuit of happiness.

Ritchie v. People, 155 Ill. 98, 29 L.R.A. 79, 46 Am. St. Rep. 315, 40 N. E. 454; Re Morgan, 26 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1072; Allgeyer v. Louisiana, 165 U. S. 578, 589, 41 L. ed. 832, 835, 17 Sup. Ct. Rep. 427; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; Ramsey v. People, 142 Ill. 380, 17 L.R.A. 853, 32 N. E. 364; State v. Wilson, 61 Kan. 32, 47 L.R.A. 71, 58 Pac. 981; Re House Bill No. 203, 21 Colo. 27, 39 Pac. 432; Whitebreast Fuel Co. v. People, 175 Ill. 51, 51 N. E. 853; Kellyville Coal Co. v. Harrier, 207 Ill. 624, 99 Am. St. Rep. 240, 69 N. E. 927; State v. Loomis, 115 Mo. 316, 21 L.R.A. 789, 22 S. W. 350; Godcharles v. Wigeman, 113 Pa. 431, 6 Atl. 354; Braceville Coal Co. v. People, 147 Ill. 66, 22 L.R.A. 340, 37 Am. St. Rep. 206, 35 N. E. 62; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Ex parte Kubach, 85 Cal. 274, 9 L.R.A. 482, 20 Am. St. Rep. 226, 24 Pac. 737; Massie v. Cessna (Oct. 26, 1908; Ill.) People ex rel. Tyroler v. Warden, 157 N. Y. 116, 43 L.R.A. 264, 68 Am. St. Rep. 763, 51 N. E. 1011; Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 757, 28 L. ed. 591, 4 Sup. Ct. Rep. 652; Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; Lawton v. Steele, 152 U. S. 137, 38 L. ed. 388, 14 Sup. Ct. Rep. 499; Lochner

v. New York, 198 U. S. 57, 49 L. ed. 941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; People v. Gillson, 109 N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Live Stock Dealers' & Butchers' Asso. v. Crescent City L. S. L. & S. H. Co. 1 Abb. (U. S.) 388, Fed. Cas. No. 8,408; Re Aubrey, 36 Wash. 308, 104 Am. St. Rep. 952, 78 Pac. 900, 1 A. & E. Ann. Cas. 927; Horwich v. Walker-Gordon Laboratory Co. 205 Ill. 497, 98 Am. St. Rep. 254, 68 N. E. 938; Crescent Liquor Co. v. Platt, 148 Fed. 902; Ruhstrat v. People, 185 Ill. 133, 49 L.R.A. 181, 76 Am. St. Rep. 30, 57 N. E. 41; Republic Iron & Steel Co. v. State, 160 Ind. 379, 62 L.R.A. 136, 66 N. E. 1005; Frank L. Fisher Co. v. Woods, 187 N. Y. 90, 12 L.R.A. (N.S.) 707, 79 N. E. 837.

The act is clearly unconstitutional and void because of the classification which it adopts of operators and laborers in mines where ten or more men are employed underground, leaving operators and laborers in all other coal mines free to make their own bargains and contracts for labor therein.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; State v. Haun, supra; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627.

Mr. James Brizzolara submitted the cause for defendant in error. Messrs. Henry L. Fitzhugh and William F. Kirby were on the brief:

Legislation for the prevention of fraud in weights and measures dates from the earliest period of English history.

Freund, Pol. Power, §§ 272-275.

The Arkansas screen law is substantially the same as, we might say almost identical with, the statutes of several other states. The same law has been enforced for many years in Missouri, Kansas, Indiana, West Virginia, and in several other states.

State v. Peel Splint Coal Co. 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000; State v. Wilson, 61 Kan. 34, 47 L.R.A. 71, 58 Pac. 981; Woodson v. State, 69 Ark. 521, 65 S. W. 465.

The purpose of these statutes being to furnish a reliable means upon which to base the miner's compensation, and to protect him in the payment for all coal he mines, he not only has the right to have it justly and honestly weighed in the original form in which he loaded it, but he has the right also to have a true record kept of it.

Snyder, Mines, § 1675.

Many statutes which go much further than this in abridging the liberty of con-

tract have been sustained by courts of last resort.

Patterson v. The Eudora, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821; *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1; *Re Considine*, 83 Fed. 157; *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Pierce v. Kimball*, 9 Me. 54, 23 Am. Dec. 537; *State v. Moore*, 104 N. C. 714, 17 Am. St. Rep. 696, 10 S. E. 143.

If the Arkansas screen law was passed for the purpose of preventing fraud, or to secure some reliable means upon which to base the minor's compensation, or to promote the public convenience or the general prosperity, and has a tendency to accomplish all or any of such purposes, it is a valid exercise of the police power, though not purporting to deal with the public health, morals, or safety.

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289.

The legislature has the right to discriminate between different classes of corporations and individuals.

Freund, Pol. Power, §§ 721-738; *Missouri P. R. Co. v. Mackey*, 127 U. S. 205, 32 L. ed. 107, 8 Sup. Ct. Rep. 1161; *St. Louis, I. M. & S. R. Co. v. Paul*, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Mason v. State*, 179 U. S. 328, 45 L. ed. 214, 21 Sup. Ct. Rep. 125; *Fidelity & C. Co. v. Freeman*, 54 L.R.A. 680, 48 C. C. A. 692, 109 Fed. 847; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651; *Harding v. American Glucose Co.* 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; *Re Oberg*, 21 Or. 406, 14 L.R.A. 577, 28 Pac. 130; *State ex rel. Chandler v. Main*, 16 Wis. 399; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Wurts v. Hoagland*, 114 U. S. 606, 29 L. ed. 229, 5 Sup. Ct. Rep. 1086; *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 25 L. ed. 989; *Sullivan v. Haug*, 82 Mich. 548, 10 L.R.A. 263, 46 N. W. 795; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; 53 L. ed.

New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 38 L. ed. 269, 14 Sup. Ct. Rep. 437; *Brass v. North Dakota*, 153 U. S. 391, 38 L. ed. 757, 4 Inters. Com. Rep. 670, 14 Sup. Ct. Rep. 857; *Lowe v. Kansas*, 163 U. S. 81, 41 L. ed. 78, 16 Sup. Ct. Rep. 1031; *Duncan v. Missouri*, 152 U. S. 377, 38 L. ed. 485, 14 Sup. Ct. Rep. 570; *Munn v. Illinois*, 94 U. S. 133, 24 L. ed. 86.

Equal protection is not denied where the law operates alike upon all persons similarly situated.

Walston v. Nevin, 128 U. S. 578, 32 L. ed. 544, 9 Sup. Ct. Rep. 192; *State v. Schlemmer*, 42 Ia. Ann. 1166, 10 L.R.A. 135, 8 So. 307; *State v. Moore*, *supra*; *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10; *Barbier v. Connolly*, 113 U. S. 32, 28 L. ed. 925, 5 Sup. Ct. Rep. 357; *Soon Hing v. Crowley*, 113 U. S. 709, 28 L. ed. 1147, 5 Sup. Ct. Rep. 730; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Minneapolis & St. L. R. Co. v. Beckwith*, 129 U. S. 26, 32 L. ed. 585, 9 Sup. Ct. Rep. 207; *Kentucky R. Tax Cases*, 115 U. S. 321, 29 L. ed. 414, 6 Sup. Ct. Rep. 57; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 282, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594.

Plaintiff in error would argue that it is just as important for the protection of employees that the hoisting ropes used in mines employing nine men should be examined daily as in one employing eleven men. The same argument could be made with reference to fencing shafts and covering cages. These statutes have all been sustained as a legitimate exercise of the police power of the state for the protection of the employees.

Hancock v. Yaden, 121 Ind. 366, 6 L.R.A. 576, 16 Am. St. Rep. 396, 23 N. E. 253; *Smith v. State*, 90 Tenn. 575, 18 S. W. 248; *Consolidated Coal Co. v. Illinois*, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616.

The legislature must decide when the exigency exists, and the courts cannot set aside a statute for the reason that it may be, in their opinion, unwise or unnecessary.

Dow v. Beidelman and *Bacon v. Walker*, *supra*.

Mr. Justice Day delivered the opinion of the court:

This proceeding is brought to review the judgment of the supreme court of Arkansas (81 Ark. 304, 98 S. W. 729), affirming a conviction of the plaintiff in error for violation of a statute of the state of Arkansas, entitled "An Act to Provide for the *Weigh-[543] ing of Coal Mined in the State of Arkansas as It Comes from the Mine, and before It Is Passed over a Screen of Any Kind." The act provides:

"Sec. 1. It shall be unlawful for any

mine owner, lessee, or operator of coal mines in this state, where ten or more men are employed underground, employing miners at bushel or ton rates, or other quantity, to pass the output of coal mined by said miners over any screen or any other device which shall take any part from the value thereof, before the same shall have been weighed and duly credited to the employee sending the same to the surface, and accounted for at the legal rate of weights fixed by the laws of Arkansas; and no employee, within the meaning of this act, shall be deemed to have waived any right accruing to him under this section by any contract he may make contrary to the provisions thereof, and any provisions, contract, or agreement between mine owners, lessees, or operators thereof, and the miners employed therein, whereby the provisions of this act are waived, modified, or annulled, shall be void and of no effect, and the coal sent to the surface shall be accepted or rejected; and, if accepted, shall be weighed in accordance with the provisions of this act; and right of action shall not be invalidated by reason of any contract or agreement; and any owner, agent, lessee, or operator of any coal mine in this state, where ten or more men are employed underground, who shall knowingly violate any of the provisions of this section, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be punished by a fine of not less than \$200 nor more than \$500 for each offense, or by imprisonment in the county jail for a period of not less than sixty days, nor more than six months, or both such fine and imprisonment; and each day any mine or mines are operated thereafter shall be a separate and distinct offense; proceedings to be instituted in any court having competent jurisdiction." (Acts 1905, chap. 219, § 1.)

The case was tried upon an agreed statement of facts, as follows:

544] "That the Bolen-Darnall Coal Company is a corporation organized and existing under the laws of the state of Missouri, and is also doing business under the laws of the state of Arkansas, and has complied with the laws of Arkansas permitting foreign corporations to transact and do business within said state.

"It is further agreed that John McLean, defendant, is the managing agent of the said Bolen-Darnall Coal Company, and, as such, has charge of the coal mine of said company situated near Hartford, in Sebastian county, Arkansas.

"It is further agreed that the said Bolen-Darnall Coal Company employs more than ten men to work underground in its mine sit-

uated near Hartford, of which the said John McLean is agent and manager.

"It is further agreed that the said Bolen-Darnall Coal Company, by and through said John McLean, as its agent and manager, did, on the 19th day of June, 1906, in Greenwood district of said Sebastian county, employ one W. H. Dempsey and others, coal miners, to mine coal underground in said mine by the ton at the rate and price of 90 cents per ton for screened coal, and that the said John McLean, in the said district and county, did knowingly pass the output of coal, so mined and sent up from underground by the said W. H. Dempsey and others, over a screen, according to and as provided by a contract between it and the said Dempsey and others, and paid the said Dempsey and others for only the coal that passed over said screen, according to and as provided under the contract, and paid or allowed them nothing for the coal which passed through said screen, part of the value of said coal having passed through said screen, which part of said coal was not weighed or accredited to the said Dempsey and others, and for which they received no pay; said coal not having been weighed or accredited to the said Dempsey or others before the same was passed over said screen, as provided for by the statutes of Arkansas.

It is further agreed that more than ten men were employed and did work under said employment underground in mining coal for the said Bolen-Darnall Coal Company, in said mine aforesaid, at said time; and it is also agreed that there are coal mines in said state and county operated by both corporations and individuals in which less than ten men are employed underground by the ton and bushel rates.

"It is further agreed that the said John McLean did violate the provisions of § 1, act No. 219, duly passed by the legislature of Arkansas in 1905, which law went into operation and became effective on the 1st day of April, 1906, as hereinabove set out, and the only question herein raised being the validity of said act of the legislature aforesaid, under the law and facts herein."

The objections to the judgment of the state supreme court of a constitutional nature are twofold: First, that the statute is an unwarranted invasion of the liberty of contract secured by the 14th Amendment of the Constitution of the United States; second, that the law, being applicable only to mines where more than ten men are employed, is discriminatory, and deprives the plaintiff in error of the equal protection of the laws, within the inhibition of the same Amendment.

That the Constitution of the United States, in the 14th Amendment thereof,

protects the right to make contracts for the sale of labor, and the right to carry on trade or business, against hostile state legislation, has been affirmed in decisions of this court, and we have no disposition to question those cases in which the right has been upheld and maintained against such legislation. *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277. But, in many cases in this court, the right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the state, enacted for the protection of the public health, safety, or welfare, the same may be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications 546] of the right of freedom of contract have been applied and enforced. Some of them are collected in *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383, in which it was held that the hours of work in mines might be limited.

In *Knoxville Iron Co. v. Harbison*, 183 U. S. 13, 46 L. ed. 55, 22 Sup. Ct. Rep. 1, it was held that an act of the legislature of Tennessee, requiring the redemption in cash of store orders or other evidences of indebtedness issued by employers in payment of wages due to employees, did not conflict with any provisions of the Constitution of the United States, protecting the right of contract.

In *Frisbie v. United States*, 157 U. S. 160, 39 L. ed. 657, 15 Sup. Ct. Rep. 586, the act of Congress prohibiting attorneys from contracting for a larger fee than \$10 for prosecuting pension claims was held to be a valid exercise of police power.

In *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730, a statute of California, making it unlawful for employees to work in laundries between the hours of 10 P. M. and 6 A. M. was sustained.

The statute fixing maximum charges for the storage of grain, and prohibiting contracts for larger amounts, was held valid. *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

In *Patterson v. The Eudora*, 190 U. S. 169, 47 L. ed. 1002, 23 Sup. Ct. Rep. 821, this court held that an act of Congress making it a misdemeanor for a shipmaster to pay a sailor any part of his wages in advance was held to be valid.

In *Gundling v. Chicago*, 177 U. S. 183, 44 L. ed. 725, 20 Sup. Ct. Rep. 633, this court summarized the doctrine as follows:

"Regulations respecting the pursuit of 53 L. ed.,

a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business, or occupation they shall apply, are questions for the state to determine, and their determination comes within the proper exercise of the police power by the state; and, unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed *without due[547 process of law, they do not extend beyond the power of the state to pass, and they form no subject for Federal interference."

In *Jacobson v. Massachusetts*, 197 U. S. 11, 49 L. ed. 643, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765, this court said:

"The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times, and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

It is, then, the established doctrine of this court that the liberty of contract is not universal, and is subject to restrictions passed by the legislative branch of the government in the exercise of its power to protect the safety, health, and welfare of the people.

It is also true that the police power of the state is not unlimited, and is subject to judicial review; and, when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution. While the courts can set aside legislative enactments upon this ground, the principles upon which such interference is warranted are as well settled as is the right of judicial interference itself.

The legislature, being familiar with local conditions, is, primarily, the judge of the necessity of such enactments. The mere fact that a court may differ with the legislature in its views of public policy, or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference, unless the act in question is unmistakably and palpably in excess of legislative power. *Jacobson v. Massachusetts*, supra; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Atkin v. Kansas*, 191 U. S. 207, 223, 48 L. ed. 148, 158, 24 Sup. Ct. Rep. 124.

If the law in controversy has a reasonable

relation to the protection of the public health, safety, or welfare, it is not to be set aside because the judiciary may be of opinion that the act will fail of its purpose, or 548]because it is thought to be an *unwise exertion of the authority vested in the legislative branch of the government.

We take it that there is no dispute about the fundamental propositions of law which we have thus far stated; the difficulties and differences of opinion arise in their application to the facts of a given case. Is the act in question an arbitrary interference with the right of contract, and is there no reasonable ground upon which the legislature, acting within its conceded powers, could pass such a law? Looking to the law itself, we find its curtailment of the right of free contract to consist in the requirement that the coal mined shall not be passed over any screen where the miner is employed at quantity rates, whereby any part of the value thereof is taken from it before the same shall have been weighed and credited to the employee sending the same to the surface; and the coal is required to be accounted for according to the legal rate of weights, as fixed by the law of Arkansas, and contracts contrary to this provision are invalid. This law does not prevent the operator from screening the coal before it is sent to market; it does not prevent a contract for mining coal by the day, week, or month; it does not prevent the operator from rejecting coal improperly or negligently mined, and shown to be unduly mingled with dirt or refuse. The objection upon the ground of interference with the right of contract rests upon the inhibition of contracts which prevent the miner employed at quantity rates from contracting for wages upon the basis of screened coal instead of the weight of the coal as originally produced in the mine.

If there existed a condition of affairs concerning which the legislature of the state, exercising its conceded right to enact laws for the protection of the health, safety, or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail.

While such laws have not been uniformly 549]sustained when *brought before the state courts, the legislatures of a number of the states have deemed them necessary in the public interests. Such laws have been passed in Illinois, West Virginia, Colorado, and perhaps in other states. In Illinois they have been condemned as unconstitutional. *Ramsey v. People*, 142 Ill. 380, 17

L.R.A. 853, 32 N. E. 364. The same conclusion has been reached in Colorado, citing and following the Illinois case, *Re House Bill No. 203*, 21 Colo. 27, 39 Pac. 431.

In West Virginia, while at first sustained by a unanimous court, such an act was afterwards, upon rehearing, maintained by a divided court. *State v. Peel Splint Coal Co.* 36 W. Va. 802, 17 L.R.A. 385, 15 S. E. 1000.

We are not disposed to discuss these state cases. It is enough for our present purpose to say that the legislative bodies of the states referred to, in the exercise of the right of judgment conferred upon them, have deemed such laws to be necessary.

Conditions which may have led to such legislation were the subject of very full investigation by the industrial commission authorized by Congress by the act of June 18, 1898. 30 Stat. at L. 476, chap. 466. Volume 12 of the report of that commission is devoted to the subject of "Capital and Labor Employed in the Mining Industry." In that investigation, as the report shows, many witnesses were called and testified concerning the conditions of the mining industry in this country, and a number of them gave their views as to the use of screens as a means of determining the compensation to be paid operatives in coal mines. Differences of opinion were developed in the testimony. Some witnesses favored the "run of the mine" system, by which the coal is weighed and paid for in the form in which it is originally mined; others thought the screens useful in the business, promotive of skilled mining, and that they worked no practical discrimination against the miner. A number of the witnesses expressed opinions, based upon their experience in the mining industry, that disputes concerning the introduction and use of screens had led to frequent and sometimes heated controversies between the operators and the miners. This condition was *testified to have been[550 the result, not only of the introduction of screens as a basis of paying the miners for screened coal only, but, after the screens had been introduced, differences had arisen because of the disarrangement of the parts of the screen, resulting in weakening it, or in increasing the size of the meshes through which the coal passed, thereby preventing a correct measurement of the coal as the basis of paying the miner's wages.

We are unable to say, in the light of the conditions shown in the public inquiry referred to, and in the necessity for such laws, evinced in the enactments of the legislatures of various states, that this law had no reasonable relation to the protection of a large class of laborers in the receipt of their just dues and in the promotion of the

harmonious relations of capital and labor engaged in a great industry in the state.

Laws tending to prevent fraud and to require honest weights and measures in the transaction of business have frequently been sustained in the courts, although, in compelling certain modes of dealing, they interfere with the freedom of contract. Many cases are collected in Mr. Freund's book on "Police Power," wherein that author refers to laws which have been sustained, regulating the size of loaves of bread when sold in the market; requiring the sale of coal in quantities of 500 pounds or more, by weight; that milk shall be sold in wine measure, and kindred enactments. § 274.

Upon this branch of the case it is argued for the validity of this law that its tendency is to require the miner to be honestly paid for the coal actually mined and sold. It is insisted that the miner is deprived of a portion of his just due when paid upon the basis of screened coal, because, while the price may be higher, and theoretically he may be compensated for all the coal mined in the price paid him for screened coal, that practically, owing to the manner of the operation of the screen itself, and its different operation when differently adjusted, or when out of order, the miner is deprived of payment for the coal which he has actually 551]mined. It is not denied that the *coal which passes through the screen is sold in the market. It is not for us to say whether these are actual conditions. It is sufficient to say that it was a situation brought to the attention of the legislature, concerning which it was entitled to judge and act for itself in the exercise of its lawful power to pass remedial legislation.

The law is attacked upon the further ground that it denies the equal protection of the law, in that it is applicable only to mines employing ten or more men. This question is closely analogous to one that was before this court in the case of Consolidated Coal Co. v. Illinois, 185 U. S. 203, 46 L. ed. 872, 22 Sup. Ct. Rep. 616, wherein an inspection law of the state was argued to be clearly unconstitutional by reason of its limitation to mines where more than five men are employed at any one time, and in that case, as in this, it was contended that the classification was arbitrary and unreasonable,—that there was no just reason for the discrimination. Of that contention this court said (p. 207):

"This is a species of classification which the legislature is at liberty to adopt; provided it be not wholly arbitrary or unreasonable, as it was in *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30, in which an act defining what should

constitute public stock yards, and regulating all charges connected therewith, was held to be unconstitutional, because it applied only to one particular company, and not to other companies or corporations engaged in a like business in Kansas, and thereby denied to that company the equal protection of the laws. In the case under consideration there is no attempt arbitrarily to select one mine for inspection, but only to assume that mines which are worked upon so small a scale as to require only five operatives would not be likely to need the careful inspection provided for the larger mines, where the workings were carried on upon a larger scale or at a greater depth from the surface, and where a much larger force would be necessary for their successful operation. It is quite evident that a mine which is operated by only five men could scarcely have passed the experimental stage, or that precautions necessary in the operation *of coal mines of ordi- [552 nary magnitude would be required in such cases. There was clearly reasonable foundation for a discrimination here."

This language is equally apposite in the present case. There is no attempt at unjust or unreasonable discrimination. The law is alike applicable to all mines in the state employing more than ten men underground. It may be presumed to practically regulate the industry when conducted on any considerable scale. We cannot say that there was no reason for exempting from its provisions mines so small as to be in the experimental or formative state, and affecting but few men, and not requiring regulation in the interest of the public health, safety, or welfare. We cannot hold, therefore, that this law is so palpably in violation of the constitutional rights involved as to require us, in the exercise of the right of judicial review, to reverse the judgment of the supreme court of Arkansas, which has affirmed its validity. The judgment of that court is affirmed.

Dissenting: Mr. Justice Brewer and Mr. Justice Peckham.

B. H. HARDAWAY and R. P. Prowell,
Doing Business as Hardaway & Prowell,
Appts.,

v.

NATIONAL SURETY COMPANY.

(See S. C. Reporter's ed. 552-562.)

Bonds — of public contractor — subcontractor — sureties.

1. Persons who, in view of the financial embarrassment of a public contractor, un-

undertake to superintend the completion of a public work and to furnish the necessary funds, for which they are to be paid by an assignment of the reserve fund in the hands of the government and by checks or payments under the original contract, are not subcontractors furnishing labor and materials for the fulfilment of such original contract, so as to be entitled to the protection of the bond executed pursuant to the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), conditioned for the prompt payment by the original contractors to all persons supplying them with labor or materials in the prosecution of the work.

[For other cases, see Bonds, II. in Digest Sup. Ct. 1908.]

Bonds — of public contractor — extent of surety's liability.

2. A surety on the bond of a public contractor is not liable on a claim for labor and materials furnished by the assignees of the contract, where the contract of assignment obligates the assignor only to assign the reserve fund in the hands of the government, and to turn over the checks or payments under the original contract.

[For other cases, see Bonds, II. b, in Digest Sup. Ct. 1908.]

Subrogation — right of surety.

3. The right of a surety for a government contractor to be subrogated, in case of loss, to the contractor's right to the reserve fund in the hands of the government, representing work done prior to an assignment of the contract, is superior to any rights of the assignees.

[For other cases, see Subrogation, IV. in Digest Sup. Ct. 1908.]

[No. 44.]

Argued December 8, 1908. Decided January 4, 1909.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the Circuit Court for the Western District of Kentucky, denying a recovery against the surety on a bond to secure the performance of a public contract. Affirmed.

See same case below, 80 C. C. A. 283, 150 Fed. 465.

The facts are stated in the opinion.

Messrs. Temple Bodley and John Bryce Baskin argued the cause, and, with Messrs. J. Manly Foster and W. B. Oliver, filed a brief for appellants:

NOTE.—As to the right of sureties on contractor's bond, who perform contract on abandonment by contractor, to moneys unpaid on contract, as against assignees or creditors of contractors—see case note to *Labbe v. Bernard*, 14 L.R.A. (N.S.) 457.

On the doctrine of subrogation generally—see note to *German Bank v. United States*, 37 L. ed. U. S. 564.

Agreeing to pay the cost of the work plus 15 per cent instead of a lump sum does not destroy the subcontract feature of the arrangement.

Wetzel & T. R. Co. v. Tennis Bros. Co. 75 C. C. A. 266, 145 Fed. 458, 7 A. & E. Ann. Cas. 426.

Superintending the work was supplying labor.

Flagstaff Silver Min. Co. v. Cullins, 104 U. S. 176, 26 L. ed. 704; *Central Trust Co. v. Richmond, N. I. & B. R. Co.* 54 Fed. 728; *Tennis Bros. Co. v. Wetzel & T. R. Co.* 140 Fed. 193.

Money loaned to a contractor to be used in procuring labor and materials, and so used, may be recovered from the contractor's surety.

Prairie State Nat. Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142; *Henningsen v. United States Fidelity & G. Co.* 74 C. C. A. 484, 143 Fed. 812.

The construction placed upon an ambiguous contract by the parties is an aid which may always be called in.

Knox County v. Ninth Nat. Bank, 147 U. S. 100, 37 L. ed. 96, 13 Sup. Ct. Rep. 267.

Even if the contract of February 5, 1901, be treated as an assignment to Coyne of the government contract, or as substituting him for his firm, the surety is still bound.

United States use of *Hill v. American Surety Co.* 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168; *City Trust, S. D. & Surety Co. v. United States*, 77 C. C. A. 397, 147 Fed. 155; *United States use of Vermont Marble Co. v. Burgdof*, 13 App. D. C. 506; *Adams v. Haigler*, 123 Ga. 659, 51 S. E. 638; *Kaufmann v. Cooper*, 46 Neb. 645, 65 N. W. 796; *Abbott v. Morrisette*, 46 Minn. 10, 48 N. W. 416; *Leader Printing Co. v. Lowry*, 9 Okla. 89, 59 Pac. 242; *Drumheller v. American Surety Co.* 30 Wash. 530, 71 Pac. 25.

Where contractors engage a subcontractor, and labor and materials are supplied to him, this is the same in effect as supplying labor and materials to the chief contractors. That is to say, the labor thus supplied to the contractor, being by or through the remote procurement of the chief contractors, must be deemed to have been supplied to such chief contractors.

United States use of *Hill v. American Surety Co.* supra.

Where labor and materials are furnished by third parties, though not subcontractors, with the consent of the chief contractors, it is the same in effect as supplying the chief contractors.

Mullin v. United States, 48 C. C. A. 677, 109 Fed. 819.

Messrs. William W. Watts and Henry Flitts argued the cause, and, with Mr. William J. Griffin, filed a brief for appellee:

Hardaway & Prowell's agreement with Coyne expressly eliminated the financial resources of Willard and Cornwell, as a barrier between the surety and ultimate loss. In event of loss, appellants agreed to stand without recourse as against at least two of the three principals in the bond. That this novation released the surety is elementary.

1 Brandt, Suretyship, 3d ed. p. 286; 1 Lindley, partn. 2d Am. ed. pp. 245, 267; Child. Suretyship & Guaranty, p. 209; Byers v. Hickman Grain Co. 112 Iowa, 451, 84 N. W. 500; Prior v. Kiso, 81 Mo. 250; State v. Boon, 44 Mo. 254; Connecticut Mut. L. Ins. Co. v. Bowler, Holmes, 263, Fed. Cas. No. 3,106; Cremer v. Higginson, 1 Mason, 323, Fed. Cas. No. 3,383; Bill v. Barker, 16 Gray, 62.

The surety for the performance of the engagement of a firm is released if there be any change in its membership unless he agrees to remain bound.

1 Brandt, Suretyship, p. 829; Crescent Brewing Co. v. Handley, 90 Ala. 486, 7 So. 912; White sewing Mach. Co. v. Hines, 61 Mich. 423, 28 N. W. 157; Parham Sewing Mach. Co. v. Brock, 113 Mass. 194; Dupee v. Blake, 143 Ill. 453, 35 N. E. 867.

Recovery against the surety is unconscionable.

United States use of Heise v. American Bonding & T. Co. 89 Fed. 921.

If appellants were subcontractors, they were such for a fixed price, which has been paid.

Prairie State Nat. Bank v. United States, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142; Henningsen v. United States Fidelity & G. Co. 74 C. C. A. 484, 143 Fed. 810.

This claim is an analogy to the claim of the bank which lent money for the purpose of paying for work and material, and even, under the arrangement, went so far as to pay money direct to the laborer, and to take up the labor check as evidence of payment. That bank was held not to be protected by the terms of the bond.

United States use of Fidelity Nat. Bank v. Rundle, 52 L.R.A. 505, 46 C. C. A. 251, 107 Fed. 227.

The object of the bond is to require the surety to secure the payment for the visible material that was furnished for direct use and incorporated in that work, and the payment of wages to the men whose services were directly employed in doing the work. Thereby the surety had a direct conception of his liability. He was not compelled to see to it that money borrowed or advanced to

aid in the prosecution of the work should be repaid.

United States v. Kimpland, 93 Fed. 406.

While the bond creates an obligation *in personam*, and not a right *in rem*; and rights under it are to be worked out under principles fixing or discharging personal liability (Sears v. Mahoney, 66 Fed. 860), yet, in determining what persons are intended to be made obligees in the second aspect of the bond, we may inquire to what persons the mechanics' lien is extended.

It has been uniformly held that no lien can be had for money loaned, with which material was purchased, or labor paid, in favor of the lender.

20 Am. & Eng. Enc. Law, 2d ed. p. 349; Godeffroy v. Caldwell, 2 Cal. 489, 56 Am. Dec. 360; Williams v. Bradford (N. J. Ch.) 21 Atl. 331; International Bldg. & L. Asso. v. Fortassain (Tex. Civ. App.) 23 S. W. 496; Gaylord v. Loughridge, 50 Tex. 573; First Municipality v. Bell, 4 La. Ann. 121; Hamilton v. Stillwaugh, 11 Ohio C. C. 182.

Nor can a lien be had in favor of one who lends his credit to another to enable him to purchase materials.

20 Am. & Eng. Enc. Law, 2d ed. p. 349.

A person who advances money to a vendee to pay for land is not entitled to the vendor's lien, even though the vendee may have promised him such, or he may have taken a mortgage or a note reciting the alleged existence of such lien.

29 Am. & Eng. Enc. Law, 2d ed. p. 749; Chapman v. Abrahams, 61 Ala. 108; Jones v. Kennedy, 138 Ala. 502, 35 So. 465.

A statutory lien on steamboats for work done or material furnished does not extend to a claim for money loaned to the master, to be applied by him in discharge of debts which were a statutory lien upon the vessel.

The James Battle v. Waring, 39 Ala. 180.

An officer of a corporation, who, without any obligation on his part, and merely to befriend laborers employed by the company, advances the amount of their wages without an assignment of their claims, cannot be subrogated to such liens. Nor will a merchant who pays store orders given to workmen for their wages be subrogated to a preferred claim for wages, conferred upon such workmen by statute.

27 Am. & Eng. Enc. Law, 2d ed. p. 257.

A person who advances rent on land to a tenant will not be subrogated to the landlord's lien in the absence of any agreement for subrogation.

Gerson v. Norman, 111 Ala. 433, 20 So. 453; Bostick v. Ammons, 63 S. C. 302, 41 S. E. 310.

A person advancing money to a married woman for the purchase of necessities is not

subrogated to the favored position of the person furnishing such necessities.

Skinner v. Tirrell, 159 Mass. 474, 21 L.R.A. 673, 38 Am. St. Rep. 447, 34 N. E. 692.

While the doctrine of subrogation has been evolved from the judicial conscience for the purpose of putting one man in another's place, to avoid certain conditions of hardship, this doctrine has never been applied to a mere volunteer in paying another's debts or lending another money; such volunteer having suffered no hardships from the universality of the common law.

Prairie State Nat. Bank v. United States, supra; *Ætna L. Ins. Co. v. Middleport*, 124 U. S. 534, 31 L. ed. 537, 8 Sup. Ct. Rep. 625; *Greenville Sav. Bank v. Lawrence*, 22 C. C. A. 646, 42 U. S. App. 179, 76 Fed. 545; *Sheldon, Subrogation*, § 240. See also *Central Trust Co. v. Bridges*, 6 C. C. A. 539, 16 U. S. App. 115, 57 Fed. 774.

Mr. Justice Day delivered the opinion of the court:

This is an appeal from a decree of the circuit court of appeals for the sixth circuit, affirming a decree of the circuit court of the United States for the western district of Kentucky, whereby the appellants Hardaway and Prowell were denied the right to recover against the appellee, the National Surety Company, as surety for the faithful performance of a certain contract entered into on September 28, 1899, between the United States and a firm of contractors composed of James E. Willard, Charles L. Cornwell, and Joseph Coyne, doing business as Willard & Cornwell. The contract was for the construction of a lock and dam No. 4, in the Black Warrior river, near Tuscaloosa, Alabama. Bond was given in accordance with the requirements of the act of Congress approved August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), in order to secure the faithful performance of the contract.

The contract has been kept so far as the United States is concerned, and the surety is relieved from obligation in that respect. The contention in this case involves the construction and application of that condition 554] of the bond which requires *the contractors to "promptly make full payment to all persons supplying them labor or materials in the prosecution of the work, provided for in said contract."

The question for consideration here is, under the circumstances of the case, can Hardaway and Prowell recover upon the bond on their claim as for labor done and material furnished within the terms thereof? The record discloses that the original contractors carried on the work until Feb-

ruary 5, 1901, when they made an agreement between themselves and Coyne, by which agreement Coyne was to pay the debts of the firm, to make all future purchases in his own name, and to receive all profits from the contract. After February 5, 1901, Coyne carried on the work. The government made the checks payable to Willard and Cornwell as before, in accordance with the terms of the contract. On June 2, 1903, Coyne, having become financially unable to complete the contract, made a contract in writing with Hardaway and Prowell, which we shall hereinafter set out in full, concerning the work.

Owing to freshets and washouts, as is contended by appellants, it became necessary to do over much of the work, and after its completion appellants made a claim for \$32,757.34 interest included to March 1, 1906, and included therein \$7,556, being 15 per cent of the cost expended on the contract with Coyne.

On October 24, 1904, the National Surety Company, appellee, filed a bill in the United States court at Louisville, averring the insolvency of the contractors, and that there would be a loss for labor and material which it would be compelled to pay as surety on the bond, asking for an injunction and the appointment of a receiver. On November 8, 1904, an order was made, referring the case to a special master, and providing that parties having claims for labor and materials might prove the same, with the right to contest them, and to take the proofs thereof as in equity cases. The order provided that appellee, the surety company, should pay into court, in satisfaction of the claims and costs of action, such *a sum as might be required after the[555 government payments were exhausted.

The claim of Hardaway and Prowell was filed. A special master allowed the claim. Upon error, the circuit court disallowed the same, and, upon appeal to the circuit court of appeals for the sixth circuit, the decree was affirmed. 80 C. C. A. 283, 150 Fed. 465. The case then came here.

The case turns upon the construction of the contract between Coyne and Hardaway and Prowell. The contract reads as follows:

State of Alabama, Tuscaloosa county:

This contract, made this 2d day of June, 1903, by and between B. H. Hardaway and R. P. Prowell, hereinafter called Hardaway & Prowell, as parties of the first part, and Joseph Coyne, as party of the second part, witnesseth:

That, whereas, Willard & Cornwell, a firm composed of J. E. Willard, C. R. Cornwell and the said Joseph Coyne, did, heretofore

on, to wit, the — day of —, 1899, enter into a contract with the United States for the construction of lock No. 4 in the Black Warrior river above Tuscaloosa, Alabama, and whereas, shortly after the beginning of the work upon said lock the said Joseph Coyne, by an arrangement between him and his copartners, undertook to complete and finish said lock according to the specifications of the contract of said firm with the United States, and, in consideration of such an undertaking, acquired the beneficial interest of said firm in said contract, and was to receive all amounts paid by the United States in consideration of such contract, and whereas said lock is still uncompleted, and the said Joseph Coyne cannot, on account of his inability to procure the necessary financial aid, and on account of the disorganization of his labor forces, and for various and sundry other reasons, complete and finish the said work in accordance with the said contract, and whereas said contract is a valued asset to the said Joseph Coyne if the said work can be prosecuted to 556]its *completion under the terms of said contract, there being held in reserve by the government, under the terms of said contract, about \$8,300, which has already been earned by said Coyne, and whereas, by reason of his said inability to finish said work, the said contract is about to be forfeited, and the said Coyne is in imminent danger of losing, not only what profits may be made upon the completion of the work, but the entire reserve fund also retained by the government, and whereas the said Joseph Coyne, for the purpose of preventing the forfeiture of said contract, has made overtures to the said Hardaway & Prowell to take up said work and complete it, and the said Hardaway & Prowell have agreed to do so upon the terms and stipulations hereinafter set forth; now, therefore,

1. The said Hardaway & Prowell do hereby undertake and agree with the said Joseph Coyne to superintend the completion of the said lock and dam No. 4 and to furnish the necessary finances for the completion thereof, and to put in charge of said work a competent superintendent, and to properly organize the work for an energetic prosecution thereof to completion, for which services they are to receive an agreed compensation of 15 per cent upon the total cost of completing said contract, which total cost shall be construed to include all amounts necessarily expended and expenses incurred by Hardaway & Prowell in the completion of said work and all amounts necessarily paid and expenses incurred by them to effect a settlement with and an acceptance of said lock and dam by the United States.

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2. The said Joseph Coyne agrees to the above compensation for Hardaway & Prowell, and further agrees to turn over to them entire charge of the completion of said work, and not to interfere with them in any way in the prosecution of said work to completion, and further agrees to turn over to the said Hardaway & Prowell the entire outfit of machinery, tools, etc., which he now has at said lock and dam and the quarries where he is getting stones, and to give the use of the same to them for the completion of said work, free of any charge.

*3. The said Joseph Coyne further[557 agrees to have all checks for each estimate upon said work forwarded by the government to the said Hardaway & Prowell, and to properly indorse such checks, so that they may be collected by Hardaway & Prowell.

4. It is further agreed by all parties hereto that, out of the proceeds of the checks referred to in the next foregoing paragraph, the obligations shall be paid preferentially in the following order:

1. The compensation of the said Hardaway & Prowell, as herein agreed, for their services.

2. All moneys advanced by Hardaway & Prowell, and used in the prosecution of said work.

3. All debts necessarily incurred by the said Hardaway & Prowell for the prosecution of said work, other than debts for labor and material.

4. All debts incurred by said Hardaway & Prowell for labor and material or moneys advanced by them in payment for labor or material debts.

5. The said Joseph Coyne, for the completion of said work and for the securing to the said Hardaway & Prowell all amounts that they shall have to pay, on whatever account, for the completion of said lock and dam, and for a settlement with the United States and acceptance of said lock and dam by the proper authorities of the government, does hereby assign and set over to the said Hardaway & Prowell all his interest in the amount, aggregating, as aforesaid, about \$8,300, retained and now held in reserve by the government under the said contract for the building of said lock and dam, which shall be applied by the said Hardaway & Prowell in the following order:

1. To the payment of all debts for labor and material incurred in the building of said lock and dam.

2. Any balance that may be due to said Hardaway & Prowell for their compensation under this contract.

3. All other necessary debts incurred in the prosecution *of the said work by[558 Hardaway & Prowell, and all amounts, in-

cluding expenses, which they shall have to pay in order to effect a settlement with the government, and acceptance by it of said lock and dam.

4. Any balance to be paid to the said Joseph Coyne.

6. It is understood and agreed by all parties hereto that if the said Joseph Coyne should, at any time, fail or be unable to turn over to the said Hardaway & Prowell the checks for estimates on said work, properly indorsed, so that Hardaway & Prowell can collect them, or should fail to secure the collection of them by the said Hardaway & Prowell, then the said Hardaway & Prowell shall, in that event, have the option of annulling said contract, and stopping work without notice to the said Joseph Coyne, or to any other parties whomsoever; but, in said event, the said Hardaway & Prowell shall have a claim against the said Joseph Coyne for all moneys furnished by them and expenses incurred by them upon any account whatsoever in the prosecution of said work, and which shall not have been repaid to them, and for all compensation earned under this contract, and not paid to them, and such claim shall be due and payable at once upon their termination of the contract.

In witness whereof the said parties of the first and second parts have hereunder set their hands and seals in duplicate this, the day and year first above written.

B. H. Hardaway.

R. P. Prowell.

Attest: C. B. Verner. Joseph Coyne.

It is said that the master sustained the claim of Hardaway and Prowell upon authority of the case of *United States v. American Surety Co.* 200 U. S. 197, 50 L. ed. 437, 26 Sup. Ct. Rep. 168. In that case this court held that the obligation of a bond similar to the one here in suit, when construed in the light of the statute requiring its execution, and looking to the protection of those who supply labor and materials provided for in the original contract, [559] was broad enough to include *laborers who had performed work for a subcontractor who furnished labor or material which the original contractor had obligated himself to furnish. It was held that, in such a case, the original contractor, who employed a subcontractor, who bought materials or hired labor with which to carry out and fulfil the engagement of the original contract for the construction of a public building, was thereby supplied with materials and labor for the fulfilment of his contract as effectually as if he had directly hired the labor or bought the materials. We are unable to see how that case controls the one at bar; nor can we reach the conclusion that

Hardaway and Prowell were subcontractors furnishing labor or materials to the original contractor, or furnishing such labor or materials to subcontractors which enabled the original contract to be fulfilled, thereby bringing themselves within the principles of the *Hill Case*. As we read this contract, Hardaway and Prowell, in view of Coyne's financial and other difficulties, undertook to do certain things in relation thereto. They undertook to superintend the completion of the lock and dam, and, to that end, to furnish the necessary finances for the completion of the work; for this they were to receive an agreed percentage upon the total cost upon the completion of the contract.

Coyne, on his part, agreed that such compensation should be paid, and agreed to turn over the charge of the work to Hardaway and Prowell, and not to interfere therewith in any way, and to give them the use of his outfit and tools, etc., and the quarries from which he was taking stone for the construction of the lock and dam. He agreed to have the checks given by the government, upon estimates, forwarded to Hardaway and Prowell, and to properly indorse such checks so as to make them collectible by them.

The manner in which Hardaway and Prowell should distribute the money received from such checks is specifically provided in paragraph 4 of the contract. By the fifth paragraph Coyne assigned to Hardaway and Prowell for the completion of the work, and for security to Hardaway & Prowell, *for the amount which they should [560] have to pay on all accounts for the completion of the work and for a settlement with the United States and acceptance of said lock and dam by the proper authorities, all of his interest in \$8,300, retained and held in reserve by the government under the contract, which was to be applied by Hardaway and Prowell, 1st, for the payments of debts for labor and materials; 2d, any balances due to Hardaway and Prowell for their compensation under the contract; 3d, all other necessary debts incurred in the prosecution of the work by Hardaway and Prowell, and all amounts which they shall be obliged to pay in order to effect a settlement with the government, and acceptance by it of said lock and dam; 4th, any balance to go to Coyne.

The sixth paragraph of the contract made provision for the possibility that Hardaway and Prowell should not receive payment of the checks coming from the government, in which event they should have the right, at their option, of annulling the contract and stopping the work. In that contingency they should have a claim against Coyne for money furnished by them

on account of the prosecution of the work, and for all compensation earned under the contract.

Hardaway and Prowell bound themselves to furnish superintendence and to furnish the money to complete the work which Coyne had undertaken to do. These things were all that Hardaway and Prowell undertook to do; they were not subcontractors, in our view, who undertake to furnish labor and materials upon a contract with the original contractor. The extent of the agreement was to furnish funds to complete the work, and to superintend it. For this they were to be paid by the assignment of the reserve funds in the hands of the government and the checks or payments under the original contract. There was no undertaking on the part of the surety company that the contract should be profitable to its principal or to any other substituted in the contract by assignment or otherwise. The surety did agree, by the terms of the bond, that the original contractors should make 561] full payment to all persons *supplying them with labor and materials in the prosecution of the work. This was for the protection of the subcontractors and others supplying such labor and materials for the fulfillment of the original agreement, as we held in the Hill Case.

We agree with the circuit court of appeals that Coyne entered into no agreement to pay Hardaway and Prowell beyond the assignment of the checks from the government and the assignment of the reserved \$8,300. This is shown by the terms of the agreement, read in the light of the circumstances surrounding the parties at the time the contract was made. Coyne had failed to complete the contract, and was financially embarrassed. Hardaway and Prowell looked to the assignment of the reserve fund from Coyne and the payments from the government for their commissions, not to the personal liability of Coyne. Coyne was to be personally liable only in the event that Hardaway and Prowell should fail to realize on the government checks, as provided in paragraph 6 of the contract. As the claim of Hardaway and Prowell set up in this case must be worked out against the surety because of the liability of the principal in the bond to them, and as there is no such liability either from Willard and Cornwell or Coyne to them, there can be no recovery against the surety on the bond.

Nor do we think that Hardaway and Prowell can complain of the disposition of the \$8,300 (exactly \$8,161.75), reserved payments under the contract. This sum was paid into court for work done previous to the making of the contract of June 2, 1903. 80 C. C. A. 291, 150 Fed. 473. The circuit 53 L. ed.

court of appeals held that this sum, thus paid into court, should be credited upon the \$13,261.76, which the surety company had been directed to pay into court for the satisfaction of labor claims which had been proved and allowed in the case. The right of the surety to be subrogated had attached to the fund, and was superior to any rights which Hardaway and Prowell had as assignees of Coyne. *Prairie State Nat. Bank v. United States*, 164 U. S. 227, 41 L. ed. 412, 17 Sup. Ct. Rep. 142. *We think[562 this was the correct view. We find no error in the decree of the Circuit Court of Appeals, and the same is affirmed.

EDWARD MURPHY, 2d, Plff. in Err.,
v.

JOHN HOFMAN COMPANY.

(See S. C. Reporter's ed. 562-574.)

Bankruptcy — conflicting jurisdiction — possession of res.

1. Goods in the possession of a receiver in bankruptcy cannot be seized on a writ of replevin from a state court on the theory that the receiver is holding the goods as an individual, and not as receiver, where the only circumstance tending to support such theory is that, pending the settlement of a dispute over the title, and for no other reason than that the dispute existed, the goods in question were not included in the schedule of the property of the bankrupt filed by the receiver.

[For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

Bankruptcy — conflicting jurisdiction — possession of the res.

2. The vacation by a court of bankruptcy of its order enjoining any interference under process from a state court with certain property then in the possession of the receiver in bankruptcy cannot be deemed an abandonment by the court of bankruptcy of its possession of the property, and a turning over of such property to be dealt with by the state court, where, in the meantime, there had been various dealings with the property by the bankruptcy court, including a sale by the trustee in bankruptcy. [For other cases, see Bankruptcy, II. b, in Digest Sup. Ct. 1908.]

[No. 33.]

Argued December 1, 2, 1908. Decided January 4, 1909.

NOTE.—On the exclusiveness of jurisdiction acquired by the appointment of a receiver—see note to *Re Schuyler's Steam Towboat Co.* 20 L.R.A. 391.

On jurisdiction as affected by possession of the subject-matter—see notes to *Adams v. Mercantile Trust Co.* 15 C. C. A. 6, and *Louisville Trust Co. v. Cincinnati*, 22 C. C. A. 356.

IN ERROR to the Court of Appeals of the State of New York to review a judgment which affirmed a judgment of the Appellate Division of the Supreme Court of that state, Fourth Department, affirming a judgment of the Supreme Court in and for the County of Monroe, in favor of plaintiff in an action of replevin. Reversed and remanded for further proceedings.

See same case below, 187 N. Y. 548, 80 N. E. 1111.

The facts are stated in the opinion.

Mr. **Herbert D. Bailey** argued the cause and filed a brief for plaintiff in error:

The bankrupt's actual possession of this property at the inception of the bankruptcy proceedings, and its delivery thereof to the receiver, as a part of its property, rendered it the duty of the receiver not only to take, but to hold, the property pending an order of the Federal court as to its disposition.

Re Schermerhorn, 16 Am. Bankr. Rep. 507; *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007, 4 Am. Bankr. Rep. 178; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277, reversing 74 N. Y. 156; *Re Rochford*, 10 Am. Bankr. Rep. 608; *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778, 14 Am. Bankr. Rep. 45; *Re Leeds Woolen Mills*, 12 Am. Bankr. Rep. 136; *Gluck & B. Receivers*, 389, 390; *Alderson, Receivers*, 329; *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240.

The Federal court having found the property in the possession of the bankrupt, who claimed it, had exclusive jurisdiction, and having by its orders disposed specifically of the property prior to October 11, 1904, on notice to the Hofman Company, its disposition was effectual and conclusive. The state court was without jurisdiction to review, modify, or disturb the disposition made by the Federal court.

White v. Schloerb and *Whitney v. Wenman*, *supra*; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Riggs v. Johnson County* (*United States ex rel. Riggs v. Johnson County*) 6 Wall. 166, 18 L. ed. 768; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co.* 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Rio Grande R. Co. v. Gomila* (*Rio Grande R. Co. v. Vinet*) 132 U. S. 478, 33 L. ed. 400, 10 Sup. Ct. Rep. 155; *Dowell v. Aplegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; *Covell v. Heyman*, 111

U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Re Watts*, 190 U. S. 1, 47 L. ed. 933, 23 Sup. Ct. Rep. 718; *Wiswall v. Sampson* 14 How. 52, 14 L. ed. 322; *Feibelman v. Packard*, 109 U. S. 421, 27 L. ed. 984, 3 Sup. Ct. Rep. 289; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277; *Ex parte City Bank*, 3 How. 292, 11 L. ed. 603.

Mr. **John A. Barhite** argued the cause and filed a brief for defendant in error:

The bankruptcy act nowhere gives exclusive jurisdiction to the United States courts to determine questions between receivers and trustees in bankruptcy and adverse claimants. The right of the United States court to administer property which comes into its possession must rest upon the principle, where it applies, that property once in the possession of a court will be administered by that court, and not taken from its possession by some other court.

Cook v. Whipple, 55 N. Y. 150, 14 Am. Rep. 202; *Peck v. Jenness*, 16 N. H. 516, 43 Am. Dec. 581; *State v. University*, 65 N. C. 719; *Clafin v. Houseman*, 93 U. S. 130, 134, 23 L. ed. 833, 837; *Eyster v. Gaff*, 91 U. S. 521, 525, 23 L. ed. 403, 405; *Bardes v. First Nat. Bank*, 178 U. S. 524, 537, 44 L. ed. 1175, 1181, 20 Sup. Ct. Rep. 1000; *Sharpe v. Doyle*, 102 U. S. 686, 26 L. ed. 277; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257.

Mr. Justice **Moody** delivered the opinion of the court:

This is a writ of error to review a final judgment of the court of appeals of the state of New York in an action of replevin. The writ was allowed to the plaintiff in error, *Murphy*, but denied to the party joined with him, by the chief judge of that court while the record was still in its possession, and before it had been remitted [565] to the supreme court, in accordance with the practice of the state. A clear understanding of the questions before this court will be aided by a relation of the facts out of which the litigation arose. Such of them as do not bear upon the Federal questions may either be omitted or stated in a very general way.

The Dodge Dry Goods Company, a corporation, had contracted with the John Hofman Company, the defendant in error, for the construction and installation in the store of the Dodge Company of a lot of show cases. Shortly after the installation of the show cases, and before the contract price was paid, proceedings in bankruptcy against the Dodge Company were begun in the district court of the United States, and, on August 18, 1903, *Edward Murphy*, 2d, the

plaintiff in error, was appointed by that court temporary receiver of the property of the alleged bankrupt. Thereupon the Hofman Company took the position that the show cases had never been accepted by the bankrupt, and that, although they had been used for some time in the business, title to them had not passed from the vendor. Accordingly, the Hofman Company, on August 20, 1903, demanded in writing the possession and delivery of the show cases from "Edward Murphy, 2d, Receiver, etc., of Dodge Dry Goods Company." Murphy declined to deliver up the property, saying that he was in possession as receiver. The order of the district court appointing the receiver recites the filing of the petition and affidavit, and directs the alleged bankrupt to show cause on the 6th of October, 1903, why a permanent receiver should not be appointed, and then directs that, pending the return of the order, the "alleged bankrupt be, and it hereby is, enjoined and restrained from making any transfer of any of its property and . . . all persons are enjoined and restrained from instituting and from prosecuting any and all suits and proceedings in any court against said alleged bankrupt and against any of its property . . . that 566]Edward Murphy, *2d, . . . be, and he hereby is, appointed temporary receiver of all the property, real and personal, and rights of action and demands due said alleged bankrupt, with power to collect and receive same and continue the business with the present employees." The order further directs that the receiver shall take immediate possession of the property of the bankrupt and carry on the business. On August 21, 1903, Murphy notified the president of the Dodge Company that he had been appointed receiver, and demanded possession of the property of the alleged bankrupt. The keys of the store were given to the receiver, and he took possession of the property in it, including the show cases, and continued the business. At that time the show cases were filled with goods, and they thenceforth were used by the receiver in the conduct of the business. Nothing at the time was said specifically about them, but shortly afterward the president of the Dodge Company informed the receiver that the title to the store was in the Century Mercantile Company, another corporation, and that, by the terms of the lease to the Dodge Company, the fixtures, including the show cases, became the property of the landlord on the bankruptcy of the tenant. The receiver then entered into negotiations with the counsel of the Century Mercantile Company, and it was agreed that the show cases should be omitted from the receiver's inventory, and the dispute as to the title to them between

the receiver and the Century Mercantile Company should be referred to the decision of the bankrupt court. The situation then was this: The receiver was in possession of the stock of goods, engaged in conducting the business, and using the show cases in the business, claiming the right to do so because they were the property of the bankrupt. The receiver had been informed that there were two outstanding conflicting claims to the title of the show cases: first, that of the John Hofman Company, who manufactured and installed them, and claimed that the title had not passed to the bankrupt, but remained in the vendor; second, that of the Century Mercantile Company, who claimed that the title had *passed to the bank-[567 rupt, and that afterwards, by virtue of the terms of the lease of the store, title had been vested in it. The receiver disputed both claims, and, as we shall see hereafter, the dispute with the Century Mercantile Company was settled by the bankruptcy court in favor of the receiver. The John Hofman Company, however, failed to resort to the bankruptcy court for the adjudication of its claim, and began an action against "Edward Murphy, 2d, and Century Mercantile Company," by the service, on the 6th day of October, 1903, of a summons "to answer the complaint in this action," together with an affidavit in replevin and a requisition to replevy the show cases and a copy of an undertaking from the plaintiff accepted by the sheriff. It will be observed that Murphy was not described in the summons as receiver. On that day the sheriff went to the store, identified the show cases, and said with respect to each one, "I replevy this show case." He was requested by both defendants not to take them away. He did not move them, or lock up the store, or put a keeper in charge, and went away, leaving the show cases exactly as they were when he came in. On the 9th of October, 1903, the judge of the bankruptcy court, on the petition of the receiver, enjoined all further proceedings in the action of replevin until the further order of the court; enjoined the sheriff from executing any requisition in replevin of property in the possession of the receiver, and enjoined the sheriff and all other persons from interfering in any manner with the property then in the possession of the receiver. The John Hofman Company applied for an order vacating this injunction. The application remained pending for a year, owing to the illness of the district judge, and on October 11, 1904, the order of injunction was vacated. Three days later, on October 14, 1904, the sheriff removed the show cases from the store. In the meantime they had been sold at a trustee's sale of the property of the bankrupt.

Thereafter the defendants severally filed answers. Murphy set up in defense that at 568] the time of the service of summons *upon him he was in possession of the property as the receiver of the bankrupt; that he remained in possession as receiver until the adjudication of bankruptcy and the appointment of himself as a trustee, and that as trustee, under the order of the bankruptcy court, he sold the property, and the sale was duly confirmed. The issue made by the pleadings was this: The plaintiff in replevin demanded the property in dispute from Murphy as an individual. Murphy, on the other hand, asserted that he had no concern with the property except in his capacity as receiver; that is to say, as an officer of the court of bankruptcy. The burden rested upon the plaintiff to show, first, that the title had not passed from it to the Dodge Company,—a question purely of state cognizance; and, second, that the possession of Murphy of the show cases was not a possession as receiver in bankruptcy,—a question ultimately for Federal cognizance. There was a trial before a jury and a verdict for the plaintiff, without damages, which was successively affirmed by the appellate division of the supreme court and by the court of appeals. Neither court rendered an opinion.

Before going further it is well to ascertain the principles of law which are applicable to the situation. The bankrupt act of 1898 [30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418], as originally enacted, did not confer jurisdiction on the district courts of the United States over suits brought by trustees in bankruptcy to assert title to property as assets of the bankrupt, or to set aside transfers made by the bankrupt in fraud of the creditors or by way of preference, unless by consent of the defendant. *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000; *Frank v. Vollkommer*, 205 U. S. 521, 51 L. ed. 911, 27 Sup. Ct. Rep. 596. The act, however, preserves the jurisdiction, otherwise existing by statute, of the courts of the United States, though it is limited to courts where the bankrupt himself could have prosecuted the action. *Bush v. Elliott*, 202 U. S. 477, 50 L. ed. 1114, 26 Sup. Ct. Rep. 668. But, where the property in dispute is in the actual possession of the court of bankruptcy, there comes into play another principle, not peculiar to courts of bankruptcy, but applicable to all courts, Federal 569] or state. Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts. The court, having possession of the property, has an an-

cillary jurisdiction to hear and determine all questions respecting the title, possession, or control of the property. In the courts of the United States this ancillary jurisdiction may be exercised, though it is not authorized *by any statute. The jurisdiction in such cases arises out of the possession of the property, and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 Sup. Ct. Rep. 182. Accordingly, where property was in the possession of the bankrupt at the time of the appointment of a receiver, it was held that the bankruptcy court had jurisdiction to determine the title to it as against an adverse claimant, and that the receiver had no right to deliver it to him without the order of the court. *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778. On the day the opinion in the *Bardes Case* was announced the same justice delivered the opinion of the court in *White v. Schloerb*, 178 U. S. 542, 44 L. ed. 1183, 20 Sup. Ct. Rep. 1007, a case in which the facts were essentially those of the case at bar. Certain persons, copartners in trade, were adjudicated bankrupts and the case was sent to a referee in bankruptcy. They had a stock of goods in a store, the entrance to which was locked by the referee. Certain other persons claimed title to part of the stock of goods as obtained from them by a fraudulent purchase, which had been rescinded. After the adjudication, these persons brought an action of replevin of the goods against the bankrupt in a state court, which was executed. It was held that replevin would not lie in the state court, and that the district court had jurisdiction by summary proceedings to compel the return of the property seized. The court said: "The goods were then in the lawful possession of and custody of the referee in bankruptcy, and of the bankruptcy court, whose representative and substitute he was. Being thus in the custody of a court of the United States, they *could not be taken out of [570 that custody upon any process from a state court." The last two cases cited proceed upon and establish the principle that when the court of bankruptcy, through the act of its officers, such as referees, receivers, or trustees, has taken possession of a *res*, as the property of a bankrupt, it has ancillary jurisdiction to hear and determine the adverse claims of strangers to it, and that its possession cannot be disturbed by the process of another court. And see *Skilton v. Codington*, 185 N. Y. 80, 85, 86, 113 Am. St. Rep. 885, 77 N. E. 790, and *Frank v. Vollkommer*, which, by implication, approve the same principle.

We think this principle was lost sight of in the trial of the case before us. We must assume in favor of the plaintiff in replevin that the replevin was completed on the 6th of October, 1903, when the sheriff identified the goods and, at the request of the defendant, left them in place in the store, and delivered to the defendants the undertaking, which apparently was accepted by them as good. If, at this time, the show cases were in the possession of the court of bankruptcy, that is to say, were in the possession of Murphy, as the receiver appointed by the court of bankruptcy, then, according to principle and in obedience to the express authority of *White v. Schloerb*, supra, the action of replevin in the state court cannot be maintained. Upon the undisputed facts, as they appeared at the trial, it is impossible to suppose that Murphy had any possession except as receiver. He had no personal interest in the affairs of the bankrupt, and no relation to its property except that created by his appointment to that office. There is but a single circumstance which points the other way, and to that circumstance reference presently will be made. The demand of the plaintiff in replevin for the delivery of the goods was made upon "Edward Murphy, 2d, Receiver," etc. The plaintiff introduced no evidence tending to show that Murphy had any possession except as receiver. When the evidence for the defendant came to be introduced the nature of Murphy's possession was more fully explained. James E. Dodge, president *of the Dodge Dry Goods Company, and manager of its business, testified that on the 21st day of August, 1903, Murphy called at the store and notified him of his (Murphy's) appointment as receiver, and demanded the possession of the assets of the Dodge Dry Goods Company. He says: "The property that I gave him possession of at that time was merchandise and fixtures in the store, also supplies and book accounts; all the property of the Dodge Dry Goods Company. And all the property that was in possession of the Dodge Dry Goods Company. And among the things I turned over to him were included these show cases that are the subject of this action. There was no exception made of the show cases.

. . . I handed him the keys of the store, and I told him its contents were the property of the Dodge Dry Goods Company. And these show cases were part of the contents at that time. There was no special mention made of the show cases at that time." Murphy testified that, at this interview, Dodge turned over to him the keys of the building, and showed him the property of the Dodge Dry Goods Company,—stock, dry goods, and merchandise,—

complete store equipment, consisting of show cases, counters, etc. The show cases were then on the ground floor, and the goods were in them when they were turned over to him as receiver, and he continued to use the show cases in the performance of his duty as receiver, and claimed them as the property of the bankrupt. The defendant offered in evidence the order of the court of bankruptcy, made August 18, 1903, appointing him as receiver, and offered to show that it was exhibited to the sheriff at the time of the replevin. This order, which hereinbefore has been fully set forth, appointed Murphy "temporary receiver of all the property, real and personal," of the bankrupt, directed him to take immediate possession of all the property, and to carry on the business. This evidence was excluded, and we think the exclusion was clearly erroneous.

The plaintiff in replevin lays much stress upon one circumstance, as tending to show that Murphy was not in possession *of [572 the property as receiver, but as bailee of the Century Mercantile Company, and to that circumstance more particular attention must now be given. Murphy testified upon cross-examination that he did not include the show cases in the schedule filed by him as receiver, but this testimony must be considered in connection with the explanation which accompanied it. Dodge originally had owned the store and had leased it to the Dodge Dry Goods Company, of which he was president. The lease contained a provision that, upon the bankruptcy of the dry goods company, the fixtures, including the show cases, should become the property of the owner of the store. The store subsequently was conveyed to the Century Mercantile Company, of which Dodge was also president. After the stock in trade, including the show cases, had been turned over to Murphy as receiver, Dodge, acting in behalf of the Century Mercantile Company, made a demand upon him for the fixtures and show cases, basing his demand upon the provision in the lease. Just how long after the delivery of possession to Murphy this demand was made is not clear, but it is enough to say that the demand was subsequent to the delivery. Murphy declined to yield to this demand, and agreed with counsel for the Century Mercantile Company that the dispute should be decided by the court of bankruptcy. The defendant offered to show that subsequently the court decreed that the provision in the lease was void, and that the fixtures, including the show cases, were the property of the bankrupt. This evidence was excluded, and, we think, erroneously. It tended, in connection with other evidence, to show the nature

of Murphy's possession, and that he was insisting upon his right as receiver, and had not accepted the goods personally as bailee of the Century Mercantile Company. Pending the settlement of the dispute, and for no other reason than that the dispute existed, the show cases were omitted from the inventory. The facts which have been recited deprived this omission of all significance as showing that Murphy had any other possession than as receiver.

573] *At the trial Murphy relied upon his possession as receiver to defeat the action. His answer had set up that defense, and in many ways, which it would be unprofitable to set forth in detail, he sought to avail himself of it. It is enough to say that, at the conclusion of the evidence, the court was requested to direct a verdict for the defendant Murphy, upon the grounds, among others, "that the plaintiff has not shown itself entitled to possession at the time of the commencement of the action, but has shown that the then present right of possession was in the United States court;" and "the plaintiff has not shown that the property was in the possession of the defendant Murphy, but that it was in the possession of the United States court;" and "this court had no jurisdiction over the subject-matter of this action when it was commenced." The judge presiding at the trial refused, under exception, to give any of these instructions, and submitted the case to the jury in a charge which made no reference to the rights of Murphy as receiver, or to the possession of the property by him as an officer of the court of bankruptcy, other than to say, "as the case then stood, Mr. Murphy was claiming this property as the receiver of the Dodge Company." The judge instructed the jury that, if they should find that the show cases furnished by the Hoffman Company had not been accepted by the Dodge Company, then the title failed to pass and the verdict must be for the plaintiff. Thus the whole Federal question, so far as it was a question of fact, was withdrawn from the consideration of the jury. Subsequently, after a colloquy with the defendant's counsel, in which he stated that Murphy made no claim as an individual to the property in dispute, and did not ask its return to him, the judge, against the objection and under the exception of Murphy, peremptorily directed a verdict for the plaintiff. We do not set forth that colloquy in full, although it is much relied upon by the defendant in error. While the statements of counsel were confused, we think that what was said by him amounted to nothing more than an assertion that Murphy had had no relation to the property 574]*except as receiver, and that his pos-

session as receiver entitled him to claim for the property thus possessed and controlled an immunity from the process of the state court.

But one other question needs any attention. It has been seen that the injunction against proceedings in the state court in this case, granted by the judge of the bankruptcy court on October 9, 1903, was vacated about a year later. The reason for this does not appear in the record. The Hofman Company, however, relies upon this vacation of the order of injunction as an abandonment by the court of bankruptcy of its possession of the property, and a turning over of it to be dealt with by the state court. We cannot give to the order vacating the injunction this meaning. If it has any tendency whatever to show an abandonment of possession, it is fully explained by much evidence of a dealing with the property by the bankruptcy court, some of which was excluded at the trial.

On the whole case, we are of the opinion that the seizure of these goods on a writ of replevin from another court was an unlawful invasion of the possession of the court of bankruptcy, which cannot be justified by the assertion, entirely unsupported by the evidence, that Murphy was then holding the goods, not as an officer of the court, but as an individual. For this reason the judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

*E. J. PAGE and Robert Markert, Ex-[575
ecutors of Thomas Merriam, Deceased,
Appts.,

v.

H. F. ROGERS, Trustee of I. B. Merriam,
Bankrupt.

(See S. C. Reporter's ed. 575-581.)

Appeal — review of facts — concurrent findings.

1. Concurrent findings of facts of the two courts below in a suit in equity will be accepted by the Federal Supreme Court, on appeal, unless error is clearly shown.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

Bankruptcy — unlawful preference.

2. The avoidance, as an unlawful preference, of a conveyance by an insolvent debtor to a creditor in satisfaction of the debts due the latter, or those for which he is liable, cannot be defeated on the theory that such conveyance was in performance of an

NOTE.—On avoidability of a transfer within four months' period, pursuant to executory agreement antedating that period—see note to Godwin v. Murchison Nat. Bank, 17 L.R.A. (N.S.) 935.

agreement between the parties, antedating the bankruptcy proceedings by more than four months, where the contract in fact was merely an agreement on the part of the bankrupt and his co-owner to sell, and, on the part of the creditor and another, to buy, at a named price, and such contract and a deed drawn in pursuance of its terms were never delivered, but were deposited in escrow, and never became operative instruments.

[For other cases, see Bankruptcy, VI. b, in Digest Sup. Ct. 1908.]

Bankruptcy — unlawful preference.

3. A trust deed never delivered as a present, valid, and subsisting obligation cannot excuse a payment by the grantor on the indebtedness covered by such deed, which payment otherwise would be invalid under the bankruptcy law as an unlawful preference. [For other cases, see Bankruptcy, VI. b, in Digest Sup. Ct. 1908.]

Bankruptcy — provable claims — effect of compulsory surrender of preference.

4. A creditor of a bankrupt, who has been compelled to surrender an unlawful preference, is entitled to prove his claim, and to receive a dividend on it upon an equality with the other creditors.

[For other cases, see Bankruptcy, 349-357, in Digest Sup. Ct. 1908.]

Judgment — amount — compelling surrender of unlawful preference.

5. A court of bankruptcy, in entering judgment compelling a creditor to surrender an unlawful preference, should permit the creditor to prove his claim against the bankrupt estate, and deduct from the amount of the preference which he is required to surrender the dividend which the court finds is coming to him.

[Amount of judgment, see Judgment, II. d, in Digest Sup. Ct. 1908.]

[No. 39.]

Argued December 3, 4, 1908. Decided January 4, 1909.

APPEAL from the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which affirmed a decree of the District Court for the Eastern District of Tennessee, compelling the surrender of a preference received by a creditor in violation of the bankruptcy law. Reversed and remanded to the District Court with directions to modify the amount of the judgment.

See same case below, 79 C. C. A. 153, 149 Fed. 194.

The facts are stated in the opinion.

Mr. Frank Spurlock argued the cause, and, with Messrs. E. J. Page, Louis L. Waters, and Foster Brown, filed a brief for appellants.

Mr. J. B. Sizer argued the cause, and, with Messrs. George D. Laneaster and Robert Pritchard, filed a brief for appellee.

53 L. ed.

*Mr. Justice Moody delivered the [576] opinion of the court:

This is an appeal in equity from a decree of the circuit court of appeals for the sixth circuit. The suit was begun by the appellee, the trustee of the estate of I. B. Merriam, a bankrupt, against Thomas Merriam, to recover a preference alleged to have been received by the latter in violation of the bankruptcy law. During the pendency of the suit the defendant died, and the executors of his will were admitted to defend. The plaintiff had a decree, which was affirmed by the circuit court of appeals. There were findings of fact by the district court, concurred in by the circuit court of appeals. These findings, together with the undisputed facts, may be condensed and stated in narrative form.

I. B. Merriam had been engaged in business for some years as a wholesale grocer at Chattanooga, Tennessee. On the 1st day of June, 1903, he was considerably indebted and insolvent, and the defendant knew it. Much the larger portion of his indebtedness was to his brother, the defendant, Thomas Merriam, or to persons holding claims which Thomas Merriam had guaranteed by indorsement or otherwise. I. B. Merriam then had no assets of much value, with the exception of an undivided half interest in certain coal lands situated in Tennessee. On that day he conveyed his interest in the coal lands to Thomas Merriam, who agreed to pay therefor \$65,000 in money and stock of the par value of \$20,000 in the Tennessee Lumber & Coal Company, a corporation, to which Thomas Merriam immediately sold and conveyed the land. The purchase money, after the deduction of \$7,400, used for the purpose of extinguishing encumbrances on the land, in pursuance of an agreement made at the time, was mainly devoted to the payment of the debt then due directly from I. B. Merriam to Thomas Merriam, and to the payment of other debts of I. B. Merriam for which Thomas Merriam was liable. At the same time, and as part of the same transaction, Thomas Merriam caused to be advanced to I. B. Merriam \$10,000 additional upon the pledge of his stock in the Tennessee Lumber & Coal Com-[577] pany. The net result of the transaction was that I. B. Merriam received, as the consideration for the conveyance of his interest in the coal lands, \$75,000 in cash and an equity of redemption of the pledged shares in the corporation. Of this \$75,000, \$61,000, by agreement, was applied either to the payment of the debt due to Thomas Merriam, or, on his demand, to the payment of debts for which he was liable. At the time of the conveyance and the making of the agreement stated Thomas Merriam

had reasonable cause to believe that thereby his brother intended to give him a preference. The purpose and effect of the transfer was to give Thomas Merriam a greater percentage of his debt than could be obtained by other creditors of the same class. Indeed, the purpose and effect of the transfer was to pay Thomas Merriam in full and to exonerate him from all liability as guarantor, and its effect was to leave all other creditors with substantially nothing to meet their claims. Within a very few days after this transaction was completed I. B. Merriam filed a voluntary petition in bankruptcy, and was subsequently adjudicated a bankrupt.

Upon the foregoing statement of facts it is indisputable that Thomas Merriam received a preference to the extent of \$61,000, forbidden by the bankrupt law, and that it could be avoided and recovered by the trustee. We do not understand counsel for the defendant as disagreeing with this conclusion. Conceding it, however, counsel urged with great earnestness that the findings of fact in the two courts below were erroneous, and we were invited to consider the evidence again in that view. But the rule is well established that where two courts have concurred in findings of facts in a suit in equity, this court will accept those findings, unless clear error is shown. *Dun v. Lumbermen's Credit Asso.* 209 U. S. 20, 52 L. ed. 663, 28 Sup. Ct. Rep. 335.

We are unable to discover any such error. On the contrary, every fact essential to constitute a preference was substantiated by the evidence. That being so we decline to subject to minute scrutiny the language of the court employed in discussing questions of fact. There is no reason for a re-578] view of the *evidence in detail. The circuit court of appeals has reviewed it satisfactorily in a convincing opinion, and we do not feel called upon to repeat the discussion.

There, however, should be a brief reference to two contentions of the defendant,—that the findings were influenced by erroneous views of the law. It is first said that there was error in law in confounding the individual debts of I. B. Merriam with the partnership debts of I. B. Merriam & Son, with the result that I. B. Merriam was found to be insolvent as an individual, while really he was solvent, as his individual assets exceeded his individual indebtedness. But there was no real partnership. I. B. Merriam & Son was simply the name under which I. B. Merriam conducted the whole-sale grocery business. The son was only an employee, receiving a salary, and had no interest whatever in the business. All the

assets were owned and all the debts were owed by I. B. Merriam alone.

It is further said that I. B. Merriam agreed in writing, on November 15, 1902, to convey the coal lands to Thomas Merriam in satisfaction of the debts due to him or for which he was liable. It is, therefore, argued that, as the conveyance, on June 1, 1903, was in performance of this agreement, which antedated the bankruptcy proceedings by more than four months, it cannot be regarded as a preference.

The facts, however, do not raise the question which was argued. Upon a proper interpretation of the evidence we need not determine whether an insolvent debtor may make an agreement to convey a substantial portion of his assets to a favored creditor, keep that agreement secret for more than four months, and then execute it in fraud of the rights of his other creditors, in favor of a creditor who then has reasonable cause to believe that he is receiving a preference. *Re Broadway Sav. Trust Co.* 81 C. C. A. 58, 152 Fed. 152, and see *Wilson Bros. v. Nelson*, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74.

What actually occurred was that a contract in writing was made in November, 1902, between I. B. Merriam and his co-owner, parties of the first part, and Thomas Merriam and another, *parties of the[579 second part, whereby the parties of the first part agreed to sell and the parties of the second part agreed to buy the coal lands for a named price. Nothing whatever in this contract required that I. B. Merriam's share of the consideration should be paid to Thomas Merriam or on debts for which he was liable. Moreover, the contract, and a deed which was drawn in pursuance of its terms, were not delivered, but were deposited in escrow with a bank in Syracuse, New York, and never became operative instruments. Nothing more need be said of them, or of the question supposed to be raised.

When Thomas Merriam came to file his answer in the suit, he alleged, in substance, that several years before the conveyance, which has been referred to, and the adjudication in bankruptcy, which followed, I. B. Merriam had executed and delivered, for an expressed consideration of \$35,000, a trust deed of the coal lands, which was intended to be a security to Thomas Merriam for loans which he had made or might make to his brother, up to that amount. This trust deed, as subsequently appeared by the evidence, was executed, but not registered. A registration of the deed was not required by the law of the state of Tennessee to make it a valid instrument *inter partes*. The defendant therefore contended that, so far as the payments

from the purchase money of the coal lands were applied to the indebtedness secured by the trust deed, they were payments for the extinguishment of a valid, subsisting lien upon the land, fixed upon it more than four months before bankruptcy, and therefore not a preference. It may be assumed, without decision, that the payment within four months of bankruptcy of a mortgage older than four months, and valid *inter partes*, though unrecorded, cannot be a preference. There is no such case here. The trust deed was not delivered unconditionally, and the parties to it intended that it should go into effect as a lien only when it was registered, which was never done. The instrument, though actually written, was never delivered as a present, valid, and subsisting obligation. It was executed and 580] held in the possession of *the grantor, to be delivered and to become operative as a conveyance at some future time, which never arrived. It was written and held ready for instant use, but never actually used until brought forward to excuse a payment which otherwise would be an unlawful preference. In other words, the paper was not as much as an unrecorded deed; it was not a deed at all. Such, in effect, was the finding of both courts below, and we think it was warranted by the evidence. As has been said, the first reference to this paper was made by the defendant's answer, wherein it was alleged that the paper was a deed, executed and delivered. The plaintiff's general replication put in issue at least the existence of the deed and no amendment to the bill was needed.

The alternative ruling that the trust deed was invalid for want of good faith, and because it was agreed to be withheld from record to mislead and defraud creditors, may be disregarded. Therefore we need not consider whether the bill should have been amended to permit an attack on the deed as fraudulent.

What has been said disposes of every question made in the case, except one, which may be considered more advantageously after the form of the decree is noticed. There were two decrees in the cause. Their effect, taken together, as we understand them, is to order the defendant to pay into the court of bankruptcy the \$61,000 received as a preference on June 1, 1903, with interest to the date of the rendition of the final decree, making the total amount to be paid \$70,891.54. The theory upon which the decree proceeded was, that no greater sum should be required of the defendant than would be needed to meet the amount of the claims proved or provable against the bankrupt and the cost and expenses of the administration of the bank-

rupt estate, including fees of counsel for the trustee. As this amount exceeded that received by the defendant by way of preference, the decree exacted of him all that he had received. In computing the amount required to meet the expenses of administration a fee of \$15,000, of counsel for the *trustee for their services to him in all[581 matters, including this litigation, was included. The defendant complains that this fee is exorbitant. It certainly appears to be large. It seems, however, that the proper place to raise this question would be in the bankruptcy court. In any event, we would be unwilling to reverse the judgment of the lower courts upon this question, in view of the fact that they have a much more intimate acquaintance with the services than we can possibly have. All that has been said would naturally lead to an affirmance of the decree. Nevertheless, we are of the opinion that it ought to be modified, for a reason not dwelt upon in argument. Now that this litigation has come to an end, and the defendant has been compelled to surrender the preference which he received, he is entitled to prove his claim and to receive a dividend on it upon an equality with other creditors. *Keppel v. Tiffin Sav. Bank*, 197 U. S. 356, 49 L. ed. 790, 25 Sup. Ct. Rep. 443. In view of the fact that this suit was brought in the bankruptcy court itself, and a final decree is to be entered by the judge of that court, it is entirely practicable to avoid the circuitous proceeding of compelling the defendant to pay into the bankruptcy court the full amount of the preference which he has received, and then to resort to the same court to obtain part of it back by way of dividend. The defendant may be permitted, if he shall be so advised, to prove his claim against the estate of the bankrupt, and the bankruptcy court then may settle the amount of the dividend coming to him, and the final decree may direct him to pay over the full amount of his preference, with interest, less the amount of his dividend. Solely for the purpose of accomplishing this result, the final decree in the case is reversed and the case remanded to the district court to take proceedings in conformity with this opinion.

Decree reversed.

*GREEN COUNTY, Kentucky, Petitioner,
v.

MARY AMIS QUINLAN, Executrix of the Last Will and Testament of Leonard Q. Quinlan, Deceased.

(See S. C. Reporter's ed. 582-598.)

Bonds — railway aid — condition precedent.

1. A condition imposed by a vote of a

county, authorizing a bond issue in aid of railroads, that such bonds shall not be issued until the county shall be exonerated from a prior subscription to the stock of another railway company, is a condition precedent to the lawful issue of the bonds. [For other cases, see *Bonds, V. c.* in *Digest Sup. Ct. 1908.*]

Evidence — presumption — performance of condition precedent to issue of municipal bonds.

2. A presumption, though not a conclusive one, that there has been a compliance with the condition precedent to the issuance of county bonds in payment of a subscription to the capital stock of a railway company, that the county should first be exonerated from a prior subscription to the stock of another railroad company, arises from the mere fact of subscription and issuance by the officer charged with the duty of issuing the bonds upon the performance of the condition precedent.

[For other cases, see *Evidence, 479-481*, in *Digest Sup. Ct. 1908.*]

Bonds — railway aid — conditions.

3. The provision in a vote authorizing an issue of county bonds in payment of a subscription for railroad stock "upon condition" that the railroad company shall locate and construct the railroad through the county and within 1 mile of a named town in such county, and shall expend the amount so subscribed within the county limits, will not be deemed to impose a condition upon the lawful issue of the bonds or upon the obligation of the county to pay them to the legal holders and owners, where the vote, in dealing with the question of exoneration from a prior subscription to the stock of another railway company, explicitly makes such exoneration a condition precedent to the lawful issue of the bonds, and where to hold otherwise would make unsalable a bond issue evidently designed for the market.

[For other cases, see *Bonds, V. c.* in *Digest Sup. Ct. Rep. 1908.*]

[No. 351.]

Argued December 17, 18, 1908. Decided January 4, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Western District of Kentucky, dismissing the petition in an action on county bonds and coupons, and directed judgment for plaintiff. Modified by directing the Circuit Court to exclude coupons barred by the statute of limitations, and, as modified, affirmed.

See same case below, 84 C. C. A. 537, 157 Fed. 33.

The facts are stated in the opinion.

Mr. Ernest Macpherson argued the cause, and, with Mr. John W. Lewis, filed a brief for petitioner:

The court of appeals erred in holding that the so-called conditions were merely covenants, and that it was in contemplation of the original parties to the contract that the remedy for its breach should be only an action by the county against the railroad for damages.

Hopper v. Covington, 118 U. S. 148, 30 L. ed. 190, 6 Sup. Ct. Rep. 1025; *Independent School Dist. v. Stone*, 106 U. S. 187, 27 L. ed. 91, 1 Sup. Ct. Rep. 84; *Green County v. Shortell*, 116 Ky. 108, 75 S. W. 251.

Subscription becomes absolute only when the condition is performed.

McMillan v. Maysville & L. R. Co. 15 B. Mon. 218, 61 Am. Dec. 181; 2 *Thomp. Corp.* § 1335; *Henderson & N. R. Co. v. Leavell*, 16 B. Mon. 359; *Taggart v. Western Maryland R. Co.* 24 Md. 563, 89 Am. Dec. 760; *Burke v. Smith* (*Putnam v. New Albany & S. C. Junction R. Co.*) 16 Wall. 390, 21 L. ed. 361; *Galt v. Swain*, 9 Gratt. 633, 60 Am. Dec. 311; *Jewett v. Lawrenceburgh & U. M. R. Co.* 10 Ind. 539.

The law in respect to recitals has really no place in the discussion of this case. There are no recitals in these bonds. The bare fact that a bond is issued by the official having power to issue bonds does not shut off defenses.

Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579.

The general principle running through all the cases is that, in the absence of a recital, there is no estoppel of any kind.

See especially *Citizens' Sav. & L. Asso. v. Perry County*, 156 U. S. 701, 39 L. ed. 589, 15 Sup. Ct. Rep. 547; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Hopper v. Covington*, *supra*; *Crow v. Oxford*, 119 U. S. 222, 30 L. ed. 390, 7 Sup. Ct. Rep. 180; *Marsh v. Fulton County*, 10 Wall. 683, 19 L. ed. 1042; *Merchants' Exch. Nat. Bank v. Bergen County*, 115 U. S. 392, 29 L. ed. 432, 6 Sup. Ct. Rep. 88.

There being no recitals, the case should be decided according to the general principles of the laws of agency. It is thoroughly settled as principles of general commercial law that an agent of a municipal corporation must keep strictly within his powers of attorney at all times, and that the authority of all agents in executing commercial papers will be rigidly construed.

Chisholm v. Montgomery, 2 Woods, 584, Fed. Cas. No. 2,686; *Baltimore v. Reynolds*, 20 Md. 1, 83 Am. Dec. 535; *Snow v. Warner*, 10 Met. 136, 43 Am. Dec. 417; *Reese v. Medlock*, 27 Tex. 120, 84 Am. Dec. 611;

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Eaton & G. Com. Paper, p. 81; Tiedeman, Com. Paper, p. 139; Lewis v. Bourbon County, 12 Kan. 216.

Messrs. Edmund F. Trabue and George DuRelle argued the cause, and, with Messrs. John J. McHenry, John C. Doolan, and Atilla Cox, Jr., filed a brief for respondent:

These bondholders are entitled to all the presumptions and entitled to full value of their bonds, whether by payment from the county or by realization of the price thereof obtainable from purchasers; and accordingly entitled to have their vendees, or purchasers, obtain all the rights and remedies to which they would be entitled, for otherwise their market would be destroyed without their fault; and they are entitled to their market as well as to their action at law.

Scotland County v. Hill, 132 U. S. 107, 33 L. ed. 262, 10 Sup. Ct. Rep. 26; May v. Chapman, 16 Mees. & W. 355.

Covenants are independent, and one not a condition precedent as to the other, where the time of performance and of payment are not made coincident, nor performance required to be anterior to payment.

Pordage v. Cole, 1 Wms' Saund. 320, note 1; Cutter v. Powell, 1 Smith. Lead. Cas. 14, note 1; Goldsborough v. Orr, 8 Wheat. 217, 5 L. ed. 600; Loud v. Pomona Land & Water Co. 153 U. S. 564, 578, 38 L. ed. 822, 828, 14 Sup. Ct. Rep. 928.

The question whether the performance of a stipulation in a contract is a condition precedent to the performance of other stipulations in it depends upon the order in which the parties intend the several stipulations to be performed. The calling of provisions or stipulations a condition is not conclusive, and if, from the contract or other circumstances, it is seen that it was not the intention of the parties that its performance should be a condition precedent, it will not be held to be such.

Stanley v. Colt, 5 Wall. 119, 18 L. ed. 502; Union Stockyards Co. v. Nashville Packing Co. 72 C. C. A. 195, 146 Fed. 701; Sohler v. Trinity Church, 109 Mass. 1; Greene v. O'Connor, 18 R. I. 56, 19 L.R.A. 262, 25 Atl. 692; Scovill v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175; Bucksport & B. R. Co. v. Brewer, 67 Me. 295.

Conditions are not favored, and a provision will not be construed as such unless the intention is clear.

6 Am. & Eng. Enc. Law, p. 502; Clapham v. Moyle, 1 Lev. 155; Shep. Touch. 122; Huff v. Nickerson, 27 Me. 106; Paschall v. Passmore, 15 Pa. 307.

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*Mr. Justice Moody delivered the [583] opinion of the court:

The record and proceedings in this cause are in this court by virtue of a writ of certiorari issued to the circuit court of appeals for the sixth circuit. The action was brought in the circuit court of the United States by Quinlan against Green county on certain bonds and coupons attached thereto, purporting to have been issued by Green county. The jurisdiction was based upon diversity of citizenship.

The petition alleged that the plaintiff was "the holder and owner" of the bonds named; that the bonds and coupons were duly executed and issued, were due and unpaid, and prayed judgment for their face value with interest.

The defendant filed a plea in abatement to the jurisdiction, alleging, in substance, that the plaintiff was not the real holder and owner of the bonds, and that the jurisdiction of the court was invoked fraudulently. Certain allegations contained in this plea were, on motion, stricken therefrom, and no exception was taken to the order. A reply to the plea was filed, denying its allegations. Thereupon it was agreed that the issues of law and fact should be tried by the court without a jury, and that the plea should be deemed a part of the answer, which was that day filed. In addition to the facts alleged in the plea the answer set up in defense (1) a denial of all the allegations of the petition; (2) that there was no consideration for the bonds; (3) that they were obtained by fraud; (4) that recovery upon some of the coupons was barred by the statute of limitations; (5) that the bonds were issued in payment of a subscription to the stock of the Cumberland & Ohio Railroad upon two conditions, namely, that the railroad should be constructed in a certain designated manner, and that the county first should be exonerated from a prior subscription to the bonds of another railroad company, neither of which conditions had been performed. The plaintiff filed a reply, denying the allegations of the answer. There were further pleadings, which are unimportant here. After trial, the court rendered the following judgment:

*"This action by a stipulation in [584] writing, having been heretofore submitted to the judgment of the court without the intervention of a jury, and the court having heard the evidence and the arguments of counsel, and being now sufficiently advised, makes part of this judgment the following:

Finding of Fact.

"1. The court finds that the plaintiff is a citizen of the state of New York, and was so when this action was instituted on the 28th day of March, 1899, and that the plain-

tiff was then the bona fide holder for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court.

"2. That the Cumberland & Ohio Railroad Company was a corporation organized and existing under the laws of the state of Kentucky, with power to receive a subscription to its capital stock from the defendant, Green county, and said county was authorized, conformably to law, to make a subscription to said capital stock, and to pay for the same in the bonds of said county.

"3. That, on June 17th, 1869, there was, as appears from the records thereof, presented to the Green county court, by the commissioners of said railroad company, the following request:

"We, the undersigned, commissioners of the Cumberland & Ohio Railroad Company, hereby request that the county court of Green county submit to a vote of the qualified voters of said county the question: "Whether said court shall subscribe, for and on behalf of said county, and in pursuance of the provisions of the charter of said railroad company, \$250,000 to the capital stock of said company, payable in the bonds of said county, having twenty years to run and bearing 6 per cent interest from date, upon the condition that said company shall locate and construct said railroad through Green county and within 1 mile of the town of Greensburg in said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further conditions that said bonds shall not be issued or said county pay any 585]part of either principal or interest *on said amount subscribed as aforesaid until said county of Green shall be fully and completely exonerated from the payment of the capital stock subscribed for by the county court of said county, for and on behalf of said county, to the Elizabethtown & Tennessee Railroad Company."

"4. That on the same day, namely, on June 17th, 1869, the county judge of Green county, acting alone and as the county court, entered an order in said court in the following language:

"Present: Thos. R. Barnett, Judge.

"Whereas the commissioners of the Cumberland & Ohio Railroad Company, by virtue of the authority delegated to them by the charter of said company, have requested the county court of Green county to order an election in the said county of Green, and to submit to the qualified voters of said county the question whether said county court shall subscribe, for and on behalf of said county, \$250,000 to the capital stock of the Cumberland & Ohio Railroad

Company, and payable in the bonds of said county, having twenty years to run and bearing 6 per cent interest from date, and upon condition that said company shall locate and construct said railroad through the said county of Green, and within 1 mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company, until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county, and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad, or any part of the interest thereon. It is therefore ordered by the court that an election by the qualified voters of Green county, at the voting places in said county, be held and conducted by the several officers as prescribed by law for holding elections, on the 3d *day of July, 1869, to vote on the ques-[586 tion as to whether or not the said county court shall, for and on behalf of said county, subscribe \$250,000 to the capital stock of the said Cumberland & Ohio Railroad, conditioned and to be paid, as above stated."

"5. That at the election held pursuant to said order there were cast in favor of said proposition and subscription a majority of the votes of the qualified voters of said county, and this fact, upon being duly ascertained, was certified by the proper officers, as required by law.

"6. That on the 3d day of June, 1870, the county judge of said county, acting alone and as the county court of said county, entered an order in said court as follows:

"Present: Thomas R. Barnett, Judge.

"Whereas, in pursuance of an order of this court, made on the 17th day of June, 1869, an election was held in the said county of Green, on the 3d day of July, 1869, at the several precincts of said county, and it appearing that a majority of the qualified voters at said election decided that the county of Green should subscribe for \$250,000 of the capital stock of the Cumberland & Ohio Railroad Company; now, it further appearing that said election was held in conformity with the law, and in conformity with the provisions of the charter of said company, now, therefore, I, Thomas R. Barnett, the presiding judge of the Green county court, by virtue of the authority in me vested by law, and to carry out the wishes of said voters, do hereby subscribe for \$250,000 of the capital stock of said Cumberland & Ohio Railroad Company, for and on behalf of said county of Green, which

subscription is to be paid in the bonds of said county as prescribed in said order of submission; and this subscription is made with the conditions set out in the order of this court, ordering said election, and now of record in the office of this county.'

"7. That on the 12th day of October, 1871, the said county judge of said county, acting alone and as the county court of 587]*said county, entered an order in said court in the following language:

"Present: Thomas R. Barnett, Judge.

"On motion of E. H. Hobson, director of the Cumberland & Ohio Railroad, it is ordered that Z. F. Smith, president of the Cumberland & Ohio Railroad, be, and he is hereby, authorized to have printed for the county of Green bonds to the amount of \$250,000, the amount of the subscription of Green county to the said railroad, in the following denominations, to wit, the same to be conditioned as specified in the order submitting the vote of the said county:

125 bonds at \$1,000	\$125,000
200 bonds at 500	100,000
250 bonds at 100	25,000

250,000'

"8. That pursuant to all that was done, as aforesaid, the defendant, Green county, issued and delivered to the said Cumberland & Ohio Railroad Company \$250,000 of its bonds of the description aforesaid, except that the said conditions were not stated therein, in payment of said subscriptions to said capital stock, and thereupon there was delivered to said county, in payment thereof, and said county received, and has ever since held and owned, the certificates of the said railroad company for the 2,500 shares of \$100 each of its capital stock so paid for by said bonds.

"9. That the \$47,509 of bonds and coupons sued on in this action were part of the bonds thus issued and delivered to said railroad company in payment for said stock.

"10. That while the proposed line of said railroad was located through said county from its northern line to its southern line, and within 1 mile of Greensburg, yet that only about 5 miles of said railroad has ever been constructed or attempted to be constructed in said county, the part thus constructed extending from the northernmost 588]line of said county *to the town of Greensburg, the county seat; that town is located about 15 miles from the southernmost line of the county, and about as distant from any other line of the county except the northern line.

"11. That only \$150,000 of the bonds thus issued, or the proceeds thereof, were expended within the limits of Green county.

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No other part of said bonds was expended in said county.

"12. That with said \$150,000 of said bonds the grading, bridging, and tunneling on the track of said railroad was done and paid for over the 5 miles aforesaid, but no further, and when this was done the work on the railroad was suspended for some years. Afterwards the rails and ties and superstructure generally were put upon the track theretofore graded and the railway was completed from the northernmost line of the county to Greensburg, under the terms of its lease, by the Louisville & Nashville Railroad Company, at its own expense, and not with any of the bonds issued as aforesaid by the defendant.

"13. That on the 15th day of August, 1872, at a called term of the Green county court, over which Thomas R. Barnett, county judge, presided, and no justice of the peace being present, the following order was entered by said court:

"Present: Thos. R. Barnett, Judge.

"Application was this day made to the presiding judge of the county court of Green county, by the president and board of directors of the Cumberland & Ohio Railroad Company to issue the balance of the bonds of said county to the amount of the subscriptions of said county of Green to said Cumberland & Ohio Railroad Company, and, the court being sufficiently advised, it is ordered by the court that the balance of said bonds be and they are hereby ordered to be issued, the same to be signed by the judge of said county court of Green county, and countersigned by the clerk of said court, as required by the charter of said company.'

"14. That except as to the number of the bonds and the *amount agreed to be[589 paid therein, the bonds sued on were each of the following, namely:

"United States of America,

"County of Green, State of Kentucky, \$500.00.

"For the Cumberland & Ohio Railroad.

"Twenty years after date, the county of Green, in the state of Kentucky, will pay to the holder of this bond the sum of five hundred dollars with interest thereon at the rate of six per cent per annum, payable semiannually upon presentation of the proper coupons hereto attached, the principal and interest being payable at the Bank of America, in the city of New York.

"In testimony whereof, the judge of said county of Green has hereunto set his hands and affixed the seal of said county on the first day of April, A. D. 1871, and caused the same to be attested by the coun-

ty clerk, who has also signed the coupons hereto attached.

[Green county seal.]

T. R. Barnett, Judge.

D. T. Towles, Clerk.'

"As appears on the face of each of said bonds, there was no recital therein of any of the facts herein found to be true.

"15. That the plaintiff knew, when he purchased the bonds sued on, that the railroad had not been constructed in Green county otherwise than as herein found to be the fact; namely, from the northern line of said county to the town of Greensburg, but no further.

"16. That, in the year 1868, upon a proposition therefor being submitted to the vote of the qualified voters of Green county, the majority of said qualified voters voted in favor of a proposition to subscribe for \$300,000 of the capital stock of the Elizabethtown & Tennessee Railroad Company, and, upon the said result of the election being properly ascertained and certified, the county judge of Green county, sitting alone and as the county court of said county, made and entered of record in said court the following orders:

590] "1868. Green County Court, May Called Term, 1868, 20th Day of May.

"Present: T. R. Barnett, Judge.

"This day, T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, this day produced their certificate in words and figures as follows, viz.: We, T. R. Barnett, Presiding Judge, and D. T. Towles, Clerk of the Green county court, duly authorized to compare the poll book of Green county, certify that an election held in said county at the various voting places in said county, on the 16th day of May, 1868, on the question whether the county court of Green county shall, for and on behalf of said county, subscribe for 3,000 shares in capital stock of Elizabethtown & Tennessee Railroad Company, to be paid for in the bonds of said county, payable in twenty years, and bearing 6 per cent interest, payable semiannually in the city of New York, with interest coupons attached thereto, and that 586 votes were cast for said subscription and 204 against said subscription.

"May 20th, 1868.

T. R. Barnett.

D. T. Towles.

"It is therefore ordered by the court that the said vote be, and is now, entered of record, as follows, to wit: 586 votes cast for said subscription, and 204 votes were cast against said subscription, showing that

there is a majority for said subscription of 382 votes.

"It is now, therefore, ordered that the clerk of this court, for and on behalf of the county of Green, make said subscription on the terms specified in the order submitting the question to a vote, as aforesaid.'

"17. That no formal or express exoneration of said county from the payment of said last-named subscription was ever made or attempted, but nothing further has, up to this date, ever been done in respect to it, and neither bonds by the county nor stock by the said last-named railroad company have ever *been issued or deliv-[591
ered in execution of said orders or under the terms of said subscription.

"Upon consideration of the facts hereinbefore found to be true, and of the opinion of the court of appeals, in the case of Green County v. Shortell, 116 Ky. 108, 75 S. W. 251, the court, in deference to said opinion, has recorded the following

"Conclusions of Law.

"1. That the plaintiff is not entitled to recover because the conditions upon which the subscription for the capital stock of the Cumberland & Ohio Railroad Company was made, and upon which the bonds sued on were issued, have not been performed or complied with; and

"2. That the failure to recite in the bonds any of the facts herein found to be true, or any of the conditions upon which the bonds were issued, is immaterial as against the defense that there was a failure to perform the said conditions.

"Judgment.

"In consideration of the premises it is considered and adjudged by the court that the plaintiff's petition be, and it is, dismissed, and that the defendant recover of the plaintiff its costs herein expended, and it may have execution therefor."

The defendant filed no exception or objection to the findings of fact, but the plaintiff excepted to the judgment, and sued out a writ of error to the circuit court of appeals, which, after the response by this court to a question certified to it (205 U. S. 410, 51 L. ed. 860, 27 Sup. Ct. Rep. 505), reversed the judgment of the circuit court, with direction to enter a judgment for the plaintiff. The question to be determined is whether, on the findings of fact, the court of appeals erred in ordering judgment for the plaintiff.

We think, although the defendant contends to the contrary, that the findings of fact, which accompanied the judgment of the circuit court, afford ample foundation for a final judgment. They were not objected to by the defendant at the time, and it was content to submit the case for judg-

592]ment upon *them. Nor has anything been advanced in argument which leads us to doubt their accuracy, or to desire that they should be more complete.

The defendant's counsel has not confined his argument to the questions presented by the record. It seems expedient, therefore, simply to determine the questions deemed to arise on the record, and stop there.

When the case was here before it was decided that the county had the power to issue the bonds, upon the approval of the qualified voters, and that (following the ruling of the highest court of Kentucky in this respect) the voters might impose conditions upon the issue. The approval was given, and the conditions imposed were expressed in the vote, as follows:

" . . . upon condition that said company shall locate and construct said railroad through the said county of Green, and within 1 mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county; and also upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest on said amount subscribed to said Cumberland & Ohio Railroad Company until said county of Green is fully and completely exonerated from the payment of the capital stock voted by said county and authorized to be subscribed by said Green county court to the Elizabethtown & Tennessee Railroad."

Bonds to the amount of \$250,000 were issued, and delivered pursuant to the vote, to the Cumberland & Ohio Railroad Company, and some of them have come to be legally owned by the plaintiff. There was consideration for them in 25,000 shares of the stock of the company, which were delivered to the county and have been held by it up to the present time. There is not the slightest evidence of fraud in their issue.

The real defense is that the bonds were void because the conditions expressed in the vote, which are said to be indispensable prerequisites to their validity, have 593]not been fulfilled. *The conditions relied on in defense are two, and they are subject to different considerations.

The condition that the bonds should not be issued until the county had been "exonerated" from a subscription theretofore authorized to be made to the stock of the Elizabethtown & Tennessee Railroad is a condition precedent to the lawful issue of the bonds. As these bonds contained no recital importing that the conditions had been performed, it was open to the county to show, even against a purchaser for value, 53 L. ed.

before maturity, without notice, that the conditions had not been performed. But the issue of bonds in payment of a subscription to railroad stock by an officer charged with the duty of ascertaining whether the conditions indispensable to the lawful issue had been fulfilled raises a presumption of their fulfillment prior to the issue. A lawful holder of the bonds is entitled to rely upon this presumption, although he incurs the danger that the presumption will be overcome by evidence. If he wishes absolute security in this respect, he must insist upon a recital. This much was determined by the decision of this court when the case was here before. 205 U. S. 410, 51 L. ed. 860, 27 Sup. Ct. Rep. 505. That case did not decide that there was a presumption of performance arising out of the length of time during which no claim was made in respect of the Elizabethtown & Tennessee Railroad subscription, but that there was a presumption of performance before the issue of the bonds. When we come to look at the facts found by the circuit court there is nothing to rebut this presumption. On the contrary, everything tends to support it. Even the wide range of the argument for the defendant did not suggest a single fact which could, to the slightest extent, control the presumption. The conclusion follows that the exoneration from the prior subscription had happened before the issue of the bonds to the Cumberland & Ohio Railroad Company. That condition has been performed, and is not available as a defense.

We must next consider the effect of the provision in the vote, that the subscription to the stock, payable in bonds, shall *be "upon condition that said company[594 shall locate and construct said railroad through the said county of Green, and within 1 mile of the town of Greensburg, in said county, and shall expend the amount so subscribed within the limits of Green county." If this part of the vote imposes a condition upon the lawful issue of the bonds or upon the obligation of the county to pay them, the defense must prevail, for the condition has not been performed. Only \$150,000 have been expended within the limits of the county, and the railroad, though constructed to Greensburg, a distance of 5 miles, was not carried further, although it was located from north to south through the county, a distance of 20 miles. It is not conclusive that the obligation thus imposed upon the railroad company is called a condition. It frequently has been the case that the word "condition" has been used in written instruments in a looser and broader sense than the law attaches to it. In ascertaining the true meaning of instruments in writing, courts

do not confine their attention to single words, phrases, or sentences. The meaning is sought from the whole instrument, viewed in the light of the subject with which it deals. This general rule of interpretation often makes it manifest that that which is called a condition is really but a covenant or agreement, to be performed independently of the counter obligation with which it is associated. When such an intent is discovered the courts have no difficulty in giving it effect, though the result be to disregard the technical meaning of the word "condition." *Stanley v. Colt*, 5 Wall. 119, 18 L. ed. 502; *Sohier v. Trinity Church*, 109 Mass. 1; *Episcopal City Mission v. Appleton*, 117 Mass. 326; *Cassidy v. Mason*, 171 Mass. 507, 50 N. E. 1027; *Clapp v. Wilder*, 176 Mass. 332, 50 L.R.A. 120, 57 N. E. 692; *Post v. Weil*, 115 N. Y. 361, 5 L.R.A. 422, 12 Am. St. Rep. 809, 22 N. E. 145; *Clark v. Martin*, 49 Pa. 289; *Watrous v. Allen*, 57 Mich. 362, 58 Am. Rep. 363, 24 N. W. 104; *Scovill v. McMahon*, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; *Hartung v. Witte*, 59 Wis. 285, 18 N. W. 175.

A consideration of the vote of the county leaves no doubt that that part of it which prescribed the nature of the railroad construction was not a condition. It would have been easy *to have postponed the obligation to pay the bonds until the construction had been completed, as desired by the county. Such a provision as that in *Provident Life & T. Co. v. Mercer County*, 170 U. S. 594, 42 L. ed. 1156, 18 Sup. Ct. Rep. 788, would have been enough. Indeed, the draftsman need not have looked afield. Nothing need have been done except to use the same language with reference to construction which he used in this vote with reference to exoneration from the prior subscription to the stock of another railroad. There he said that the subscription should be "upon the further condition that said bonds shall not be issued or said county pay any part of the principal or interest" until the exoneration had happened. The studied omission of this apt, clear, and emphatic language from the part of the vote dealing with the construction of the Cumberland & Ohio Railroad is of controlling significance. If the question rested upon this comparison of language alone, it would be quite enough to warrant the inference that it was not intended that the condition which was imposed in the one case should be equally imposed in the other. This conclusion is confirmed by a consideration of the subject-matter with which the vote dealt.

It would have defeated the very purpose for which the bonds were issued if the obligation to pay them had been made conditional upon the completion of the construction desired. The railroad to whose stock the county was authorized to subscribe, was not constructed, and needed the proceeds of the bonds to complete the work of construction. By accepting bonds upon the terms proposed, it came under the obligation to expend the amount subscribed within the limits of the county. As the subscription to the stock was to be paid for by the bonds, the amount subscribed was the amount of the bonds. The bonds which the county was authorized by the legislature to issue were described in the law as "payable to bearer, with coupons attached, bearing any rate of interest not exceeding 6 per cent per annum, payable semiannually in the city of New York, payable at such times as they may designate, not exceeding thirty years from date." The bonds thus *described were evidently designed for [596 the market. They could pass from hand to hand, since they were payable to bearer. The interest was represented by detachable coupons, and was payable at the chief money center of the country. It is manifest that the bonds were intended to be issued and delivered to the railroad company before the construction began. It would require the very strongest words in the vote to convince us that it was intended to attach to such bonds a condition which would destroy their obligation, if, after a term of years, it should appear that the construction had not been completed in the manner designated. Bonds with such a condition would be unsalable; and it is inconceivable that they could be issued with any expectation that they could be used. We cannot doubt that the county, in its anxiety to secure the building of the railroad, was content to rest upon the agreement of the company to construct it in the manner desired, and that the only technical condition to the validity of the bonds was that which referred to the exoneration from a prior subscription. As it turned out, it would have been very much wiser for the county to have declined to issue the bonds until the construction was completed, or to have taken some security for the performance of the agreement with reference to the construction. But courts cannot make for the parties better agreements than they themselves have been satisfied to make. The records of this court show that prudence has not been a marked characteristic in the issue of municipal bonds in aid of the construction of railroads.

Our conclusion upon the whole case is that, with the exception of the condition which has been performed, the bonds were issued upon a good consideration and unconditionally, and were a valid obligation of the county in whosoever hands they subsequently lawfully came.

We have examined with attention and respect the case of *Green County v. Shortell*, 116 Ky. 108, 75 S. W. 251, wherein the court of appeals of the state arrived at a different conclusion, and regret that we are unable to concur in its reasoning.

597] *The finding of the circuit court was that the plaintiff, at the time of beginning his action, which was after the bonds were overdue, was the bona fide holder, for value of the bonds and coupons sued on. In view of the conclusion at which we have arrived it seems unnecessary to dwell upon the exact terms of this finding. In any event, the plaintiff was the legal holder and owner of the bonds. This is not disputed. Assuming that any defense is open of which the holder might have had notice by inspecting the law, vote, and the records of the county court, it would come to nothing, because such an inspection would have shown that no defense to the payment of the bonds existed.

We need not consider what would have been the situation if the bonds were still in the hands of the railroad and it were bringing action upon them, and an attempt had been made to set up against their amount the damages resulting from the railroad's failure to perform the agreement with respect to construction. The bonds here are not in the hands of the railroad nor is any such defense set up. The defense is, that the bonds are null and void, and, as has been shown, that defense is without merit.

It appears that a recovery upon some of the coupons declared upon is barred by the statute of limitations. This is conceded by the plaintiff, who says that the judgment of the circuit court of appeals, in view of the state of the pleadings, does not require that there should be a recovery upon the coupons thus barred. It is better, however, that this question be freed from doubt and the judgment be modified so as to require the circuit court to ascertain what coupons are barred by the statute of limitations and to enter judgment for the remainder, and for the principal of the bonds, of course, with interest in both cases. Thus modified, the judgment of the Circuit Court of Appeals is affirmed.

GREEN COUNTY, Kentucky, Petitioner,
v.

MARY AMIS QUINLAN, Executrix of the Last Will and Testament of Leonard Q. Quinlan, Deceased. [No. 351.]

GREEN COUNTY, Kentucky, Petitioner,
v.

THOMAS, Executor. [No. 352.]

Mr. Justice Harlan, dissenting:

I quite agree with Judge Lurton of the circuit court of appeals, *that common[598 justice requires that there should not be now any judgment upon the merits in these cases. He correctly said that the findings of fact do not adequately cover all the issues, and upon those to which they are responsive they are neither definite nor full enough to justify a judgment in favor of the plaintiff. Without expressing at this time any views upon the merits of these cases, I am of opinion that the judgment in each case should be reversed and the cases remanded with an order for a new trial, when all the facts may be more fully disclosed and sufficient findings made.

GREEN COUNTY, Kentucky, Petitioner,
v.

JOHN THOMAS'S EXECUTOR, Henry Knippenberg, et al.

(See S. C. Reporter's ed. 598-603.)

Writ of error — parties — amendment — dismissal.

1. The circuit court of appeals is justified in allowing an amendment to correct a writ of error which, owing to the illness of counsel, does not set forth accurately the parties plaintiff, and in denying a motion to dismiss the writ, founded upon such mistake.

[For other cases, see Appeal and Error, 3067-3089, in Digest Sup. Ct. 1908.]

Courts — amount in dispute — joint interests.

2. The undivided interests of the joint owners and holders of the bonds and coupons on which suit is brought may be united for the purpose of making up the amount necessary to give jurisdiction to a Federal circuit court.

[For other cases, see Courts, 908-914, in Digest Sup. Ct. 1908.]

NOTE.—On amendments of writ of error, citation, or notice of proceedings for review—see note to *Thomas v. Green County*, 77 C. C. A. 490.

On the jurisdiction of Federal courts as affected by the amount in dispute—see notes to *Rich v. Bray*, 2 L.R.A. 225; *Auer v. Lombard*, 19 C. C. A. 75; and *Tennent-Stirling Shoe Co. v. Roper*, 36 C. C. A. 459.

On certiorari in Federal courts—see note to *Clark v. Hackett*, 17 L. ed. U. S. 69.

Appeal — rendering final judgment for plaintiff in error.

3. Final judgment in favor of plaintiff in error may be entered by the appellate court where the findings of the court below are full and adequate, and protect every substantial right of the party in whose favor the judgment originally was entered.

[For other cases, see Appeal and Error, IX. d, in Digest Sup. Ct. 1908.]

Certiorari — scope of review.

4. The scope of review on certiorari will not be broadened so as to include, in addition to the questions which the petitioner has properly raised, technical questions tending to embarrass the progress and delay the final ending of an action, the merits of which are with the respondents.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. 1908.]

[No. 352.]

Argued December 17, 18, 1908. Decided January 4, 1909.

ON WRIT OF Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which reversed a judgment of the Circuit Court for the Western District of Kentucky, dismissing the petition in an action on county bonds and coupons, and directed the entry of a judgment for plaintiffs. Affirmed.

See same case below, 159 Fed. 339.

The facts are stated in the opinion.

Mr. Ernest Macpherson argued the cause, and, with Mr. John W. Lewis, filed a brief for petitioner.

Messrs. Edmund F. Trabue and George DuRelle argued the cause, and, with Messrs. Alexander Pope Humphrey and Alexander C. Ayers, filed a brief for respondents:

Whether these are conditions or not depends entirely upon the construction of the whole instrument.

Episcopal City Mission v. Appleton, 117 Mass. 326; Scovill v. McMahon, 62 Conn. 378, 21 L.R.A. 58, 36 Am. St. Rep. 350, 26 Atl. 479; Hartung v. Witte, 59 Wis. 285, 18 N. W. 175; Stanley v. Colt, 5 Wall. 119, 166, 18 L. ed. 502, 509.

Courts have been almost unanimous in construing provisions similar to these as covenants, and not as conditions.

1 Cook, Stock & Stockholders, § 78; Chamberlain v. Painesville & H. R. Co. 15 Ohio St. 225; North Missouri R. Co. v. Winkler, 29 Mo. 318; Swartwout v. Michigan Air Line R. Co. 24 Mich. 389; Pittsburgh & S. R. Co. v. Biggar, 34 Pa. 455; Paducah & M. R. Co. v. Parks, 86 Tenn. 554, 8 S. W. 842; Morrow v. Nashville Iron, Steel & Charcoal Co. 87 Tenn. 262, 3 L.R.A. 37, 10 Am. St. Rep. 658, 10 S. W. 495;

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McMillan v. Maysville & L. R. Co. 15 B. Mon. 218, 61 Am. Dec. 181; Miller v. Pittsburg & C. R. Co. 40 Pa. 237, 8 Am. Dec. 570.

Mr. Justice Moody delivered the opinion of the court:

This case relates to the same issue of bonds referred to in the one preceding, and is governed by it, unless there is something to prevent in the questions following.

There were several plaintiffs, including three corporations. In the petition they alleged that they were "jointly the owners and holders" of sixty-seven bonds, whose aggregate face value exceeded the jurisdictional amount. Diversity of citizenship was duly alleged. By leave of court, on suggestion of the death of one of the plaintiffs, and that his personal representatives had been discharged, his heirs were made parties plaintiff. No objection was made to this amendment by the defendant at the time. The defendant's answer denied that the plaintiffs were "jointly the owners or holders" of the bonds. Certain interrogatories to each of the plaintiffs were attached to the answer, which prayed that plaintiffs be compelled to answer them on oath. These interrogatories were directed to the subject of the acquisition and ownership of the bonds by the plaintiffs. The answers disclosed that the bonds in suit were taken from the Cumberland & Ohio Railroad Company by the Indianapolis Rolling Mill Company in payment for iron to be used in building the railroad through Green county, were by the mill company turned over to its stockholders. (who were *the plaintiffs, or[600 represented by them) as dividends, and that they, fifteen years before, agreed to become joint owners and holders of all the bonds in certain named proportions. And it was stated that each plaintiff owned an undivided interest in all the bonds and coupons in suit. The defendant then suggested the death of two of the plaintiffs, but no action appears to have been taken thereon by the court.

The defendant was permitted to file an amended answer, which alleged that, after the distribution of the bonds by way of dividends, each distributee owned a separate and distinct interest which were joined together to give the court jurisdiction, which, in the case of certain plaintiffs, it would otherwise lack on account of the insufficient value of their respective interests, and concluded by averring that the court was without jurisdiction.

The defendant moved the court for a rule on the plaintiffs to furnish dates of the deaths of the parties plaintiff named in the pleadings, who had died since the institution of the action, and to show cause why the

action should not be dismissed for failure to revive within the time prescribed by law. This motion was denied and defendant excepted.

On the 22d day of March 1905, the defendant moved the court to dismiss the action on the ground of misjoinder of plaintiffs, and for want of jurisdiction of such of the plaintiffs whose claims were separately less than \$2,000. On the same day the parties stipulated that the issues of fact might be tried and determined by the court without the intervention of a jury.

On the 1st day of June 1905, the circuit court ordered judgment for the defendant, with the same findings of fact and conclusions of law which were made in the preceding case. The plaintiffs, each and all, excepted to the judgment and to each part of it, and filed a petition for a writ of error to the circuit court of appeals, with assignment of errors. The defendant did not object or except to the findings of fact, or request any rulings of law, or file any writ of error or assignment of errors, or any bill of exceptions, or take any other step whatever which would carry to the appellate court any questions of law different from those contained in the plaintiffs' assignment of errors. Throughout the record, up to this point, the defendant appears to have been content to raise questions of law without attempting in any form to save any of its rights upon the resulting rulings of the court.

On the 1st day of May, 1906, the plaintiffs in error moved the court of appeals to amend the writ of error by striking out certain persons named therein as plaintiffs and by inserting the names of certain other persons. On the same day the defendant in error moved the court to dismiss the writ of error because some of the plaintiffs against whom judgment had been rendered in the court below had failed to prosecute the writ of error without a summons and severance, and because certain persons who were never parties to the action were named in the writ of error. These cross motions seem to have raised the same questions. It appeared that, owing to illness of counsel for the plaintiffs in error, the petition for a writ did not set forth accurately the parties plaintiff. The error was a pure accident, and we think the court below was entirely justified in allowing the amendment and in denying the cross motion to dismiss. Rev. Stat. § 1005, U. S. Comp. Stat. 1901, p. 714.

The court of appeals reversed the judgment of the circuit court, and ordered, as will hereafter more specifically appear, that court to enter a judgment for the plaintiffs. The case is here upon a writ of certiorari. It has been argued by the defendant apparently upon the theory that all questions of

law which were raised by it or were remotely suggested in the record were open for consideration in the appellate court. But we ought not to encourage such looseness of practice. Some of the questions raised by the defendant were passed on adversely to it in the circuit court of appeals, and we do not intend to intimate any doubt of the correctness of the decision of that court. The writ of error sued out by the plaintiffs, and the assignment of errors which accompanied it, set forth all the *questions regard-[602]ing the action of the court below, of which the appellate court was bound to take notice. The *Maria Martin* (*Martin v. Northern Transp. Co.*) 12 Wall. 31, 40, 20 L. ed. 251, 252; *Bolles v. Outing Co.* 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94. Neither that court nor this ought to be expected to search through a confused record for the purpose of finding errors, where the party complaining has not taken the pains, at the time the alleged errors were committed, to save its rights in some form known to the law. It would be, of course, entirely unfair to enter final judgment in favor of the party appellant unless the court can see that the findings of the court below are full and adequate and protect every substantial right of the party in whose favor the judgment originally was entered. But we think that the findings did this. The first finding of the court was that the plaintiffs, at the date of the beginning of the suit, were "the bona fide holders for value of the bonds and coupons sued on, and fully entitled to sue the defendant thereon in this court." This is a finding which, among other things, supports the jurisdiction of the court, and could proceed only upon the theory that the plaintiffs were the joint owners and holders of the bonds and coupons sued on. If they were, the court had jurisdiction under the rule stated in *Clay v. Field*, 138 U. S. 464, 479, 34 L. ed. 1044, 1049, 11 Sup. Ct. Rep. 419.

The defendant owes the amount of these bonds, and, at the beginning of this action, owed it to the plaintiffs. It has no interest or concern in the proper division of the amount due on the bonds among those who are entitled to share the proceeds of the verdict. We are not disposed to open the way to the defendant to raise technical questions to embarrass the progress and delay the final ending of this action. The defendant is entitled to a decision upon the questions which it has properly brought to this court, and no others.

The judgment of the court of appeals was "that the judgment of the said circuit court in this cause be, and the same is hereby, reversed with costs and cause remanded with directions to the said circuit court

that, upon the suggestion on the record of the deaths of such of the original plaintiffs as 603] have *died pending the suit, and striking out the names of their personal representatives, it enter judgment for the plaintiffs as they then appear of record, for the amount of the principal of the bonds in suit, with interest thereon from the date when their latest coupons severally become due, and for the coupons in suit, with interest on each from the time when they severally fell due." We have no doubt of the correctness of this judgment or that it will protect every substantial right which the defendant has, and it is, therefore, affirmed.

For dissenting opinion, see ante, 343.

SOUTHERN REALTY INVESTMENT
COMPANY, Plff. in Err.,
v.
NANCY WALKER.

(See S. C. Reporter's ed. 603-608.)

Federal courts — jurisdiction — diverse citizenship — collusive incorporation.

An action brought by a South Dakota corporation against a citizen of Georgia, in a Federal circuit court sitting in the latter state, will be dismissed under the act of March 3, 1875 (18 Stat. at L. 470, 472, chap. 137, U. S. Comp. Stat. 1901, pp. 508, 511), § 5, as collusive, where such corporation is merely the agent of Georgia attorneys, who brought it into existence as a corporation that individual citizens of Georgia having controversies with other individual citizens of that state might, in their discretion, have the use of its corporate name in order to create cases apparently within the jurisdiction of the Federal court.

[For other cases, see Courts, 697, 698, in Digest Sup. Ct. 1908.]

[No. 43.]

Argued December 7, 8, 1908. Decided January 4, 1909.

NOTE—As to diverse citizenship as ground of Federal jurisdiction—see notes to *Shipp v. Williams*, 10 C. C. A. 247; *Mason v. Dullaghan*, 27 C. C. A. 296; *Seddon v. Virginia, T. & C. Steel & I. Co.* 1 L.R.A. 108; *Myers v. Murray, N. & Co.* 11 L.R.A. 216; *Emory v. Greenough*, 1 L. ed. U. S. 640; *Strawbridge v. Curtiss*, 2 L. ed. U. S. 435; *M'Donald v. Smalley*, 7 L. ed. U. S. 287; and *Roberts v. Lewis*, 36 L. ed. U. S. 579.

On the citizenship of corporations with reference to jurisdiction—see notes to *National S. S. Co. v. Tugman*, 27 L. ed. U. S. 87, and *Hope Ins. Co. v. Boardman*, 3 L. ed. U. S. 36.

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IN ERROR to the Circuit Court of the United States for the Southern District of Georgia to review a judgment dismissing, as collusive, a suit brought by a South Dakota corporation against a citizen of Georgia. Affirmed.

The facts are stated in the opinion.

Mr. Alex. C. King argued the cause, and, with Messrs. King, Spalding, & Little, filed a brief for plaintiff in error:

A corporation is, for the purposes of jurisdiction in the United States courts, conclusively presumed to be composed of citizens of the state of its creation.

St. Louis & S. F. R. Co. v. James, 161 U. S. 545, 554, 557, 40 L. ed. 802, 805, 806, 16 Sup. Ct. Rep. 621; *Southern R. Co. v. Allison*, 190 U. S. 326, 332, 47 L. ed. 1078, 1081, 23 Sup. Ct. Rep. 713; *Louisville, C. & C. R. Co. v. Letson*, 2 How. 497, 555, 11 L. ed. 353, 377; *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. ed. 86; *Marshall v. Baltimore & O. R. Co.* 16 How. 314, 14 L. ed. 953; *Germania F. Ins. Co. v. Francis*, 11 Wall. 210, 20 L. ed. 77; *Ex parte Schollenberger*, 96 U. S. 377, 24 L. ed. 854; *Shaw v. Quincy Min. Co. (Ex parte Shaw)* 145 U. S. 444, 446, 36 L. ed. 768, 770, 12 Sup. Ct. Rep. 935.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307, is not controlling.

Maxfield v. Levy, 4 Dall. 330, 1 L. ed. 854, Fed. Cas. No. 9,321; *M'Donald v. Smalley*, 1 Pet. 620, 7 L. ed. 287; *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *Irvine Co. v. Bond*, 74 Fed. 854; *Slaughter v. Mallet Land & Cattle Co.* 72 C. C. A. 430, 141 Fed. 287.

Where a corporation is organized for bona fide and valid reasons, and title to property is bona fide vested in it, without any trust, expressed or secret, in favor of any other person, the fact that knowledge that such corporation could sue in the Federal court was also a reason for forming the same, and for vesting in it the title to the property, and converting the interest into an ownership of stock in lieu of an ownership of land, does not render the transaction other than bona fide, or in any way affect the jurisdiction of the United States court.

M'Donald v. Smalley, 1 Pet. 620, 624, 7 L. ed. 287, 289; *Barney v. Baltimore*, 6 Wall. 280, 283, 18 L. ed. 825, 826; *Crawford v. Neal*, 144 U. S. 593, 36 L. ed. 556, 12 Sup. Ct. Rep. 759; *DeLaveaga v. Williams*, 6 Sawy. 573, Fed. Cas. No. 3,759; *Neal v. Foster*, 36 Fed. 41; *Foote v. Hancock*, 15 Blatchf. 343, Fed. Cas. No. 4,911; *Dickerman v. Northern Trust Co.* 176 U. S. 181,

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191, 44 L. ed. 423, 430, 20 Sup. Ct. Rep. 311; *South Dakota v. North Carolina*, 192 U. S. 286, 310, 311, 48 L. ed. 448, 457, 458, 24 Sup. Ct. Rep. 269.

Mr. Olin J. Wimberly argued the cause and filed a brief for defendant in error:

A fraud upon the jurisdiction of the court derives no sanctity from the fact that the real parties may garb themselves in the attire of a foreign corporation.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; *Little v. Giles*, 118 U. S. 596, 30 L. ed. 269, 7 Sup. Ct. Rep. 32; *Kreider v. Cole*, 79 C. C. A. 339, 149 Fed. 647.

604] *Mr. Justice Harlan delivered the opinion of the court:

This action of ejectment was brought in the circuit court of the United States for the southern district of Georgia to recover a tract of land in that state. The plaintiff, the Southern Realty Investment Company, sued as a corporation of South Dakota, while the defendant is a citizen of Georgia.

The articles of incorporation filed by the company in South Dakota stated that the purpose for which the corporation was formed was to buy, sell, or lease real estate; open up farm lands and operate farms; carry on any business which may be deemed advantageous in connection with farming operations; borrow and lend money on such security as may be deemed advisable; make and furnish abstracts of title to lands; guarantee titles of lands; buy, sell, or discount notes, accounts, mortgages, bonds, judgments, executions, and commercial paper of any kind; issue bonds and secure the same by mortgage or conveyance of property, real or personal, and sell, pledge, or hypothecate such bonds; derive compensation and profit from such transactions; and generally to do any and everything needful to the carrying on of such business transactions.

The case was tried on a plea to the jurisdiction of the circuit court of the United States.

In that plea it was averred that although the petition alleged diversity of citizenship, the suit was not, in fact, one of that character, but one in which the parties have been improperly made for the purpose only of creating a case of which the circuit court of the United States could take cognizance; that the Southern Realty Investment Company was incorporated and organized, under the laws of South Dakota, at the instance of two named Georgia lawyers, in order that it might, under their direction, prosecute suits in the United States court that did not really and substantially involve disputes or controversies within its jurisdiction, but controversies really and substantially be-

tween citizens of Georgia; that the only business the company has is to prosecute suits in the United States courts, *in its[605 name, for those attorneys and other citizens of Georgia, to recover lands and mesne profits, of which suits those courts cannot properly take cognizance; and that the present suit against citizens of Georgia has been brought, in the name of the South Dakota corporation, for the use and benefit of certain other citizens of Georgia (the real and substantial plaintiffs in interest), for the purpose of conferring an apparent jurisdiction on the circuit court of the United States. The defendant's prayer was that the court should take no further cognizance of the action, but should dismiss it as one not really and substantially involving a dispute or controversy properly within the jurisdiction of the court, and one in which the parties to the suit had been improperly and collusively made for the purpose of creating a case cognizable in said court.

The plea to the jurisdiction was based on the act of Congress of March 3d, 1875, chap. 137, determining the jurisdiction of the circuit court of the United States, and regulating the removal of causes from state courts. By that act (§5) it was provided, among other things, that if, at any time after a suit is commenced in a circuit court of the United States, it shall appear to the satisfaction of the court "that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require," etc. 18 Stat. at L. 470, 472, U. S. Comp. Stat. 1901, pp. 508, 511.

At the trial of the plea to the jurisdiction, the plaintiff submitted various requests for instructions to the jury, but each of those requests was denied, the plaintiff duly excepting to the action of the court. One of the requests in effect called for a peremptory finding for the plaintiff; for the court was asked to say to the jury that no fact was disclosed that authorized the jury to find that the suit was not one of which the circuit court *of the United States could[606 take cognizance. The court charged the jury, and to one part of the charge the defendant took an exception.

The verdict of the jury sustained the plea, and thereupon the court dismissed the suit as one that did not really and substantially involve a dispute or controversy within the jurisdiction of the court, and as one

that was collusive within the meaning of the act of Congress.

A bill of exceptions was taken which embodied all the evidence introduced by each side at the trial.

We will not extend this opinion by setting out the evidence at large. Except in its special facts and circumstances this case does not differ from cases heretofore determined under the judiciary act of 1875. There was evidence leading to the conclusion that the Southern Realty Investment Company was brought into existence as a corporation only that its *name* might be used in having controversies that were really between citizens of Georgia determined in the Federal, rather than in the state, court. It did not have, nor was it expected to have, as a corporation, any will of its own or any real interest in the property that stood or was placed in its name. It was completely dominated by the two Georgia attorneys who secured its incorporation under the laws of South Dakota through the agency of a South Dakota lawyer, who, in a letter to one of the Georgia attorneys, claimed that his office had, within three years, secured nine hundred and eighty-five (985) charters under the laws of that state for nonresidents, and part of whose business was to "furnish" South Dakota incorporators, when necessary. In short, the plaintiff company was and is merely the agent of the Georgia attorneys, who brought it into existence as a corporation that individual citizens of Georgia, having controversies with other individual citizens of that state, might, in their discretion, have the use of its corporate name in order to create cases apparently within the jurisdiction of the Federal court. It had, it is true, a president and a board of directors,—all of whom were citizens of Georgia, two 607] of the five directors being *the Georgia attorneys, and one being the female stenographer of such attorneys,—but the president and a majority of the directors were the holders each of only one share of donated stock, and recognized it to be their duty to represent the Georgia attorneys and to obey, as they did obey, their will implicitly. The company, in respect of all its business, was the agent of those attorneys to do their bidding. Its president testified that he did not know for what purpose the company was really organized, or that it had ever done any business except "as to the bringing of these suits," or that it had any money. Its place of business in Georgia was in the office of the Georgia attorneys. Its pretended place of business in South Dakota was in what is called a domiciliary office, maintained by the attorney in that state who procured its charter. In the latter office there could have been found, no doubt,

a desk and a chair or two, but no business. The company's president never knew of its doing any business in South Dakota. As a corporation the Southern Realty Investment Company must be deemed a mere sham. It has, in fact, no property or money really its own, and it was not intended by those who organized it that it should become the real owner of any property of its own in South Dakota or elsewhere. It is, as already stated, simply a corporation whose name may be used by individuals when they desire, for their personal benefit, to create a case technically cognizable in the Federal court. Those individuals, using the name of a corporation for the benefit of themselves and their clients, citizens of Georgia, seem to be the real parties in interest in every transaction carried on in the name of the corporation.

The present case is controlled by the decisions of this court in *Williams v. Nottawa* 104 U. S. 209, 211, 26 L. ed. 719, 720; *Morris v. Gilmer*, 129 U. S. 315, 328, 32 L. ed. 690, 694, 9 Sup. Ct. Rep. 289; *Lehigh Min. & Mfg. Co. v. Kelly*, 160 U. S. 329, 336, 40 L. ed. 445, 447, 16 Sup. Ct. Rep. 307, et seq., and *Miller & Lux v. East Side Canal & Irrig. Co.* 211 U. S. 293, ante, 189, 29 Sup. Ct. Rep. 111. The case is one in which it was the duty of the court, under the act of 1875, not to proceed. No error of law was committed at the trial to the substantial prejudice of the plaintiff. The charge to the jury fairly covered the issue *made by [608 the plea, and was not liable to any valid objection. The judgment must be affirmed.

It is so ordered.

Mr. Justice Brewer dissents.

EL PASO & SOUTHWESTERN RAILROAD COMPANY, Plff. in Err.,

v.

H. D. VIZARD.

(See S. C. Reporter's ed. 608-612.)

Master and servant — contributory negligence.

1. Mounting a moving open water car by placing one foot on the journal box and catching hold of an iron hand rail running through standards on the side of

NOTE.—Liability of railway company for injury to servant while using as handhold an appliance not designed for that purpose.

Very similar in its facts to *EL PASO & S. W. R. Co. v. VIZARD* is *Quirouet v. Alabama G. S. R. Co.* 111 Ga. 315, 36 S. E. 599, where a railroad brakeman attempted to mount a moving car by placing one foot

the car and within easy reach is not, as a matter of law, contributory negligence which will defeat a recovery by a brakeman for the injury sustained by the giving way of such rail under his weight.

[For other cases, see Master and Servant, II. c. 2, in Digest Sup. Ct. 1908.]

Appeal — review of facts.

2. A verdict of the jury in an action for personal injuries, approved by the trial court and by the circuit court of appeals, settles the disputed questions of fact.

[For other cases, see Appeal and Error, 4931-4959, in Digest Sup. Ct. 1908.]

[No. 31.]

Argued November 30, December 1, 1908.
Decided January 4, 1909.

on the journal box and grasping a standard furnished for the sole purpose of holding freight on the car, and was injured by the turning of the standard, which did not fit the socket. There was no hand-hold on the car, and no evidence that the company knew of or assented to a custom of employees to board cars in this way, and the brakeman's object could as well have been attained by boarding the caboose. On this state of facts a verdict directed in favor of defendant was sustained.

So, in *Chicago, R. I. & P. R. Co. v. Murray*, 85 Ark. 600, 16 L.R.A. (N.S.) 984, 109 S. W. 549, it was held that a verdict should have been directed in favor of a railway company sued for injuries received by a brakeman who attempted to use as a grab iron, while giving a signal, the standard of a freight car, which did not fit the socket, there being no evidence sufficient to show that such use of the standard was so continuous and so notorious that the company must have known of and sanctioned it.

To the same effect is *Elgin, J. & E. R. Co. v. Docherty*, 66 Ill. App. 17, where a switchman was held, as a matter of law, guilty of contributory negligence precluding any recovery from the railway company for injuries sustained by the giving way of the fastenings of the brake staff, which, in connection with the swinging brake beam, he was using in boarding a moving car, such car being supplied with hand-holds and stirrups, and his act being in direct violation of a rule of the company forbidding an employee to stand on the track and board an approaching engine or car.

So, in *Timmons v. Central Ohio R. Co.* 6 Ohio St. 106, a demurrer was sustained to a petition filed by a brakeman against a railway company to recover for injuries received in attempting to board a rapidly moving gravel ear by using the rim of the car box as a ladder.

An extreme application of the principle involved in these cases is found in *Dawson v. Chicago, R. I. & P. R. Co.* 52 C. C. A. 286, 114 Fed. 870, denying any right to recover for the death of a brakeman who

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Western District of Texas in favor of plaintiff in an action for personal injuries, which was removed to the Circuit Court from the District Court of El Paso County in the state of Texas. Affirmed.

Statement by Mr. Justice Brewer:

Defendant in error, plaintiff below, was a brakeman in the employ of the railroad company, plaintiff in error, and on February 22, 1904, was injured while in the performance of his duties as brakeman. He brought suit for \$25,000 in the district court of El Paso county, Texas, charging

was killed by reason of the giving way of a grip iron on the end of a flat car, which he had seized for the purpose of boarding the car, on the ground that, while such grip irons were proper hand-holds to be used in coupling or uncoupling, they were not intended or designed to be used for boarding the car.

The failure to have securely fastened the end gates of a gondola car, which are hinged, and can be laid inward on the car floor, so as to allow the car to be used as a flat car, is not negligence which will render the railway company liable to a brakeman who was injured while using the gate as a hand-hold in alighting from the car while in motion, although there was no hand-hold on the car. *Graham v. Chicago, St. P. M. & O. R. Co.* 62 Fed. 896.

In *McCauley v. Southern R. Co.* 10 App. D. C. 560, it was held that where the fireman on a locomotive provided with footboards and hand rails on either side, but having no rail in front, went out on the side of the locomotive while it was in motion, and walked to the front, and, while removing a flag on the other side, supported himself by grasping a number plate, placed on the locomotive as a means of identification, and not as a support, and was thrown to the ground by the slipping of the plate,—he could not recover from the railway company for injuries so received, in the absence of evidence showing that his use of the number plate as a support was with the acquiescence or within the knowledge of the company.

But where a railway company uses a road engine for switching, and provides no special hand-hold in front, it is charged with the duty of giving the number plate, which is the most convenient projection for a man of ordinary size to grasp, such an inspection as it would give to a hand-hold. *Dunn v. New York, N. H. & H. R. Co.* 40 C. C. A. 546, 107 Fed. 666.

In *Brimer v. Chicago, B. & Q. R. Co.* 109 Mo. App. 493, 85 S. W. 653, in which it appeared that the plaintiff, a laborer on a gravel train, was injured by the giving way of a stake on the side of one of the

negligence on the part of the company. Subsequently he amended his petition by adding the allegation that the car, in getting onto which he was injured, was used in interstate shipment, and that the cause of the injury was a lack of hand holds and grab irons required by the safety appliance statute of the United States. Thereupon the railroad company removed the case to the circuit court of the United States for the western district of Texas. A trial was held in April, 1906, which resulted in a judgment for \$6,000. This judgment was affirmed by the court of appeals, and from that court brought here on error.

Mr. J. F. Woodson argued the cause, and Mr. Millard Patterson filed a brief for plaintiff in error:

Where an employee contributes to his own injury by unnecessarily subjecting himself to a known danger, he is not relieved from the charge of contributory negligence nor from its effect by the fact that it was a common thing for other employees to take the same risk.

American Linseed Co. v. Heins, 72 C. C. A. 533, 141 Fed. 50; *Gilbert v. Burlington, C. R. & N. R. Co.* 63 C. C. A. 27, 128 Fed. 529.

It is the duty of a railway employee to use the appliances provided for his use, and particularly the appliances required by the safety appliance act; and where he fails to use such appliances, and exposes himself to an unnecessary danger, he assumes the risk of injury.

Gilbert v. Burlington, C. R. & N. R. Co. supra; *Morris v. Duluth, S. S. & A. R. Co.* 47 C. C. A. 661, 108 Fed. 749; *Dawson v. Chicago, R. I. & P. R. Co.* 52 C. C. A. 286, 114 Fed. 871; *Weed v. Chicago, St. P.*

M. & O. R. Co. 5 Neb. (Unof.) 623, 99 N. W. 828; *Montgomery v. Chicago G. W. R. Co.* 109 Mo. App. 88, 83 S. W. 67; *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439-443, 24 L. ed. 506-508; *Suttle v. Choctaw, O. & G. R. Co.* 75 C. C. A. 470, 144 Fed. 669; *Crookston Lumber Co. v. Boutin*, 79 C. C. A. 368, 149 Fed. 686; *Quirouet v. Alabama G. S. R. Co.* 111 Ga. 315, 36 S. E. 599; *Tuttle v. Detroit, G. H. & M. R. Co.* 122 U. S. 189, 30 L. ed. 1114, 7 Sup. Ct. Rep. 1166; *Powell v. Wisconsin C. R. Co.* 159 Fed. 864; *St. Louis, K. C. & C. R. Co. v. Conway*, 86 C. C. A. 1, 156 Fed. 234; *Chicago & N. W. R. Co. v. Davis*, 3 C. C. A. 429, 10 U. S. App. 422, 53 Fed. 61; *Cunningham v. Chicago, M. & St. P. R. Co.* 5 McCrary, 465, 17 Fed. 882; *New York, C. & St. L. R. Co. v. Hamlin (Ind.)* 10 L.R.A. (N.S.) 881, 79 N. E. 1040; *Carrier v. Union P. R. Co.* 61 Kan. 447, 59 Pac. 1075; *Ferguson v. Chicago, M. & St. P. R. Co.* 100 Iowa, 733, 69 N. W. 1026; *Perry v. Michigan Alkali Co.* 150 Mich. 537, 114 N. W. 315; *State use of Miller v. Western Maryland R. Co.* 105 Md. 30, 65 Atl. 635; *Warden v. Louisville & N. R. Co.* 94 Ala. 277, 14 L.R.A. 552, 10 So. 276; *Bailey, Personal Injuries Relating to Master & Servant*, § 1121; *Doerr v. St. Louis Brewing Asso.* 176 Mo. 547, 75 S. W. 600; *Central R. Co. v. Mosely*, 112 Ga. 914, 38 S. E. 350; *Jayne v. Sebevaing Coal Co.* 108 Mich. 242, 65 N. W. 971.

The evidence showing that Vizard attempted to use the hand rail for a purpose for which it was not intended, he assumed the risk of being injured.

Wood, Mast. & S. § 402; *Bailey, Master's Liability for Injuries to Servant*, p. 22; *1 Shearm. & Redf. Negl. p.* 346.

cars, placed there for the purpose of holding boards to retain the gravel, and which the plaintiff was using to steady himself while the train was moving, which was a common practice of the employees engaged in this work, it was held that, inasmuch as such use was habitual, and one which should have been anticipated by the defendant, not only as a customary, but as a natural, use, it was liable for negligence in not using reasonable care to keep such stake safe for that purpose.

So, in *Wallace v. Seaboard Air Line R. Co.* 141 N. C. 646, 13 L.R.A. (N.S.) 384, 54 S. E. 399, a railroad company which permitted a custom to become established by which its employees, to assist themselves in climbing over cars, in the performance of their duties, used the crosspieces nailed to the standards of loaded lumber cars, which were put on the cars for the sole purpose of holding the lumber in place, was held to be bound to exercise due care that they should be safe for such use. Ac-

cordingly recovery was allowed for the death of an employee, resulting from the pulling off of such crosspiece when he had hold of it as a support to sustain him in climbing over the end of the lumber on the car.

A street railway case involving this question is *Carroll v. Union R. Co.* 52 Misc. 163, 101 N. Y. Supp. 745, where the jury was held to be unwarranted in inferring actionable negligence on the part of the street railway company towards a conductor who was injured by the giving way under his weight of the band of a sign frame in which he was endeavoring, while standing on the dashboard of the car, to insert a slat bearing the name of a street.

For a discussion generally of the liability of a master for injury to servant in using appliance for purpose other than that for which it was primarily intended, see case note to *Chicago, R. I. & P. R. Co. v. Murray*, 16 L.R.A. (N.S.) 984.

Mr. W. H. Robeson argued the cause, and Mr. George E. Wallace filed a brief for defendant in error:

Where the plaintiff's injury was caused by an act on his part which the law regards as negligence *per se*, he cannot excuse his contributory negligence by proof of the custom on the part of others to do the same act in the same way. But where an act is not negligence *per se*, the plaintiff, to rebut a charge of contributory negligence, may introduce evidence of a general custom among persons experienced in the performance of the same act, under similar circumstances, to perform it as he did.

29 Am. & Eng. Enc. Law, p. 418; Choctaw, O. & G. R. Co. v. Tennessee, 191 U. S. 328, 48 L. ed. 202, 24 Sup. Ct. Rep. 99; San Antonio & A. Pass. R. Co. v. Waller, 27 Tex. Civ. App. 44, 65 S. W. 212; San Antonio & A. Pass. R. Co. v. Beam (Tex. Civ. App.) 50 S. W. 411; Galveston, H. & S. A. R. Co. v. Puente, 30 Tex. Civ. App. 246, 70 S. W. 362; Illinois C. R. Co. v. Clark, 21 Ky. L. Rep. 1549, 55 S. W. 699; Pennsylvania R. Co. v. Zink, 126 Pa. 288, 17 Atl. 614; Louisville & N. R. Co. v. Milliken, 21 Ky. L. Rep. 489, 51 S. W. 796; Martin v. Louisville & N. R. Co. 95 Ky. 612, 26 S. W. 801; Louisville, N. A. & C. R. Co. v. Hobbs, 3 Ind. App. 445, 29 N. E. 934; Whitney v. Queen City Ice Co. 49 App. Div. 485, 63 N. Y. Supp. 535; Curtis v. Chicago & N. W. R. Co. 95 Wis. 460, 70 N. W. 665; Rifley v. Minneapolis & St. L. R. Co. 72 Minn. 469, 75 N. W. 704; San Antonio & A. Pass. R. Co. v. Engelhorn, 24 Tex. Civ. App. 324, 62 S. W. 561, 65 S. W. 68; Flanders v. Chicago, St. P. M. & O. R. Co. 51 Minn. 193, 53 N. W. 544; Jeffrey v. Keokuk & D. M. R. Co. 56 Iowa, 546, 9 N. W. 884; Whitsett v. Chicago, R. I. & P. R. Co. 67 Iowa, 150, 25 N. W. 104; Waters v. Moss, 12 Cal. 535, 73 Am. Dec. 561; Prosser v. Montana C. R. Co. 17 Mont. 372, 30 L.R.A. 814, 43 Pac. 81; Keating v. New York C. & H. R. R. Co. 49 N. Y. 673; Nelson v. Southern P. Co. 18 Utah, 244, 55 Pac. 364; Choctaw, O. & G. R. Co. v. Tennessee, *supra*; Miller v. Illinois C. R. Co. 89 Iowa, 567, 57 N. W. 418.

Mr. Justice Brewer delivered the opinion of the court:

The circumstances of the injury, generally speaking, were these: The freight train on which plaintiff was acting as brakeman was directed to stop at Osborne and pick up a water car. This water car was a flat car with a tank on it,—a temporary water car. It had an iron hand rail on each side and upright posts, or standards, through which, near the top, the rail extended, one each end of which was supposed to be a nut to hold

the rail in position. After the water car and another car on the siding had been coupled to the train, the conductor gave the signal to pull out, and, as it drew near the switch, the water car passed the plaintiff, then standing on the ground. He put his foot on the journal box, reached up, and caught hold of the rail near the rear end of the car. It slipped out of the standard, and he fell and was injured. It appears that there was no nut at that end of the hand rail, and the weight of the plaintiff pulled the rail out from the standard. One witness, who examined the car just before as well as after the injury, said that the end of *the hand rail, where the nut ought to [611 have been, was rusty, as though none had been there for some time. Another witness supported him as to the rusty condition of the end of the rail immediately after the accident. There was testimony that plaintiff followed a common way of getting onto such a water car. Indeed, on an open, moving car, a hand rail running through standards on the side, and within easy reach, would naturally suggest doing just what the plaintiff did. It certainly could not be declared, as a matter of law, negligence. On the part of the defendant there was testimony that this car had a hand hold on the standard at the front end of the car, such as is required by the statute of the United States, that the company had an experienced inspector, who stated that he had inspected the car the day before the injury, found one nut gone, and replaced it, and that the car otherwise was in good condition.

This outline of the testimony is all that is sufficient, although there was quite a volume on both sides of the matters referred to. The court charged the jury as to the law governing the case, both in respect to the duty of the master to furnish a safe place, machinery, and tools, and the duty resting upon the employee of taking reasonable care of himself, following in the instructions the rules so often stated by this court. Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612; Northern P. R. Co. v. Herbert, 116 U. S. 642, 29 L. ed. 755, 6 Sup. Ct. Rep. 590; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 386, 37 L. ed. 772, 780, 13 Sup. Ct. Rep. 914; Union P. R. Co. v. Daniels (Union P. R. Co. v. Snyder) 152 U. S. 684, 38 L. ed. 597, 14 Sup. Ct. Rep. 756; Northern P. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978. Without reviewing the various instructions in detail, it is enough to say that they clearly presented the matters in dispute and stated the law applicable thereto correctly. The verdict of the jury, approved as it was

by the trial and appellate courts, settles the disputed questions of fact.

Under these circumstances it does not seem necessary to notice in detail the several objections pointed out in the very elaborate argument of counsel for the railroad company. A careful examination discloses 612]no error in the proceedings. *The plaintiff was injured, and the questions of his care and the company's negligence were fully and fairly submitted to the jury.

The judgment of the Court of Appeals is affirmed.

shippers alike by resuming the transfer and return of cars loaded and unloaded between the line of a connecting carrier and the flour mill and elevator of a particular shipper, upon the latter's request and demand and payment of the theretofore customary charges, is not beyond the power of the state court,—at least, until Congress or the Interstate Commerce Commission takes specific action,—although both carriers are engaged in interstate commerce, and three fifths of the output of the mill are shipped out of the state.

[For other cases, see Commerce, 68-80, 334-336, in Digest Sup. Ct. 1908.]

[No. 16.]

MISSOURI PACIFIC RAILWAY COMPANY, Plff. in Err.,
v.

LARABEE FLOUR MILLS COMPANY, a
Partnership composed of F. D. and F. S.
Larabee.

(See S. C. Reporter's ed. 612-627.)

Mandamus — to carrier — discrimination.

1. A common carrier is bound to treat all shippers alike, and can be compelled to do so by mandamus or other proper writ, irrespective of legislative action or special mandate from any commission or other administrative board.

[For other cases, see Mandamus, II. e, in Digest Sup. Ct. 1908.]

Commerce — state regulation — congressional inaction.

2. The mere delegation by Congress to the Interstate Commerce Commission of certain national powers over interstate commerce is not the equivalent of the specific action by Congress in respect to the particular matters involved, which prevents a state from making regulations conducive to the welfare and the convenience of its citizens that may indirectly affect commerce.

[For other cases, see Commerce, 68-80, in Digest Sup. Ct. 1908.]

Commerce — state regulation — inaction of Congress or Interstate Commerce Commission.

3. Compelling a carrier by mandamus to discharge its common-law duty to treat all

Argued November 11, 12, 1908. Decided
January 11, 1909.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment compelling a carrier by mandamus to resume the transfer and return of cars loaded and unloaded from the line of a connecting carrier to the flour mill and elevator of a particular shipper, upon request and demand of such shipper and upon payment of the customary charges. Affirmed.

See same case below, 74 Kan. 808, 88 Pac. 72.

Statement by Mr. Justice Brewer:

On September 15, 1906, the Larabee Flour Mills Company (hereinafter called the mill company) filed its application in the supreme court of Kansas for an alternative writ of mandamus, compelling the Missouri Pacific Railway Company (hereinafter called the Missouri Pacific) to restore, resume, and make transfer of cars between the lines of the Atchison, Topeka, & Santa Fe Railway Company (hereinafter called the Santa Fe) and the mill and elevators of the plaintiff, situated in the town of Stafford. The following diagram shows the location of the mill and railroad tracks:

NOTE.—On state regulation of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

On the power of Congress to regulate commerce—see notes to State v. Indiana & O. Oil, Gas, & Min. Co. 6 L.R.A. 579; Bullard v. Northern P. R. Co. 11 L.R.A. 246; Re Wilson, 12 L.R.A. 624; Gibbons v. Ogden, 6 L. ed. U. S. 23; Brown v. Maryland, 6 L. ed. U. S. 678; Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158; Ratterman v. Western U. Teleg. Co. 32 L.

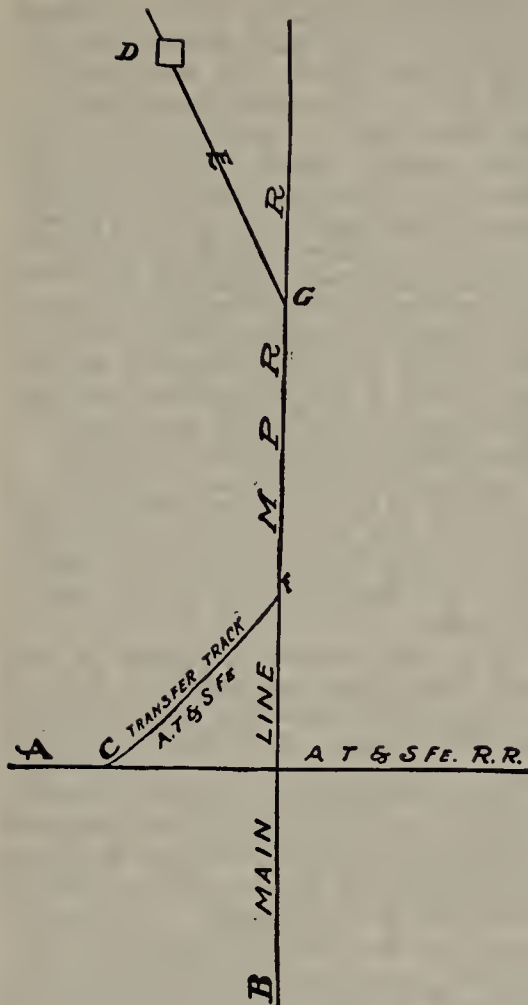
ed. U. S. 229; Harmon v. Chicago, 37 L. ed. U. S. 216; and Cleveland, C. C. & St. L. R. Co. v. Backus, 38 L. ed. U. S. 1041.

On the duties and liability of carriers as to furnishing facilities for transportation—see note to Harp v. Choctaw, O. & G. R. Co. 61 C. C. A. 414.

As to the right of a carrier at common law to discriminate between passengers or shippers—see note to Louisville, E. & St. L. Consol. R. Co. v. Wilson, 18 L.R.A. 105.

On mandamus to compel operation of railroad—see note to State ex rel. Little v. Dodge City, M. & T. R. Co. 24 L.R.A. 564.

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614] *Line "A" represents the main line of the Santa Fe Railway Company; line "B," the main line of the Missouri Pacific Railway Company; line "C," the transfer track owned by the Santa Fe Company; "D," the mill of the Larabee Company; "E," the spur track running from the main line of the Missouri Pacific Railway Company. The distance from "F" to "G" on the main line of the Missouri Pacific Railway Company is about 1 mile.

Upon the filing of this application and the answer and return of the Missouri Pacific the matter was referred to a commissioner who reported his findings of fact, which, so far as are material to the questions presented, are as follows: Stafford is a flourishing town of 1,600 people, situated in the midst of a wheat-growing district of the state. The mill company has, for more than four years, been operating a flouring mill of 1,000 barrels daily capacity. About three fifths of its product is shipped out of the state of Kansas into other states, and the remaining two fifths to points within the state. It receives a large portion of its grain in car-load lots over the two roads.

The Missouri Valley Car Service & Storage

Association (hereinafter called the car service association) is an unincorporated voluntary association of a number of railroad companies, having a manager and other employees. The object and the duty of this association is to represent and protect the interests and enforce the rights of the members thereof in the interchange of freight cars, the prompt loading, unloading, and return of cars interchanged or delivered to shippers for traffic purposes. It had been in operation for many years, commencing prior to any of the transactions mentioned in this litigation. Its objects, operations, and methods were generally understood by commercial shippers, and acquiesced in as appropriate for securing to the shipping public the greatest amount of service over the roads composing it.

No express contract existed between the two railroad companies requiring either to use or to permit the other to use the transfer track, or requiring either to place empty or loaded cars thereon, to be taken away or returned by the other. Whenever the Santa Fe placed its empty cars for the mill company on the transfer track, the Missouri Pacific, upon notice thereof, hauled and delivered them at the mill on the siding connecting it with the Missouri Pacific. The Santa Fe and the Missouri Pacific both held themselves out as ready to do such and like transferring, and continued to do so after the controversy arose in this case for all industries located on the Missouri Pacific at Stafford, making car-load shipments in or out over the Santa Fe, except the mill company. A controversy arose between the Missouri Pacific and the mill company as to two charges for demurrage; one for demurrage between December 12, 1905, and April 26, 1906, and the other between July 24 and August 14, 1906. Payment of both was demanded by the car service association. One of them, the mill company offered to pay; the other it refused, on the ground that the delay and detention were not caused by its fault, but by the defective, insufficient, and inadequate service of the Missouri Pacific in placing the cars for unloading and reloading. For a failure to pay both these charges the Missouri Pacific, by the direction of the car service association, ceased and refused to make further delivery to the mill company of empty cars placed on the transfer track for the use of the mill company by the Santa Fe, in consequence of which the mill company, when desiring to ship any of its products from Stafford by the Santa Fe, was compelled to haul the same in wagons from its mill to the station of the Santa Fe and there load into cars. This entailed upon the mill company great inconvenience and additional expense in the

management of its business. The refusal of the Missouri Pacific was based solely upon the ground above stated, and not upon a claim that the compensation paid for the service was unsatisfactory, or that the service constituted a part of interstate commerce, or that the Missouri Pacific did not undertake to perform services of such character.

The commissioner also found that the detention of the cars on account of which the demurrage charge was refused payment 616]*by the mill company was caused as much by the defective motive power and insufficient train service of the Missouri Pacific as from any fault or omission on the part of the mill company.

The case coming on for hearing before the supreme court of the state, a peremptory writ of mandamus was ordered, commanding the Missouri Pacific to immediately resume the transfer and return of cars loaded and unloaded from the line of the Santa Fe to and from the mill and elevator at the station and city of Stafford, upon the request and demand of the mill company, and upon payment of the theretofore customary charges.

Mr. Baillie P. Waggener argued the cause and filed a brief for plaintiff in error:

The office of a mandamus is to compel the performance of a plain and positive duty.

Taxing Dist. v. Loague, 129 U. S. 500, 32 L. ed. 780, 9 Sup. Ct. Rep. 327; Ex parte Cutting, 94 U. S. 20, 24 L. ed. 50; Northern P. R. Co. v. Washington Territory, 142 U. S. 498, 509, 35 L. ed. 1094, 1098, 12 Sup. Ct. Rep. 283.

Congress, by and through the interstate commerce acts, has not only impliedly, but expressly, excluded every state from any interference with or control over any part of the instrumentalities of an interstate carrier, including its rails, equipment, and instrumentalities used in the discharge of its duties to the public,—except, perhaps, only the power of police regulation.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; Willson v. Black Bird Creek Marsh Co. 2 Pet. 245, 7 L. ed. 412; Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996; Henderson v. New York (Henderson v. Wickham) 92 U. S. 271, 23 L. ed. 548.

It is said, however, that under the decisions of this court, there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid so long as it interferes with no act of Congress or treaty of the United States. Such a proposition is supported by the opinion of several of the judges in the Passenger Cases,

7 How. 283, 12 L. ed. 702, by the decisions of this court in Cooley v. Port Wardens, supra, and by the cases of Crandall v. Nevada, 6 Wall. 35, 18 L. ed. 745. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commerce clause of the Constitution, or within its compass, there are powers which, from their nature, are exclusive in Congress, and in the case of Cooley v. Port Wardens it was said that whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress.

See also South Carolina v. Georgia, 93 U. S. 10, 12, 23 L. ed. 783, 784; Sherlock v. Alling, 93 U. S. 103, 23 L. ed. 820; Hannibal & St. J. R. Co. v. Husen, 95 U. S. 469, 24 L. ed. 529; Hall v. DeCuir, 95 U. S. 489, 24 L. ed. 548.

It was the intention of Congress to place every officer, employee, servant, and agent, as well as the business of every interstate carrier, including the tracks, cars, equipments, and instrumentalities of every kind, nature, and description, under the exclusive control and supervision of the Interstate Commerce Commission. No joint or divided jurisdiction and power were conferred or attempted to be delegated. To permit a state, now that Congress has acted, to exercise any control over the interstate carrier or any of the instrumentalities of interstate commerce, will necessarily result in that confusion and conflict which this court has so uniformly condemned.

Mobile County v. Kimball, 102 U. S. 702, 26 L. ed. 241; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; Brown v. Houston, 114 U. S. 632, 29 L. ed. 260, 5 Sup. Ct. Rep. 1091; Walling v. Michigan, 116 U. S. 455, 29 L. ed. 694, 6 Sup. Ct. Rep. 454; Pickard v. Pullman Southern Car Co. 117 U. S. 49, 29 L. ed. 790, 6 Sup. Ct. Rep. 635; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 569-577, 30 L. ed. 248-251, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Robbins v. Taxing Dist. 120 U. S. 494, 30 L. ed. 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; Fargo v. Michigan (Fargo v. Stevens) 121 U. S. 245-247, 30 L. ed. 894, 895, 1 Inters. Com. Rep. 51, 7 Sup. Ct. Rep. 857; Bowman v. Chicago & N. W. R. Co. 125 U. S. 490, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Stoutenburgh v. Hennick, 129 U. S. 148, 32 L. ed. 639, 9 Sup. Ct. Rep. 256; Leisy v. Hardin, 135 U. S. 108, 34 L. ed. 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Brennan v. Titusville, 153 U. S. 300, 303, 38 L. ed. 722, 723, 4 Inters. Com. Rep.

658, 14 Sup. Ct. Rep. 829; Covington & C. Bridge Co. v. Kentucky, 154 U. S. 209, 223, 38 L. ed. 965, 970, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Interstate Commerce Commission v. Brimson, 154 U. S. 470, 38 L. ed. 1054, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; United States v. E. C. Knight Co. 156 U. S. 11, 12, 39 L. ed. 328, 329, 15 Sup. Ct. Rep. 249; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 104, 39 L. ed. 913, 15 Sup. Ct. Rep. 802; Rhodes v. Iowa, 170 U. S. 412-426, 42 L. ed. 1088-1096, 18 Sup. Ct. Rep. 664; Scranton v. Wheeler, 179 U. S. 160, 45 L. ed. 136, 21 Sup. Ct. Rep. 48; Louisville & N. R. Co. v. Eubank, 184 U. S. 38-43, 46 L. ed. 421-423, 22 Sup. Ct. Rep. 277; Kelley v. Rhoads, 188 U. S. 5-10, 47 L. ed. 361-363, 23 Sup. Ct. Rep. 259; Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339; Central R. Co. v. Murphey, 196 U. S. 203-206, 49 L. ed. 448, 449, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; Houston & T. C. R. Co. v. Mayes, 201 U. S. 327-331, 50 L. ed. 774-776, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 558, 50 L. ed. 1147, 26 Sup. Ct. Rep. 722.

In view of this most comprehensive legislation upon the subject, what jurisdiction, control, or authority has the state over the interstate carrier, or any instrumentality "used" by it? Has not this question been firmly settled by this court?

Crutcher v. Kentucky, 141 U. S. 56-62, 35 L. ed. 652-654, 11 Sup. Ct. Rep. 851; Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 40 L. ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; and Hooper v. California, 155 U. S. 652, 653, 39 L. ed. 298-300, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207.

The court erred in assuming jurisdiction of the controversy in so far as it involved the instrumentalities in use by an interstate carrier, and the subject-matter of interstate commerce.

Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

At common law a carrier is not bound to carry except on his own line; and, if he contracts to go beyond, he may, in the absence of statutory regulations to the contrary, determine for himself what agencies he will employ. He may certainly select his own agencies, and his own associates for doing his own work.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 680, 28 L. ed. 296, 4 Sup. Ct. Rep. 185.

53 L. ed.

The courts have no authority to dictate a contract to the defendant, or to require it to make one.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 571, 48 L. ed. 569, 24 Sup. Ct. Rep. 339.

If it is unlawful for a state to impose any tax upon commerce between the states, as has been so often decided by this court (Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708; Morgan v. Parham, 16 Wall. 471, 21 L. ed. 303; Almy v. California, 24 How. 169, 16 L. ed. 644; Pickard v. Pullman Southern Car Co. 117 U. S. 34, 29 L. ed. 785, 6 Sup. Ct. Rep. 635; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87; Henderson v. New York (Henderson v. Wickham) 92 U. S. 259, 23 L. ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; State Tonnage Tax Cases (Cox v. Lott) 12 Wall. 204, 20 L. ed. 370; Cannon v. New Orleans, 20 Wall. 577, 22 L. ed. 417), would it not be equally unlawful for any state, by rule or regulation, to attempt to control or superintend any instrumentality of interstate commerce, especially in view of the fact that Congress, by its affirmative legislation, has covered the whole field of operation?

Sinnot v. Davenport, 22 How. 227, 16 L. ed. 243; Gibbons v. Ogden, 9 Wheat. 229, 6 L. ed. 78; Houston v. Moore, 5 Wheat. 1, 5 L. ed. 19; Prigg v. Pennsylvania, 16 Pet. 617, 10 L. ed. 1089; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306; 7 Sup. Ct. Rep. 1126; Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 515, 44 L. ed. 868, 20 Sup. Ct. Rep. 722; Hall v. DeCuir, 95 U. S. 485, 24 L. ed. 547; Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; Houston & T. C. R. Co. v. Mayes, 201 U. S. 327, 50 L. ed. 774, 26 Sup. Ct. Rep. 491.

Is it due process of law to require the Missouri Pacific Railway Company to leave its own rails with its engines, and go onto the right of way, tracks, and terminals of the Sante Fe Railway Company,—a competing carrier,—and perform a service for it, or for its patrons?

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. supra; Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, 192 U. S. 568, 572, 48 L. ed. 565, 570, 24 Sup. Ct. Rep. 339; McNeill v. Southern R. Co. 202 U. S. 558-563, 50 L. ed. 1147-1149, 26 Sup. Ct. Rep. 722.

The referee finds that the mill company ships from its mill over these two roads substantially its entire product, three fifths of which is so shipped out of the state of Kansas and into other states, etc. The same was interstate commerce, and beyond, and not within, the regulatory power of the state or the state court.

Johnson v. Southern P. Co. 196 U. S. 21, 22, 49 L. ed. 370, 371, 25 Sup. Ct. Rep. 158; *McNeill v. Southern R. Co.* 202 U. S. 562, 50 L. ed. 1148, 26 Sup. Ct. Rep. 722; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *United States v. Northern Pacific Terminal Co.* 144 Fed. 863; *United States v. Colorado & N. W. R. Co.* 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 323.

The railroad tracks, spurs, switches, terminals, depots, and yards of the Sante Fe and Missouri Pacific companies at Stafford were instrumentalities of interstate commerce, and, as such, the regulation and control thereof vested exclusively in the Interstate Commerce Commission. The judgment of the state court is necessarily a regulation not only of interstate commerce, but of the instrumentalities of interstate commerce, within the meaning of the Federal Constitution.

Texas & P. R. Co. v. Interstate Commerce Commission, 162 U. S. 211, 40 L. ed. 944, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *Hall v. DeCuir*, 95 U. S. 489, 24 L. ed. 548; *Lottery Case (Champion v. Ames)* 188 U. S. 346-375, 47 L. ed. 497-508, 23 Sup. Ct. Rep. 321; *Seranton v. Wheeler*, 179 U. S. 160, 45 L. ed. 136, 21 Sup. Ct. Rep. 48; *Gulf, C. & S. F. R. Co. v. Hefley*, 153 U. S. 104, 39 L. ed. 912, 15 Sup. Ct. Rep. 802; *Welton v. State*, 91 U. S. 280, 23 L. ed. 349; *Pensacola Teleg. Co. v. Western U. Teleg. Co.* 96 U. S. 9, 24 L. ed. 710; *Re Rahrer (Wilkerson v. Rahrer)* 140 U. S. 561, 35 L. ed. 576, 11 Sup. Ct. Rep. 865; *Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 568, 21 L. ed. 714; *Wisconsin v. Duluth*, 96 U. S. 387, 24 L. ed. 671; *The Daniel Ball*, 10 Wall. 564, 19 L. ed. 1002; *United States v. Colorado & N. W. R. Co.* 15 L.R.A.(N.S.) 167, 85 C. C. A. 27, 157 Fed. 333; *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 51 L. ed. 681, 27 Sup. Ct. Rep. 407; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Farrington v. Tennessee*, 95 U. S. 685, 24 L. ed. 559; *Farmers' & M. Nat. Bank v. Dearing*, 91 U. S. 34, 23 L. ed. 199; *Bowman v. Chicago & N. W. R. Co.* 125 U. S. 490, 31 L. ed. 708, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; *Stoutenburgh v. Hennick*, 129 U. S. 148, 32 L. ed. 639, 9 Sup. Ct. Rep.

256; *Leisy v. Hardin*, 135 U. S. 108, 34 L. ed. 108, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; *McCall v. California*, 136 U. S. 108, 34 L. ed. 392, 3 Inters. Com. Rep. 181, 10 Sup. Ct. Rep. 881; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 204, 29 L. ed. 162, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *Armour Packing Co. v. United States*, 209 U. S. 78, 52 L. ed. 693, 28 Sup. Ct. Rep. 428.

The delegation of power to the United States to regulate commerce among the states is certainly more specific and definite and comprehensive than the implied delegation of power to authorize the creation of national banks, and yet this court has many times held that the states could exercise no control over, or regulation of, national banks not expressly authorized by Congress.

McCulloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579; *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678; *Farmers' & M. Nat. Bank v. Dearing*, supra; *Davis v. Elmira Sav. Bank*, 161 U. S. 283, 40 L. ed. 701, 16 Sup. Ct. Rep. 502.

In the express delegation of power "to regulate commerce" among the states, there is no express or implied reservation "to the states respectively, or to the people," and it follows that Congress having acted, the states are without authority.

Texas & P. R. Co. v. Interstate Commerce Commission; *Gibbons v. Ogden*; and *Brown v. Maryland*,—supra; *Sherlock v. Alling*, 93 U. S. 103, 23 L. ed. 820; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 271, 23 L. ed. 548; *Hall v. DeCuir*, 95 U. S. 489, 24 L. ed. 548; *Mobile County v. Kimball*, 102 U. S. 702, 26 L. ed. 241; *Gloucester Ferry Co. v. Pennsylvania*, supra; *Brown v. Houston*, 114 U. S. 632, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Walling v. Michigan*, 116 U. S. 455, 29 L. ed. 964, 6 Sup. Ct. Rep. 454; *Robbins v. Taxing Dist.* 120 U. S. 494, 30 L. ed. 696, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592.

The power of Congress is supreme over the whole subject (of interstate commerce), unimpeded and unembarrassed by state lines or state laws; in this matter the country is one, and the work to be accomplished is national, and state interests, state jealousies, and state prejudices do not require to be consulted; in matters of foreign and interstate commerce there are no states.

Stockton v. Baltimore & N. Y. R. Co. 1 Inters. Com. Rep. 411, 32 Fed. 17; *Gulf, C. & S. F. R. Co. v. Hefley*, supra.

Railroads are the private property of their owners; while, from the public character of the work in which they are engaged, the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities,

yet, in no proper sense, is the public a general manager.

Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 123, 52 L. ed. 705, 714, 28 Sup. Ct. Rep. 493.

Mr. Charles Blood Smith argued the cause, and, with Messrs. John C. Waters, Joseph G. Waters, and W. H. Rossington, filed a brief for defendant in error:

The service affected by the state court's judgment is purely local and intrastate.

New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Diamond Match Co. v. Ontonagon*, 188 U. S. 84, 47 L. ed. 395, 23 Sup. Ct. Rep. 266; *Interstate Commerce Commission v. Detroit, G. H. & M. R. Co.* 167 U. S. 633, 42 L. ed. 306, 17 Sup. Ct. Rep. 986; *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 403, 51 L. ed. 540, 27 Sup. Ct. Rep. 360.

The judgment of the state court is not a regulation of interstate commerce within the meaning of the Federal Constitution.

Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115, 71 Minn. 519, 40 L.R.A. 389, 70 Am. St. Rep. 358, 74 N. W. 893; *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.

If the Hepburn act, in its purpose or necessary effect, confers upon the Federal authorities the exclusive regulation and control of instrumentalities used for the doing of interstate business, irrespective of their being also employed in doing an intrastate or domestic business, then that act is, to that extent, unconstitutional and void.

Gibbons v. Ogden, 9 Wheat. 194, 195, 6 L. ed. 69, 70; *Passenger Cases*, 7 How. 400, 12 L. ed. 751; *Sinnot v. Davenport*, 22 How. 243, 16 L. ed. 247; *Trade Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 565, 30 L. ed. 247, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Louisville, N. O. & T. R. Co. v. Mississippi*, 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; *Plessy v. Ferguson*, 163 U. S. 537, 41 L. ed. 256, 16 Sup. Ct. Rep. 1138; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 209, 38 L. ed. 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *The Daniel Ball*, 10 Wall. 564, 19 L. ed. 1001; *Geer v. Connecticut*, 161 U. S. 532, 40 L. ed. 798, 16 Sup. Ct. Rep. 600; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 247, 44 L. ed. 150, 20 Sup. Ct. Rep. 96.

An argument in favor of the theory of the exclusive Federal control cannot be predicated upon the theory of inferred powers

under the Constitution, and outside of the express and enumerated powers of the Constitution. This is a government of enumerated powers. It is true, as a general proposition, that all means necessary to the carrying out of these enumerated powers exist in Congress, within the fair implication of the powers granted, but such implications may not be used, however apparently needful and expedient they may seem to be, to annul a plain reservation from, or limitation upon the exercise of, such enumerated powers.

Kansas v. Colorado, 206 U. S. 80-93, 51 L. ed. 967-973, 27 Sup. Ct. Rep. 655; *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648.

Mr. Joseph G. Waters also argued the cause, and, with Messrs. Charles Blood Smith, John F. Switzer, and John C. Waters, filed a brief for defendant in error:

If, as the railway company has asserted, this was an interstate service, the burden was on it to show it by proof; and, in the absence of such proof, the service having been commenced and ended in a city of Kansas, far interior, this court has not only said that the presumption would be that it was an internal service, but that there is no presumption that a transportation, when commenced, is to be continued beyond the state limits.

New York ex rel. Pennsylvania R. Co. v. Knight, 192 U. S. 27, 48 L. ed. 327, 24 Sup. Ct. Rep. 202; *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 414, 51 L. ed. 546, 27 Sup. Ct. Rep. 360.

Railroads, from the public nature of the business by them carried on, and the interest which the public have in their operation, are subject, as to their state business, to state regulation, which may be exerted either directly by the legislative authority, or by administrative bodies endowed with power to that end.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 19, 51 L. ed. 941, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; *Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts)* 94 U. S. 155, 24 L. ed. 94; *Peik v. Chicago & N. W. R. Co.* 94 U. S. 164, 24 L. ed. 97; *Chicago, M. & St. P. R. Co. v. Ackley*, 94 U. S. 179, 24 L. ed. 99; *Winona & St. P. R. Co. v. Blake*, 94 U. S. 180, 24 L. ed. 99; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Ruggles v. Illinois*, 108 U. S. 536, 27 L. ed. 816, 2 Sup. Ct. Rep. 832; *Illinois C. R. Co. v. Illinois*, 108 U. S. 541, 27 L. ed. 818, 2 Sup. Ct. Rep. 839; *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Stone v. Illinois C. R. Co.* 116 U. S. 347, 29 L. ed.

650, 6 Sup. Ct. Rep. 348; *Stone v. New Orleans & N. E. R. Co.* 116 U. S. 352, 29 L. ed. 651, 6 Sup. Ct. Rep. 349, 391; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 665, 40 L. ed. 838, 844, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677-695, 40 L. ed. 849-857, 16 Sup. Ct. Rep. 714; *Wisconsin, M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 48 L. ed. 614, 24 Sup. Ct. Rep. 396; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 584, 50 L. ed. 596, 605, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 261, 51 L. ed. 175, 27 Sup. Ct. Rep. 109; *Coe v. Errol*, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475; *Interstate Commerce Commission v. Brimson*, 154 U. S. 457, 38 L. ed. 1050, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 191, 40 L. ed. 935, 937, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Osborne v. Florida*, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; *Diamond Match Co. v. Ontonagon*, 188 U. S. 82, 92, 47 L. ed. 394, 398, 23 Sup. Ct. Rep. 266; *Pullman Co. v. Adams*, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; *Northern Securities Co. v. United States*, 193 U. S. 342, 48 L. ed. 702, 24 Sup. Ct. Rep. 436; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Employers' Liability Cases (Howard v. Illinois C. R. Co.)* 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141.

Messrs. Clad Hamilton, Joseph G. Waters, John F. Switzer, and John C. Waters also filed a brief for defendant in error.

There is no interstate commerce in this case.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 193, 40 L. ed. 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Ex parte Koehler*, 1 Inters. Com. Rep. 28, 30 Fed. 869; *Iowa v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 425, 33 Fed. 397; *Kentucky & I. Bridge Co. v. Louisville & N.*

R. Co. 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465; *Little Rock & M. R. Co. St. Louis, I. M. & S. R. Co.* 4 Inters. Com. Rep. 537, 59 Fed. 403; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. 559; *Chicago & N. W. R. Co. v. Osborne*, 3 C. C. A. 347, 10 U. S. App. 430, 4 Inters. Com. Rep. 257, 52 Fed. 915; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 488, 48 L. ed. 272, 24 Sup. Ct. Rep. 132; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 614, 42 L. ed. 879, 18 Sup. Ct. Rep. 488; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

Neither by the common law nor by the interstate commerce law have the national courts been vested with jurisdiction to compel interstate carriers to enter into arrangements or agreements with each other for the through billing of freight or for joint through rates. Agreements of this nature under existing laws depend upon the voluntary action of the parties, and cannot be enforced by judicial proceedings without additional legislation.

Little Rock & M. R. Co. v. St. Louis Southwestern R. Co. 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 421, 27 U. S. App. 380, 63 Fed. 775; *Southern R. Co. v. Rhodes*, 30 C. C. A. 157, 58 U. S. App. 349, 86 Fed. 422; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39; *Little Rock & M. R. Co. v. St. Louis, I. M. & S. R. Co.* 2 Inters. Com. Rep. 763, 41 Fed. 559; *Little Rock & M. R. Co. v. East Tennessee, V. & G. R. Co.* 2 Inters. Com. Rep. 454, 3 I. C. C. Rep. 1; *Railroad Commission v. Louisville & N. R. Co.* 10 Inters. Com. Rep. 173.

In the absence of statutory provision, the interchange of traffic between two connecting railroads is a matter for contract between them, and the courts have no power to compel such interchange, or to fix the terms on which it shall be made. Nor is such power conferred by the interstate commerce act.

Central Stock Yards Co. v. Louisville & N. R. Co. 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* supra; *Oregon Short Line & U. N. R. Co. v. Northern P. R. Co.* 4 Inters. Com. Rep. 249, 51 Fed. 465, 4 Inters. Com. Rep. 718, 9 C. C. A. 409, 15 U. S. App. 479, 61 Fed. 162.

It is within the power of a state to require connecting tracks between two railroad companies at an intersection, for the

transfer of cars used in local business of such lines of railroad. This may have been necessary for state commerce.

Central Stock Yards Co. v. Louisville & N. R. Co. *supra*.

Carriers are free to make arrangements of this sort by contract among themselves for local service, and there was nothing in the act which authorized either the Commission or the courts to compel one railroad company to deliver its cars to another.

Railroad Commission v. Louisville & N. R. Co. 10 Inters. Com. Rep. 188.

Whenever a separation in fact exists between transportation service wholly within the state and that between the states, a like separation may be recognized between the control of the state and that of the nation.

New York *ex rel.* Pennsylvania R. Co. v. Knight, 192 U. S. 27, 48 L. ed. 327, 24 Sup. Ct. Rep. 202; Pullman Co. v. Adams, 189 U. S. 420, 47 L. ed. 877, 23 Sup. Ct. Rep. 494; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 47 L. ed. 394, 23 Sup. Ct. Rep. 266; Osborne v. Florida, 164 U. S. 650, 41 L. ed. 586, 17 Sup. Ct. Rep. 214; Coe v. Errol, 116 U. S. 517, 29 L. ed. 715, 6 Sup. Ct. Rep. 475.

The intention or the purpose of the owners of an interstate shipment of a car load of grain or other provisions, to forward such car from the original terminal point to another point in the same state, does not make the shipment between such two points, when performed by a connecting carrier, to which the car was delivered by the original terminal carrier in obedience to the instructions of the owner, an interstate one, and, as such, exempt from the regulations of the state railroad commission.

Gulf, C. & S. F. R. Co. v. Texas, 204 U. S. 414, 51 L. ed. 546, 27 Sup. Ct. Rep. 360.

Mr. Justice Brewer delivered the opinion of the court:

All questions arising under the Constitution and laws of the state of Kansas are settled adversely to the plaintiff in error by the decision of the supreme court of the state. *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829, and cases cited in the opinion. This brings within a narrow range the controversy which this court is called upon to decide.

Coming directly to that, counsel for plaintiff in error contend that no duty was imposed on the railroad company by act of the legislature or mandate of commission or other administrative board. Conceding this, it is also true that the Missouri Pacific was a common carrier, and, as such, was engaged in the work of transferring cars from the Santa Fe track to the mill com-

pany, and, after this controversy arose, continued like transfer for all industries located on the Missouri Pacific at Stafford, except the mill company. While no one can be compelled to engage in the business of a common carrier, yet, when he does so, certain duties are imposed which can be enforced by mandamus or other suitable remedy. The Missouri Pacific engaged in the business of transferring cars from the Santa Fe track to industries located at Stafford, and continued to do so for all parties except the mill company. So long as it engaged in such transfer it was bound to treat all industries at Stafford alike, and could not refuse to do for one that which it was doing for others. No legislative enactment, no special mandate from any commission or other administrative board, was necessary, for the duty arose from the fact that it was a common carrier. This lies at the foundation of the law of common carriers. Whenever one engages in that business, the obligation of equal service to all arises; and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. Neither is [620 there any significance in the absence of a special contract between the Missouri Pacific and the mill company. It appears that the practice theretofore had been for the Missouri Pacific to charge the Santa Fe for the transfer,—that the latter collected the total freight and paid the Missouri Pacific its switching charges. There is no suggestion that the amount of this charge was changed in favor of any other shipper; and, so long as that was so, it was the charge which the Missouri Pacific was entitled to make for cars transferred at the instance of the mill company. If, in the future, a change is made in behalf of shippers generally, undoubtedly that change can be made operative in respect to the mill company. Indeed, all these questions are disposed of by one well-established proposition, and that is that a party engaging in the business of a common carrier is bound to treat all shippers alike, and can be compelled to do so by mandamus or other proper writ.

But the main contention on the part of the Missouri Pacific runs along an entirely different line. It is that the Missouri Pacific and the Santa Fe are common carriers, engaged in interstate commerce, and, as such, are subject to the control of Congress, and, therefore, in these respects not amenable to the power of the state. It appears from the findings that about three fifths of the flour of the mill company is shipped out of the state, while the other two fifths is shipped to points within the state. In addition, the hauling of the empty cars from

the Santa Fe track to the mill was, if commerce at all, commerce within the state.

The roads are, therefore, engaged in both interstate commerce and that within the state. In the former, they are subject to the regulation of Congress; in the latter, to that of the state; and, to enforce the proper relation between Congress and the state, the full control of each over the commerce subject to its dominion must be preserved. *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648. How the separateness of control is to be accomplished, it is unnecessary to determine. 621] Its existence is recognized in the *1st section of the interstate commerce act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154), as well as in that of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 893), for each provides:

"That the provisions of this act shall not apply to the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property, wholly within one state, and not shipped to or from a foreign country, from or to any state or territory, as aforesaid."

This case does not rest upon any distinction between interstate commerce and that wholly within the state. It is the contention of counsel for the mill company that it comes within the oft-repeated rule that the state, in the absence of express action by Congress, may regulate many matters which indirectly affect interstate commerce, but which are for the comfort and convenience of its citizens. Of the existence of such a rule there can be no question. It is settled and illustrated by many cases.

Thus, in *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996, it was held that a regulation of pilots and pilotage was a regulation of commerce within the grant of the power of Congress; but further that (p. 319):

"The mere grant of such a power to Congress did not imply a prohibition on the states to exercise the same power; that it is not the mere existence of such a power, but its exercise by Congress, which may be incompatible with the exercise of the same power by the states, and that the states may legislate in the absence of congressional regulations. *Sturges v. Crownshield*, 4 Wheat. 193, 4 L. ed. 548; *Houston v. Moore*, 5 Wheat. 1, 5 L. ed. 19; *Willson v. Black Bird Creek Marsh Co.* 2 Pet. 251, 7 L. ed. 414."

In *Cleveland, C. C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722, is a collection by Mr. Justice Brown, speaking for this court, of a number

of these cases. We quote from the opinion (pp. 516, 517):

"Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding *the[622 constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.

"We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities. (*Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the state (*Western U. Teleg. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Chicago & N. W. R. Co. v. Fuller*, 17 Wall. 560, 21 L. ed. 710); forbidding the consolidation of parallel or competing lines of railway (*Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714); regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made (*Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289); and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such

point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent 623] (Richmond & A. *R. Co. v. R. A. Patterson Tobacco Co. 169 U. S. 311, 42 L. ed. 759, 18 Sup. Ct. Rep. 335). In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce."

See also Missouri, K. & T. R. Co. v. Haber, 169 U. S. 613-626, 42 L. ed. 878-882, 18 Sup. Ct. Rep. 488; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Reid v. Colorado, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92.

On the other hand, it is said that Congress has already acted,—has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has intrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the state in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the state. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can, in advance, anticipate what it will do when it acts. Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the control of Congress over interstate commerce, and a delegation of that control to a commission, necessarily withdraws from the state all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the Commission, the control of the state over these incidental matters remains undisturbed. But it is further contended that this 624] is *not a mere incidental matter, indirectly affecting interstate commerce, but directly a part of such commerce, and therefore beyond the power of the state to con-

trol; and, in support of that, McNeill v. Southern R. Co. 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722, is referred to. There are many points of resemblance between that case and this, but there is this substantial distinction: In that was presented and determined solely the power of a state commission to make orders respecting the delivery of cars engaged in interstate commerce beyond the right of way of the carrier and to a private siding,—an order which affected the movement of the cars prior to the completion of the transportation; while here is presented, as heretofore indicated, the question of the power of the state to prevent discrimination between shippers, and the common-law duty resting upon a carrier was enforced. This common-law duty the state, in a case like the present; may—at least, in the absence of congressional action,—compel a carrier to discharge.

We see no error in the ruling of the Supreme Court of Kansas, and its judgment is affirmed.

Mr. Justice Holmes:

I concur in the judgment on the ground that the cars had not yet been appropriated to interstate commerce, and so were subject to state control. For this reason I have not found it necessary to make up my mind on the considerations that will be urged by Mr. Justice Moody, although I am inclined to agree with his views.

Mr. Justice Moody, dissenting:

I find myself unable to agree in the reasoning by which the judgment of the state court is affirmed. Upon the peculiar facts of this case, it is possible to say that the cars whose transfer was directed did not become the subjects of interstate commerce until they had been selected as such after their delivery upon the tracks of the Santa Fe Railroad. If the decision were put upon that ground, I should be silent.

*But it is assumed that three-fifths[625 of them were interstate shipments, and, with respect to such shipments, I am constrained to believe that the judgment of the court below exceeded the power of the state. The division of the governmental power over commerce, made by the Constitution, by which the control of interstate commerce is vested in the nation and the control of intrastate commerce is vested in the states, together with the fact that both kinds of commerce are often conducted by the same persons and corporations, through the same agencies, gives rise to highly perplexing questions in practice. The regulation of carriers and other instrumentalities of commerce is constantly undertaken, both by the

nation and the states; and the extent and limit of the respective powers vested in each government, as far as possible, ought to be accurately ascertained and declared. This is demanded imperatively for the orderly conduct of the vast transportation agencies which are engaged in both kinds of commerce. They ought not to be left uncertain as to the power to which they are responsible.

I venture to think that the weight of authority establishes the following principles: The commerce clause of the Constitution vests the power to regulate interstate commerce exclusively in the Congress, and leaves the power to regulate intrastate commerce exclusively in the states. Both powers being exclusive, neither can be directly exercised except by the government in which it is vested. Though the state may not directly control interstate commerce, it may often indirectly affect that commerce by the exercise of other governmental powers with which it is undoubtedly clothed. And this indirect effect may be allowed to operate until the Congress enacts legislation conflicting with it, to which it must yield as the paramount power. *Gibbons v. Ogden*, 9 Wheat. 1, 204, 6 L. ed. 23, 72; *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121; *Asbell v. Kansas*, 209 U. S. 251, 52 L. ed. 778, 28 Sup. Ct. Rep. 485.

In the case at bar, upon the facts as they are assumed to exist, it seems to me that the 626 judgment of the court below *directly regulated interstate commerce. If this is so, it is unimportant that the Congress has been silent. A power clearly withdrawn from the state, and vested in the nation, can no longer be exercised by the states, even though the Congress is silent. Where the Congress fails to act, the subject enjoys freedom from direct control.

The principles which I have stated have been recently applied by this court in the case of *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722. I cannot escape from the conviction that that case requires a reversal of the judgment of the court below, so far as it assumes to direct the conduct of interstate commerce. In that case the place of business of a private corporation was reached by a spur track connecting with the main track of the railroad. It had been the custom of the railroad to deliver cars consigned to this corporation from the main track to the spur track. In consequence of a dispute concerning demurrage, the railroad refused to continue thus to deliver cars. The state commission made an order requiring the railroad to deliver certain cars engaged in interstate commerce upon the

spur track on payment of freight charges. The order was held to be a regulation of such commerce, and repugnant to the commerce clause of the Constitution. In that case the regulation affected the last stages of the interstate journey. In this case it affects the first stages of the interstate journey. But, in each case, the commerce which was regulated was interstate. In that case the order was issued by a commission, and in this case by a court. But nothing turns upon that distinction, for, by whatever state agency the power is exercised, it is void, because it exceeds the authority which may rightfully be conferred by the state upon any agency.

I am not ready to assent to the proposition that, although the Congress has vested in the Interstate Commerce Commission the authority to deal with the exact situation presented to us, that fact is immaterial, because the Commission has taken no action. If the Commission has the authority to deal with a question of this kind, those who have grievances ought to *resort to that 627 body for relief. It is a very great hardship to subject the carriers to possibly conflicting regulations, and leave them uncertain which government may rightfully assert its controlling authority. So it was said in the *McNeill Case*, that the order there "asserted a power concerning a subject directly covered by the act of Congress to regulate commerce, and the amendments to that act, which forbid, and provide remedies to prevent, unjust discriminations and the subjecting to undue disadvantages by carriers engaged in interstate commerce." This statement was made as an additional reason for holding the state action invalid, and seems in conflict with the holding in this case.

I am authorized to state that Mr. Justice White joins in this opinion.

DECATUR MORGAN and Jennie G. Morgan, Plffs. in Err.,

v.

CHARLES H. ADAMS, Frank W. Adams, and Carrie M. Adams.

(See S. C. Reporter's ed. 627-630.)

Appeal — amount in dispute.

The jurisdictional amount necessary to sustain a writ of error from the Federal Supreme Court to the court of appeals of the District of Columbia, to review a decree

NOTE.—As to amount necessary to give United States Supreme Court jurisdiction—see notes to *Schunk v. Moline*, M. & S. Co. 37 L. ed. U. S. 256; and *Commercial Bank v. Buckingham*, 12 L. ed. U. S. 169.

denying probate to a will of personalty, is not involved where the total amount of the legacies to those interested in having the will admitted to probate is less than \$5,000.

[For other cases, see Appeal and Error, 550-554, in Digest Sup. Ct. 1908.]

[No. 50.]

Argued December 9, 10, 1908. Decided January 11, 1909.

IN ERROR to the Court of Appeals for the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, refusing probate to a will of personalty. Dismissed for lack of jurisdictional amount in dispute.

See same case below, 29 App. D. C. 198.

The facts are stated in the opinion.

Mr. E. Hilton Jackson argued the cause and filed a brief for plaintiffs in error.

Messrs. J. J. Darlington and S. Herbert Giesy argued the cause and filed a brief for defendants in error.

628] *Mr. Justice McKenna delivered the opinion of the court:

This writ of error brings up for review the judgment of the court of appeals of the District of Columbia, confirming the judgment of the probate court, entered upon a verdict of a jury upon issues framed under a caveat filed against a paper writing alleged to be the last will and testament of Julia M. Adams. The will was presented for probate by Decatur Morgan, who was named therein as executor, and who, with his wife, Jennie G. Morgan, were the principal legatees therein. Defendants in error, who were respectively nephews and nieces of the deceased, filed a caveat against the probate of the will, alleging the incapacity of the deceased to make a will, and also alleging undue influence and fraud and coercion exercised upon her by the Morgans and other persons. An answer was filed denying the allegations of the caveat, and the following issues were framed for submission to the jury: (1) Was the written paper propounded as the last will and testament of the deceased executed in due form of law? (2) Was the testatrix, at the time of executing the will, of sound and disposing mind? (3) Was it procured by the undue influence of Decatur Morgan or Jennie G. Morgan, or other person or persons? (4) Was it procured by fraud or coercion of either of the Morgans, or other person or persons.

A jury was impaneled to try the issues, and the questions in the case turn upon certain instructions given by the court upon the second or third issues. The other two, 53 L. ed.

that is, the first and fourth issues, were withdrawn by defendants in error. The verdict of the jury was adverse to the plaintiffs in error on the two issues submitted. Judgment was in due course entered, denying the probate of the will, which judgment was affirmed by the court of appeals. 29 App. D. C. 198.

A question is presented as to the right of plaintiffs in error to bring the case to this court. Defendants in error contend the amount in dispute is less than the necessary amount to confer jurisdiction. The total value of the estate is \$7,394.50, only \$4,144.50 of which are bequeathed to [629 the Morgans; the balance of the estate goes to defendants in error, except \$250, bequeathed to the Epiphany church. The matter in dispute, it is hence contended, is nearly \$1,000 less than the jurisdictional amount.

A similar question came up in *Overby v. Gordon*, 177 U. S. 214, 44 L. ed. 741, 20 Sup. Ct. Rep. 603. The case was a contest of a will. The plaintiffs in error in this court offered its probate on the ground that the testator was a resident of Georgia when he made the will, not of the District of Columbia, and that his personal estate passed under the laws of Georgia to plaintiffs in error, who were next of kin of the testator. They were unsuccessful in the court below and then brought the case here, and a motion was made to dismiss, because the interests of plaintiffs in error were several, and each interest less than \$5,000, and that, therefore, the matter in dispute was less than that sum, and this court had no jurisdiction. The motion was denied, this court answering that the value of the estate was the matter in dispute. This, however, was put upon the ground that the question in the case was whether an estate valued at \$9,000 should pass, as provided in the alleged will, which, in effect, excluded the next of kin, or in the mode provided by the law of the domicile of the decedent for the transmission of an intestate estate. The purpose of the case therefore was, it was said, not to seek an allotment to them of their interests, but an adjudication that the alleged will was invalid, and that that contention was advanced by virtue of a claim of common title in the next of kin of the decedent in the corpus of the estate, derived from the alleged law of the domicile of the deceased.

In other words, it was held in such case that where parties seek a recovery under the same title and for a common and undivided interest, the sum sought to be recovered, not the share of each individual claimant, constitutes the matter in dispute. And for this see *Shields v. Thomas*, 17 How. 3, 15 L. ed. 93, and *New Orleans & P. R.*

Co. v. Parker, 143 U. S. 51, 52, 36 L. ed. 68, 69, 12 Sup. Ct. Rep. 364.

The case at bar is distinctly different. 630] The legacies to the *plaintiffs in error, of course, depend upon the validity of the will. That constituted their common title, but the sum of their interest is only

\$4,144.50, which is less than the amount necessary to give jurisdiction to this court; nor would the necessary amount be reached if the legacy to the Epiphany church be added.

Writ of error dismissed.

CASES

ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

“

OCTOBER TERM, 1908.

Vol. 212.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1908.

**1]*MAYOR AND ALDERMEN OF THE
CITY OF KNOXVILLE, Appt.,
v.
KNOXVILLE WATER COMPANY.**

(See S. C. Reporter's ed. 1-19.)

Appeal — review of facts — findings by master.

1. The general rule respecting the conclusiveness of a master's findings of fact when confirmed by the court will not be applied by the Federal Supreme Court on an appeal from a decree enjoining the enforcement of a municipal ordinance fixing maximum water rates, on the ground that the ordinance is invalid under U. S. Const., 14th Amendment, as confiscatory.

[For other cases, see Appeal and Error, 4920-4930, in Digest Sup. Ct. 1908.]

Water rates — reasonableness — valuation of tangible property.

2. A deduction for depreciation from age and use must be made from the estimated cost of reproducing a waterworks plant when determining the present value of the tangible property for the purpose of testing the reasonableness of the rates fixed by a municipal ordinance.

[For other cases, see Waters, III. b, in Digest Sup. Ct. 1908.]

NOTE. — On legislative power to fix tolls, rates, or prices—see note to Winchester & L. Turnp. Road Co. v. Croxton, 33 L.R.A. 177.

Reasonableness of governmental regulation of water rates.

Water rents are reasonable and just which provide for a fair return to the persons who furnished the capital for the construction of the plant, in addition to an allowance annually of a sum sufficient to keep the plant in good repair, and to pay any fixed charges and operating expenses. *Brymer v. Butler Water Co.* 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249.

An ordinance fixing water rates so palpably unreasonable and unjust as to amount to a taking of the property of a water com-

Water rates — reasonableness — valuation of tangible property.

3. Capitalization affords no guide to the present value of the tangible property of a waterworks company which is objecting to the rates fixed by municipal ordinance as confiscatory, where substantially all the common and preferred stock was issued under construction contracts entered into with persons who controlled the corporate action, and was greatly in excess of the true value of the property furnished under the contracts.

[For other cases, see Waters, III. b, in Digest Sup. Ct. 1908.]

Water rates — reasonableness — income.

4. The absence of any requirement in a municipal ordinance fixing water rates, that the waterworks company shall continue to give a discount for prompt payment, must be taken into consideration when determining, for the purpose of testing the reasonableness of such rates, the reduction in the company's income which will be produced by the enforcement of such ordinance.

[For other cases, see Waters, III. b, in Digest Sup. Ct. 1908.]

Water rates — reasonableness — valuation.

5. Depreciation represented by the destruction or obsolescence of parts of the

pany without just compensation is not justified by a constitutional provision for the establishment of such rates. *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

Statutory authority to fix a reasonable minimum irrigation rate does not permit a board of county commissioners to fix a rate which is insufficient to pay the expense of the maintenance and operation of the irrigation system and pay the taxes thereon. *Montezuma County v. Montezuma Water & Land Co.* 39 Colo. 166, 89 Pac. 794.

A city claiming the right to fix the rates to be charged by a water company may not fix unreasonable rates. *Des Moines v. Des Moines Waterworks Co.* 95 Iowa, 348, 64 N. W. 269.

original plant and by impairment in value of those parts which remain in existence and continue in use cannot be added to the present value of the surviving parts when determining the value of the tangible property of a waterworks company for the purpose of testing the reasonableness of the rates fixed by municipal ordinance.

[For other cases, see *Waters*, III. b, in *Digest Sup. Ct.* 1908.]

Water rates — reasonableness — income.

6. The net income of a waterworks company during the years succeeding the passage of a municipal ordinance fixing maximum water rates, which has never been enforced, should be considered by the courts in determining the reasonableness of such rates.

[For other cases, see *Waters*, III. b, in *Digest Sup. Ct.* 1908.]

Water rates which will produce some reward to the owner of the water plant may be, nevertheless, so grossly and palpably insufficient to afford just compensation to the owner as to give the court power to relieve against an ordinance establishing such rates. *San Diego Water Co. v. San Diego*, supra.

A municipal ordinance requiring a private company operating in annexed territory to furnish water at rates uniform with those charged by the municipality for water supplied from its own waterworks, the effect of which is to require such company to furnish water free for charitable, religious, and educational purposes, and for sanitary fixtures in private dwellings, in flats and apartments, for all of which the company has heretofore lawfully derived a revenue, is void as taking private property for public and private use without just compensation. *Chicago v. Rogers Park Water Co.* 214 Ill. 212, 73 N. E. 375.

An irrigation company which supplies some of its customers free or at a rate lower than the maximum prescribed by a board of water commissioners cannot successfully attack such maximum rate on the ground that such rate from the balance of the land supplied by the irrigation system will not yield a fair return on the actual value of the entire property. *Boisé City Irrig. & Land Co. v. Clark*, 65 C. C. A. 399, 131 Fed. 415.

Water rates fixed by a city for water furnished it and its inhabitants need not be so adjusted as to compensate the water company for loss sustained by it in the distribution of water to consumers outside the city and under the same general system. Nor should the fact that a company, in the construction of its plant and the carrying on of its work, borrowed a large sum of money, on which it pays interest, be considered in fixing the rates. *San Diego Land & Town Co. v. National City*, 74 Fed. 79, affirmed in 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

Whether an ordinance of a board of supervisors fixing water rates deprives the waterworks company of its property with-

Courts — enjoining water rates — doubt.

7. The courts should not enjoin the enforcement of a municipal ordinance fixing maximum water rates on the ground that such ordinance is invalid under U. S. Const., 14th Amendment, as confiscatory, unless the confiscation is clearly apparent.

[For other cases, see *Courts*, 205-219, in *Digest Sup. Ct.* 1908.]

[No. 17.]

Argued April 28, 1908. Decided January 4, 1909.

APPEAL from the Circuit Court of the United States for the Eastern District of Tennessee to review a decree enjoining the enforcement of a municipal ordinance fix-

ing out due process of law, or denies it the equal protection of the laws, or abridges its privileges and immunities, is to be determined by the court, when properly presented, upon an original, independent investigation, and not by an examination of the proceedings of the board to ascertain what evidence it received and acted upon, and whether that evidence was sufficient to justify the conclusion reached. *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574.

A provision in an ordinance fixing the rates to be charged by a water company at the average price paid therefor in other cities having efficient waterworks operated by private companies, and providing for arbitration of any dispute as to what such rates shall be, will be disregarded by the court in a suit by which the city seeks to enjoin the waterworks company from demanding or receiving from the city a greater sum for furnishing water to the city and its inhabitants than the rate established by an ordinance; and the rate will be fixed by judicial inquiry on the basis of what will be a reasonable rate. *Des Moines v. Des Moines Waterworks Co.* supra.

See note to *State ex rel. Hallauer v. Gosnell*, 61 L.R.A. 33, on establishment and regulation of municipal water supply.

Valuation of tangible property.

The reasonable value of the property of a waterworks company at the time it is being used for the public service is the basis for determining whether rates fixed by the board of supervisors take the property of the company without just compensation. *Spring Valley Waterworks v. San Francisco*, supra.

The reasonable value of property rather than its original cost is to be taken as the basis of valuation in determining whether water rates fixed under legislative authority constitute a fair compensation for the use of the property, so that the owners are not deprived of their property without due process of law. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804, affirming 74 Fed. 79.

ing maximum water rates. Reversed and remanded with directions to dismiss the bill without prejudice.

The facts are stated in the opinion.

Mr. G. W. Pickle argued the cause, and, with Messrs. W. R. Turner, W. T. Kennerly, and J. Pike Powers, Jr., filed a brief for appellant:

In three cases, and three cases only, so far as we have discovered, has this court sustained the exercise of its power and jurisdiction to interfere with rates for public utility companies fixed by a legislative body. In these three cases the facts were either admitted or not seriously controverted in the evidence.

Reagan v. Farmers' Loan & T. Co. 154 U.

The reasonable value of the property of an irrigation company at the time it is being used for the public is a more satisfactory basis for estimating valuation on which the company is entitled to a fair return than the actual cost of the plant, annual depreciation, etc. San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571.

Actual investment must be considered, but need not control the decision as to the value of the property of an irrigation company when testing the reasonableness of rates fixed by a board of supervisors. Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

The investment on which a water company is entitled to base its compensation in determining the sufficiency of rates cannot include property not at present actually employed in collecting or distributing the water, however useful it may have been in the past, or may yet be in the future. San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

Irrigation rates fixed by a board of water commissioners are not invalid because they do not yield a fair return on the value of the irrigation company's property, where the plant was intended for a larger area than it is asked to supply, and for a larger number of customers than it has been able to obtain. Boisé City Irrig. & Land Co. v. Clark, supra.

Bonds and stock.

The fair value of the property of a water company furnishing water to the inhabitants of a city is the proper basis on which to calculate whether a reasonable compensation for its services is received from the rates fixed by municipal trustees to be charged for such services; and the amount of the capital stock paid in by the stockholders, as well as the amount of bonded or floating indebtedness, and the interest payable thereon, are immaterial factors. Redlands, L. & C. Domestic Water Co. v. Redlands, 121 Cal. 365, 53 Pac. 843.

53 L. ed.

S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

The same rules have been applied by the inferior courts in granting injunctions of this character in Cleveland Gaslight & Coke Co. v. Cleveland, 71 Fed. 610; New Memphis Gas & Light Co. v. Memphis, 72 Fed. 952. In these two latter cases the facts were admitted to be as stated in the bill, and the rates temporarily enjoined were, upon those facts, clearly confiscatory.

See also San Diego Water Co. v. San Diego, 62 Am. St. Rep. 302, note.

The value placed upon the property of a waterworks company by the public in dealing with its bonds and stock should be considered when valuing such property for the purpose of testing the reasonableness of water rates fixed by a board of supervisors. Spring Valley Waterworks v. San Francisco, supra.

Bonded indebtedness and the amount and value of the capital stock issued may be considered in determining the present value of the property of a waterworks company for the purpose of testing the reasonableness of rates fixed by a board of supervisors, when such stock and bonds represent the present actual value in property of the corporation, which otherwise cannot well be established. Ibid.

Franchise and good will.

The franchise of a waterworks company, which is declared by the state Constitution to be property, and is taxed as such, is an element of value as property in use for the public service, which must be considered when testing the reasonableness of rates fixed by a board of supervisors. Ibid.

The enhanced value of the property of a waterworks company arising from the facts that the company has an established business and is a going concern should be considered when fixing the value of the property of such company for the purpose of testing the reasonableness of rates fixed by a board of supervisors. Ibid.

In determining whether water rates fixed by a city ordinance are so low as to be virtually a confiscation of a water company's property, and therefore a proper object for the court's interference, the "going value" of the waterworks company's business is not an element to be considered, neither should the apparent profits for a rebuilding fund. Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N.W. 1081.

What property included in current or operating expenses.

The current expenses which may be allowed in determining the sufficiency of the

The cases are numerous in which relief in cases of this character has been denied by this court and by other courts.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *Chicago & G. T. R. Co. v. Wellman*, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; *Atty. Gen. v. Chicago & N. W. R. Co.* 35 Wis. 583; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Atlantic Coast Line R. Co. v. Florida*, 203 U. S. 256, 51 L. ed. 174, 27 Sup. Ct. Rep. 108; *Seaboard Air Line R. Co. v. Florida*, 203 U. S. 270, 51 L. ed. 178, 27 Sup. Ct. Rep. 109; *Alabama & V. R. Co. v. Mississippi R. Commission*, 203 U. S. 496, 51 L. ed. 289, 27 Sup. Ct. Rep. 163.

Rates will not be interfered with by courts if there is room for difference of intelligent opinion as to their reasonableness, and they

income provided by water rates consist of the money which is reasonably and properly expended in each year in collecting and distributing the water. *Redlands, L. & C. Domestic Water Co. v. Redlands*, 121 Cal. 312, 53 Pac. 791.

Expenses of litigation in contesting an ordinance fixing water rates cannot be considered as part of the expenses to be allowed, in determining the sufficiency of the income produced by the rates. *San Diego Water Co. v. San Diego*, supra.

Interest on the indebtedness of a water company, and annual depreciation of its plant, are not proper items of expenditure to be provided for by the trustees of a city in fixing the rates to be charged and collected for furnishing water to its inhabitants for domestic purposes. *Redlands, L. & C. Domestic Water Co. v. Redlands*, supra.

KNOXVILLE v. KNOXVILLE WATER Co. lays down a different rule as to depreciation, the court saying: "Before coming to the question of profit at all, the company is entitled to earn a sufficient sum annually to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life."

And where a deduction for deterioration is made in estimating the present value of the plant of an irrigation company on which it is entitled, under Cal. Acts March 15, 1885, to a net profit of not less than 6 per cent, an allowance should be made for such deduction and added to the annual

will, in such case, be left to the test of actual experiment.

Pensacola & A. R. Co. v. State, 25 Fla. 310, 3 L.R.A. 661, 2 Inters. Com. Rep. 522, 5 So. 833; *Chicago, B. & Q. R. Co. v. Dey*, 38 Fed. 657; *Tilley v. Savannah, F. & W. R. Co.* 4 Woods, 427, 5 Fed. 662.

This court has refused to sustain the action of inferior courts restraining rates as unreasonable and confiscatory where the investigation reaching that result has been made in the lower courts along improper lines.

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 90, 46 L. ed. 101, 22 Sup. Ct. Rep. 30.

The fact that the company is, or is not, indebted, is wholly immaterial upon the question of a "fair return."

San Diego Land & Town Co. v. National City, 74 Fed. 87; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 272, 50 Pac. 633.

The burden of proof upon all material questions and issues in the case undoubtedly rests upon the water company.

income to enable the company to renew and reconstruct so as to preserve the integrity of the plant. Otherwise, if the deterioration continues from year to year, and the rates are correspondingly reduced, both will eventually decline to a vanishing point. *San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County*, 163 Fed. 567.

Loss from seepage and evaporation should be considered by the supervisors of the different counties supplied by an irrigation company when fixing irrigation rates under Cal. Acts March 12, 1885, which entitles the irrigation company to a net profit of at least 6 per cent upon the value of the entire plant, and if the rates fixed by the counties nearest to the head works are reasonable, such rates ought not to be lower for a more distant county. *Ibid.*

See also supra,—*Brymer v. Butler Water Co.* 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249, and *Montezuma County v. Montezuma Water & Land Co.* 39 Colo. 166, 89 Pac. 794; infra,—*Wilkes Barre v. Spring Brook Water Supply Co.* 4 Lack. Leg. News, 367.

What is reasonable return.

A water rent is not unreasonable which yields enough to maintain the plant in a reasonable manner, provide a sinking fund for the payment of debts, and pay the legal rate of interest on capital judiciously expended in the construction of the plant.

San Diego Land & Town Co. v. National City, *supra*.

The courts will not and should not review the action of a legislative body, as upon an appeal.

San Diego Land & Town Co. v. Jasper and San Diego Land & Town Co. v. National City, *supra*.

Must it be declared as a matter of law that a reduction of rates necessarily diminishes income? May it not be possible—indeed, does not all experience suggest the probability—that a reduction of rates will increase the amount of business and therefore the earnings? At any rate, must the court assume that it has no such effect, and ignore all other considerations, and hold, as a matter of law, that a reduction of rates necessarily diminishes the earnings?

Chicago & G. T. R. Co. v. Wellman, *supra*.

The rules of law applicable to operating expenses are well settled. It is held to be the duty of the courts to allow no item of expenditure which is not satisfactorily shown to be an actual and proper charge in the actual conduct of the business of supplying water; and, when legal or other general expenses are claimed, they must be shown to have had a proper relation to that business.

San Diego Water Co. v. San Diego, *supra*.

Wilkes Barre v. Spring Brook Water Supply Co. *supra*.

Five per cent per annum on the present value of the property of a waterworks company used in supplying water to the city and county of San Francisco is the smallest return from rates fixed by the board of supervisors which may be considered reasonable or just. Spring Valley Waterworks v. San Francisco, 124 Fed. 574.

Water rates which will produce but little more than $3\frac{1}{2}$ per cent upon the actual cost of the waterworks after deducting current expenses do not constitute just compensation to the water company, where it is compelled to pay a much higher rate upon money which it appears to have fairly borrowed, when the rate paid does not appear to be above the lowest market rate, and the prudence and economy of the management are not successfully impeached. San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

Water rates fixed by a board of supervisors for a waterworks company in San Francisco, which, resolving all doubts against the company, will yield an annual return of not to exceed $4\frac{4}{100}$ per cent on the value of the property actually used in the public service, or $3\frac{3}{100}$ per cent on its stock after deducting operating expenses, taxes, and fixed charges, must be deemed unreasonable and unjust, and as taking private property for public use without just compensation, where the usual annual net in-

Again it is said by this court: "While the protection of vested rights of property is a supreme duty of the courts, it has not come to this, that the legislative power rests subservient to the discretion of any railroad corporation which may, by unreasonable and exorbitant salaries, or in some other improper way, transfer its earnings into what it is pleased to call 'operating expenses.'"

Chicago & G. T. R. Co. v. Wellman, *supra*.

Again it is said: "It would seem as if expenditures for additions to construction and equipment, as expenditures for original construction and equipment, should be reimbursed by all of the traffic they accommodate during the period of their operations; and that improvement that will last many years should not be charged wholly against the revenue of a single year."

Illinois C. R. Co. v. Interstate Commerce Commission, 206 U. S. 441, 51 L. ed. 1128, 27 Sup. Ct. Rep. 700.

A public utility company must confine its expenditures to such as are legitimate for carrying on its business. It may not, as between itself and the public, take the same liberties as a corporation may assume as between itself and stockholders. Even between the company and its stockholders, subscriptions to charitable objects, though calculated

come from capital invested in similar large enterprises on the Pacific coast is not less than 6 per cent, and that per cent is fixed as a minimum in certain California rate legislation. Spring Valley Waterworks v. San Francisco, *supra*.

Irrigation rates fixed by county supervisors which will yield a return on the present value of the irrigation company's plant of between $3\frac{8}{100}$ per cent and $4\frac{4}{100}$ per cent are unreasonable, even disregarding the provisions of Cal. Acts March 12, 1885, which entitles the company to a net profit of not less than 6 per cent. San Joaquin & K. River Canal & Irrig. Co. v. Stanislaus County, *supra*.

The reduction of water rates by a board of supervisors acting under the authority of Cal. Stat. 1885, p. 95, § 5, so as to give an annual income of 6 per cent upon the then value of the property of the water company actually used in supplying water to the public, does not necessarily amount to a taking of property without due process of law, or a denial of the equal protection of the laws. Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

Water rates fixed by a municipality which will yield an annual net income of but \$2,200 from a plant worth at least \$100,000 are so unreasonable as to destroy the value of the property of a waterworks company. Palatka Waterworks v. Palatka, 127 Fed. 161.

to advance the interest of a corporation, are not permissible.

McCrory v. Chambers, 48 Ill. App. 445; *Holt v. Winfield Bank*, 25 Fed. 812; *Davis v. Old Colony R. Co.* 131 Mass. 258, 41 Am. Rep. 221.

Of course, the items of expenses in the present action should be disallowed.

San Diego Water Co. v. San Diego, supra.

The water company, having fixed its own rates with a free hand, must be held to sustain the loss if it fails to make them sufficient to earn an adequate revenue. The loss must be borne by itself, and not laid upon the public in such case.

Ibid; *San Diego Land & Town Co. v. National City*, 174 U. S. 754, 43 L. ed. 1160, 19 Sup. Ct. Rep. 804.

Both the court and special master erred in refusing to compel witness William Wheeler to produce on his cross-examination the Wheeler & Parks books which were in his possession, showing actual prices and quantities of material used in a large portion of the construction of the plant.

San Diego Water Co. v. San Diego, supra.

The court and special master erred in attaching too great weight and importance to the opinions of the water company's experts, hastily made up on scant information and slight investigation, without information as to local prices or conditions, and by adopting without material change the statements of the water company's officials as to quantities and prices. In doing this they set up the opinions of two experts, contradicted by two others, to overrule the opinion of the eleven aldermen and the mayor, deliberately expressed, after full investigation. *Ibid*.

All doubts as to facts should be resolved in favor of the defendant.

Spring Valley Waterworks v. San Francisco, 124 Fed. 599; *San Diego Land & Town Co. v. National City*, supra.

Messrs. Joshua W. Caldwell and R. E. L. Mountcastle argued the cause, and, with Messrs. Charles T. Cates, Jr., and Samuel G. Shields, filed a brief for appellee:

What the company is entitled to demand in order that it may have just compensation is a fair return upon the reasonable value of the property at the time it is being used for the public.

San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578-598, 41 L. ed. 560-567, 17 Sup. Ct. Rep. 198; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 442, 47 L. ed. 894, 23 Sup. Ct. Rep. 571; *Southern P. Co. v. Railroad Comrs.* 78

Fed. 261; *New Memphis Gas & Light Co. v. Memphis*, 72 Fed. 952.

The fair value of the property of complainant should be ascertained at the date when it was in fact ascertained in this case.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418.

In ascertaining what are just rates the court should take into consideration the cost of the plant; the cost per annum of operating the plant, including interest paid on money borrowed and reasonably necessary to be used in constructing the same; the annual depreciation of the plant from natural causes resulting from its use; and the fair profit to the company over and above fixed charges for its services in supplying the water to consumers, either by way of interest on the money it has expended for the public use, or upon some other fair and equitable basis.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804.

It cannot be said that the amount of the bonds should, in every case, control the question of rates, although it may be an element in the inquiry as to what is, all the circumstances considered, just both to the company and to the public.

San Diego Land & Town Co. v. National City, 174 U. S. 757, 758, 43 L. ed. 1161, 1162, 19 Sup. Ct. Rep. 804.

Property acquired by gift or otherwise by a corporation cannot be taken away either by way of reduction of rates or condemnation, except after the payment of just compensation.

Monongahela Nav. Co. v. United States, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574.

"Going concern" has a value, and to this extent enhances the fair value of the plant as a whole.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653. 27 U. S. App. 165, 62 Fed. 853; *Spring Valley Waterworks v. San Francisco*, supra; *Kennebec Water Dist. v. Waterville*, 96 Me. 185, 60 L.R.A. 856, 54 Atl. 6; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 371, 59 Atl. 537; *Gloucester Water Supply Co. v. Gloucester*, 179 Mass. 365, 60 N. E. 977.

The going concern must be calculated with respect to the plant as it was at the date of the inquiry.

National Waterworks Co. v. Kansas City, supra.

The value of this plant must be determined under conditions existent on March 30, 1901, when the ordinance was passed.

If consideration be given to the fair, original cost of any part, it should be *in toto*, or for the whole property as well.

Brunswick & T. Water Dist. v. Maine Water Co. *supra*.

The proper method of determining the effect of a given rate regulation upon income is to take the effect of such regulation for a term preceding the date of its enactment, and not for a time subsequent thereto.

Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 881; Smyth v. Ames, *supra*.

The only fair judicial test is to apply the rates to the business that has been done in the past, and see whether, upon that basis, such rates will be remunerative, or will compel the transaction of business at a loss.

Smyth v. Ames, 169 U. S. 534, 42 L. ed. 844, 18 Sup. Ct. Rep. 418; Chicago & N. W. R. Co. v. Dey, *supra*; Spring Valley Waterworks v. San Francisco, 124 Fed. 599.

One of the things to be taken into consideration when rates are being fixed which, under all the circumstances, shall be just to the company and to the public, is the annual depreciation of the plant from natural causes resulting from its use.

San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; Spring Valley Waterworks v. San Francisco, *supra*.

It might be true that 6 per cent for simply the loan of money, where no further trouble or risk is had, or on a judgment, might be entirely adequate, and yet that 6 per cent would not be the fair measure of return upon an uncertain, hazardous business venture, such as that of the water company.

New Memphis Gas & Light Co. v. Memphis, 72 Fed. 955; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 272, 50 Pac. 633.

Rates ought to be adjusted to the value of the service rendered; and this means that the water companies should be allowed to collect annually a gross income sufficient to pay current expenses, maintain the necessary plant in a state of efficiency, and declare a dividend to stockholders equal to at least the lowest current rates of interest, not on the par or market value of the stock, but on the actual value of the property necessarily used in providing and distributing water to consumers.

San Diego Water Co. v. San Diego and Spring Valley Waterworks v. San Francisco, *supra*.

Mr. Justice Moody delivered the opinion of the court:

This is an appeal by the city of Knoxville

from a decree of the circuit court of the United States for the eastern district of Tennessee. The appellee is a public service corporation, chartered for, and engaged in, the business of supplying that city and its inhabitants with water for domestic and other uses. The cause in which the decree was rendered is a suit in equity which was brought by the company on December 7, 1901, against the city to restrain the enforcement of a city ordinance fixing in detail the maximum rates to be charged by the company. This ordinance was enacted on March 30, 1901. The bill contained many allegations, which have become immaterial by the decision of this court in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 47 L. ed. 887, 23 Sup. Ct. Rep. 531, in which the validity of the ordinance was sustained, except so far as it might confiscate the property of the company by fixing rates so low as to have that effect. The latter contention alone was left open to the company, and to it the remainder of the bill is mainly directed. The allegations in that regard are, that the rates fixed by the ordinance were so low that they denied to the company a reasonable return upon the property employed in the business, and thereby took it for public use without compensation, in violation of the 14th Amendment to the Constitution of the United States. [7] After answer by the respondent and replication by the complainant the cause was referred to a special master, whose report was confirmed by the court. The master found and reported that the value of the plant and property employed in the business at the date of the passage of the ordinance was \$608,427.95; that the gross income from the company's business was \$88,481.39, and that the operating expenses were \$34,750.91. The figures of income and expense are those of the fiscal year ending March 31, 1901, and the valuation was made as of that date. The master found and reported that the diminution of income which would have resulted from the enforcement of the ordinance during that fiscal year was \$17,623.64, and that the gross income would have been reduced thereby to \$70,857.75, leaving a net income of \$36,106.84. This net income was less than 6 per cent on the valuation. In the opinion of the master 8 per cent, which included 2 per cent to provide for depreciation, was the minimum net return which the company was entitled to earn. The judge of the circuit court, in his opinion confirming the master's report, adopted the master's valuation of the whole plant and property at \$608,427.95 (although he held that it ought to be increased by about \$3,000), and the master's finding that the gross income was \$88,481.39; that the ex-

penses were \$34,750.91; that the effect of the reduction made by the ordinance would be to lessen the gross income by \$17,623.64, and that therefore the net income under the ordinance would be \$36,106.84, or about \$400 less than 6 per cent on the valuation. Upon these assumptions of fact as to its effect the judge regarded the ordinance as confiscatory and issued a permanent injunction against its enforcement.

At the threshold of the consideration of the case the attitude of this court to the facts found below should be defined. Here are findings of fact by a master, confirmed by the court. The company contends that, under these circumstances, the findings are conclusive in this court, unless they are without support in the evidence, or were made 8]under the influence of erroneous *views of law. We need not stop to consider what the effect of such findings would be in an ordinary suit in equity. The purpose of this suit is to arrest the operation of a law on the ground that it is void and of no effect. It happens that in this particular case it is not an act of the legislature that is attacked, but an ordinance of a municipality. Nevertheless the function of rate-making is purely legislative in its character, and this is true, whether it is exercised directly by the legislature itself or by some subordinate or administrative body, to whom the power of fixing rates in detail has been delegated. The completed act derives its authority from the legislature and must be regarded as an exercise of the legislative power. *Prentiss v. Southern R. Co.* 211 U. S. 210, ante, 67, 29 Sup. Ct. Rep. 67; *Honolulu Rapid Transit & Land Co. v. Hawaii*, 211 U. S. 282, ante, 55, 29 Sup. Ct. Rep. 55. There can be at this day no doubt, on the one hand, that the courts, on constitutional grounds, may exercise the power of refusing to enforce legislation, nor, on the other hand, that that power ought to be exercised only in the clearest cases. The constitutional invalidity should be manifest, and where that invalidity rests upon disputed questions of fact, the invalidating facts must be proved to the satisfaction of the court. In view of the character of the judicial power invoked in such cases it is not tolerable that its exercise should rest securely upon the findings of a master, even though they be confirmed by the trial court. The power is best safeguarded against abuse by preserving to this court complete freedom in dealing with the facts of each case. Nothing less than this is demanded by the respect due from the judicial to the legislative authority. It must not be understood that the findings of a master, confirmed by the trial court, are without weight, or that they will not, as a practical

question, sometimes be regarded as conclusive. All that is intended to be said is, that in cases of this character this court will not fetter its discretion or judgment by any artificial rules as to the weight of the master's findings, however useful and well settled these rules may be in ordinary litigation. We approach the discussion of the facts in this spirit.

*The first fact essential to the conclu-9 sion of the court below is the valuation of the property devoted to the public uses, upon which the company is entitled to earn a return. That valuation (\$608,000) must now be considered. It was made up by adding to the appraisement, in minute detail of all the tangible property, the sum of \$10,000 for "organization, promotion, etc.," and \$60,000 for "going concern." The latter sum we understand to be an expression of the added value of the plant as a whole over the sum of the values of its component parts, which is attached to it because it is in active and successful operation and earning a return. We express no opinion as to the propriety of including these two items in the valuation of the plant, for the purpose for which it is valued in this case, but leave that question to be considered when it necessarily arises. We assume, without deciding, that these items were properly added in this case. The value of the tangible property found by the master is, of course, \$608,000 lessened by \$70,000, the value attributed to the intangible property, making \$538,000. This valuation was determined by the master by ascertaining what it would cost, at the date of the ordinance, to reproduce the existing plant as a new plant. The cost of reproduction is one way of ascertaining the present value of a plant like that of a water company, but that test would lead to obviously incorrect results if the cost of reproduction is not diminished by the depreciation which has come from age and use. The company contends that the master, in fixing upon the valuation of the tangible property, did make an allowance for depreciation, but we are unable to agree to this. The master nowhere says that he made allowance for depreciation, and the language of his report is inconsistent with such a reduction. The figures which he adopts are those of a "fair contractor's price." The basis of his calculation was the testimony of an opinion witness called by the company. That witness submitted a table which avowedly showed the cost of reproduction, without allowance for depreciation. The values testified to by him were adopted by the master in the *great majority of cases. The[10 witness's valuation of the tangible property was somewhat reduced by the master, but

the reductions were not based upon the theory of depreciation, but upon a difference of opinion as to the reproduction cost.

The cost of reproduction is not always a fair measure of the present value of a plant which has been in use for many years. The items composing the plant depreciate in value from year to year in a varying degree. Some pieces of property, like real estate for instance, depreciate not at all, and sometimes, on the other hand, appreciate in value. But the reservoirs, the mains, the service pipes, structures upon real estate, standpipes, pumps, boilers, meters, tools and appliances of every kind begin to depreciate with more or less rapidity from the moment of their first use. It is not easy to fix at any given time the amount of depreciation of a plant whose component parts are of different ages, with different expectations of life. But it is clear that some substantial allowance for depreciation ought to have been made in this case. The officers of the company, *alio intuitu*, estimated what they called "incomplete depreciation" of this plant (which we understand to be the depreciation of the surviving parts of it still in use) at \$77,000, which is 14 per cent of the master's appraisement of the tangible property. A witness called by the city placed the reproduction value of the tangible property at \$363,000, and estimated the allowance that should be made for depreciation at \$118,000, or 32 per cent. In the view we take of the case it is not necessary that we should undertake the difficult task of determining exactly how much the master's valuation of the tangible property ought to have been diminished by the depreciation which that property had undergone. It is enough to say that there should have been a considerable diminution, sufficient, at least, to raise the net income found by the court above 6 per cent upon the whole valuation thus diminished. If, for instance, the master's valuation should be diminished by \$50,000, allowed for depreciation, the net earnings found by him would show a return of substantially 6.5 per cent!

11] *Counsel for the company urge, rather faintly that the capitalization of the company ought to have some influence in the case in determining the valuation of the property. It is a sufficient answer to this contention that the capitalization is shown to be considerably in excess of any valuation testified to by any witness, or which can be arrived at by any process of reasoning. The cause for the large variation between the real value of the property and the capitalization in bonds and preferred and common stock is apparent from the testimony. All, or substantially all, the preferred and common stock was issued to

contractors for the construction of the plant, and the nominal amount of the stock issued was greatly in excess of the true value of the property furnished by the contracts. A single instance taken from the testimony will illustrate this. At the very start of the enterprise a contract was entered into for the construction of a part of the plant, which was of a value slightly, if at all, exceeding \$125,000. The price paid the contractor was \$125,000 in bonds and \$200,000 in common stock. Other contracts for construction showed a like disproportion between value furnished and nominal capitalization received for that value. It perhaps is unnecessary to say that such contracts were made by the company with persons who, at the time, by stock ownership, controlled its action. Bonds and preferred and common stock issued under such conditions afford neither measure of, nor guide to, the value of the property.

We think that the master and the court erred in another respect, which might affect in an important way the amount which could have been realized under the operation of the ordinance. This error consisted in the manner of deducting the reductions necessarily made by the ordinance. The evidence in the record is not entirely clear, though, after careful consideration, we think it shows the following state of facts: The company's schedule prescribed certain rates, which we may call the book rates, but upon a large part of them a discount of 5 per cent was made if they were promptly paid. The *consumers very generally^[12] availed themselves of this discount. The discount rates constituted the actual collections and may be called the actual rates. For the fiscal year which was examined the book rates amounted, in round numbers, to \$93,000, while the actual rates amounted, as the master found, to \$88,000. The percentage of reduction made by the ordinance was computed to be 22.88. This percentage was ascertained either by comparing the book rates with the ordinance rates, or by comparing the actual rates with the ordinance rates, still further reduced by a 5 per cent discount for prompt payment, which comes to substantially the same result. The fallacy in the process employed by the master consisted in substance in assuming that the ordinance rates would be subject to a discount for prompt payment. The company, it is true, might, if it chose, allow such a discount from the ordinance rates, but the ordinance required no discount from the rates established by it, and the company, therefore, was bound to offer none. If it stood upon the letter of the ordinance, as it had the right to do, and exacted from the consumers the full charges prescribed by

the ordinance, the amount which would have been realized would have been over \$4,000 more than that found by the master, or a net income of not less than \$40,000. Doubtless, the abandonment of the common method of discount for prompt payment would deprive the company of an efficient aid to the quick collection of its bills, but, in the case of a prime necessity like water, there are other methods of enforcing prompt payment, though it is not unlikely that the elimination of the discount rate would add somewhat to the cost of collection, and thereby to the operating expenses.

A brief recently filed by the city, to which no reply has been made, seems to show conclusively that there was still another error in ascertaining the amount of reduction effected by the ordinance. What was actually done was to deduct the 22.88 reduction from the actual water rates (excluding hydrant rentals, which were not changed); but, of these actual water rates, \$10,000 came from territory outside of the 13]corporate *limits, which was not affected by the ordinance. From this \$10,000 no percentage should have been deducted. The reduction, therefore, was too large by over \$2,000. If this correction should be made, it would amount to nearly four tenths of one per cent on the capitalization.

We are also of opinion that the master and the court erroneously excluded evidence which had an important bearing upon the true earning capacity of the company under the ordinance. A clear appreciation of this error can be best obtained by a comprehensive review of the hearing. The company's original case was based upon an elaborate analysis of the cost of construction. To arrive at the present value of the plant large deductions were made on account of the depreciation. This depreciation was divided into complete depreciation and incomplete depreciation. The complete depreciation represented that part of the original plant which, through destruction or obsolescence, had actually perished as useful property. The incomplete depreciation represented the impairment in value of the parts of the plant which remained in existence and were continued in use. It was urgently contended that, in fixing upon the value of the plant upon which the company was entitled to earn a reasonable return, the amounts of complete and incomplete depreciation should be added to the present value of the surviving parts. The court refused to approve this method, and we think properly refused. A water plant, with all its additions, begins to depreciate in value from the moment of its use. Before coming to the question of profit at all the company is entitled to earn a sufficient sum annually

to provide not only for current repairs, but for making good the depreciation and replacing the parts of the property when they come to the end of their life. The company is not bound to see its property gradually waste, without making provision out of earnings for its replacement. It is entitled to see that from earnings the value of the property invested is kept unimpaired, so that, at the end of any given term of years, the original investment remains as it was at the *beginning. It is not only the right[14 of the company to make such a provision, but it is its duty to its bond and stockholders, and, in the case of a public service corporation, at least, its plain duty to the public. If a different course were pursued the only method of providing for replacement of property which has ceased to be useful would be the investment of new capital and the issue of new bonds or stocks. This course would lead to a constantly increasing variance between present value and bond and stock capitalization,—a tendency which would inevitably lead to disaster either to the stockholders or to the public, or both. If, however, a company fails to perform this plain duty and to exact sufficient returns to keep the investment unimpaired, whether this is the result of unwarranted dividends upon over issues of securities, or of omission to exact proper prices for the output, the fault is its own. When, therefore, a public regulation of its prices comes under question, the true value of the property then employed for the purpose of earning a return cannot be enhanced by a consideration of the errors in management which have been committed in the past.

After the company had closed its case the city undertook to determine the present value of the company's property by the plain method of ascertaining the cost of reproduction, diminished by depreciation. In its case in rebuttal the company followed the same method, though the results differed largely, and, as we have seen, no proper allowance for depreciation was made. In the course of presenting its case the city offered evidence of the net income of some years subsequent to the passage of the ordinance. The case is peculiar. The company has never observed the ordinance. The suit was begun nine months after its enactment and tried considerably later. In the meantime the company's gross income had largely increased. But the decision in the court below was based solely on the operations of the fiscal year ending March 31, 1901; and the amount of net income ascertained, namely, \$36,000, was obtained by applying the reductions made by the *ordi-[15 nance to the operations of that fiscal year.

We think it was error to confine the investigation to, and base the judgment upon, that year alone. The precise subject of inquiry was, what would be the effect of the ordinance in the future. The operations of the preceding fiscal year, or of any other past fiscal year, were valueless if the year was abnormal, and were only of significance so far as they foretold the future. If, as in this case, sufficient time has passed, so that certainty instead of prophecy can be obtained, the certainty would be preferable to the prophecy. In this case there could be no absolute certainty, because the ordinance had never been put in operation. But evidence of the operations of the years succeeding to the ordinance is relevant and of great importance, and by a consideration of such evidence a much greater degree of certainty could be obtained. Suppose, by way of illustration, that before bringing suit the company had put the ordinance into effect and had observed it for a number of years, and the result showed that a sufficient net income had been realized,—is it possible that a suit then could be brought and the evidence confined to a period prior to the ordinance, and, by a process of speculation, the conclusion reached that the ordinance would be confiscatory? Some evidence regarding the income of the company after the passage of the ordinance is in the record, but it subsequently was excluded from consideration. It showed an increase of gross and net earnings, but also an increase in the property devoted to the public use. We are unable to say what the effect of the evidence excluded would be; all we can say is, that the inquiry was unduly limited by the exclusion of the evidence of the operation of subsequent years.

It follows from what has been said that the judgment of the court below cannot stand. There was error in the appraisalment of the present value of the plant, in the deduction of the reductions made by the ordinance, and in the exclusion of evidence relating to the operations of the company after the enactment of the ordinance.

16] *In ordinary cases full justice would be done by reversing the decree and remanding the cause for further proceedings in the court below, there to undergo a new and doubtless prolonged investigation. It is more than seven years since the enactment of the ordinance, and it has never been observed in any respect. This litigation ought now to be ended, if it is possible to end it with due regard to the rights of the contending parties. Disregarding for the moment all the errors which were committed in the court below, the decision of this cause may be rested upon a broader ground, which is clearly indicated by the

previous judgments of this court. The jurisdiction which is invoked here ought, as has been said, to be exercised only in the clearest cases. If a company of this kind chooses to decline to observe an ordinance of this nature, and prefers rather to go into court with the claim that the ordinance is unconstitutional, it must be prepared to show to the satisfaction of the court that the ordinance would necessarily be so confiscatory in its effect as to violate the Constitution of the United States. In *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, the last word of caution by this court was said (p. 166): "Finally, it is objected that the necessary result of upholding this suit in the circuit court will be to draw to the lower Federal courts a great flood of litigation of this character, where one Federal judge would have it in his power to enjoin proceedings by state officials to enforce the legislative acts of the state, either by criminal or civil actions. To this it may be answered, in the first place, that no injunction ought to be granted unless in a case reasonably free from doubt. We think such rule is, and will be, followed by all the judges of the Federal courts." The same thought, in effect, was expressed in *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804, 810: "Judicial interference should never occur unless the case presents, clearly and beyond all doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property *taken for the public use." And in *San*

Diego Land & Town Co. v. Jasper, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571, after repeating with approval this language, it was said (p. 441): "In a case like this we do not feel bound to re-examine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached."

It cannot be doubted that, in a clear case of confiscation, it is the right and duty of the court to annul the law. Thus, in *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, where the property was worth more than its capitalization, and, upon the admitted facts, the rates prescribed would not pay one half the interest on the bonded debt; in *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, where

the rates prescribed would not even pay operating expenses; in *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418, where the rates prescribed left substantially nothing over operating expenses and cost of service; and in *Ex parte Young*, supra, where, on the aspect of the case which was before the court, it was not disputed that the rates prescribed were in fact confiscatory, injunctions were severally sustained. But the case before us is not a case of this kind. Upon any aspect of the evidence the company is certain to obtain a substantial net revenue under the operation of the ordinance. The net income, in any event, would be substantially 6 per cent, or 4 per cent after an allowance of 2 per cent for depreciation. See *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241. We cannot know clearly that the revenue would not much exceed that return. We do not feel called upon to determine whether a demonstrated reduction of income to that point would or would not amount to confiscation. Where the case rests, as it does here, not upon observation of the actual operation under the ordinance, but upon speculations as to its effect, based upon the operations of a prior fiscal year, we will not guess whether the substantial return certain to be earned would lack some- 18]thing of the return which would *save the effect of the ordinance from confiscation. It is enough that the whole case leaves us in grave doubt. The valuation of the property was an estimate and is greatly disputed. The expense account was not agreed upon. The ordinance had not actually been put into operation; the inferences were based upon the operations of the preceding year; and the conclusion of the court below rested upon that most unsatisfactory evidence, the testimony of expert witnesses employed by the parties. The city authorities acted in good faith, and they tried, without success, to obtain from the company a statement of its property, capitalization, and earnings.

The courts, in clear cases, ought not to hesitate to arrest the operation of a confiscatory law, but they ought to refrain from interfering in cases of any other kind. Regulation of public service corporations, which perform their duties under conditions of necessary monopoly, will occur with greater and greater frequency as time goes on. It is a delicate and dangerous function, and ought to be exercised with a keen sense of justice on the part of the regulating body, met by a frank disclosure on the part of the company to be regulated. The courts ought not to bear the whole burden of saving property from confiscation, though they

will not be found wanting where the proof is clear. The legislatures and subordinate bodies, to whom the legislative power has been delegated, ought to do their part. Our social system rests largely upon the sanctity of private property; and that state or community which seeks to invade it will soon discover the error in the disaster which follows. The slight gain to the consumer, which he would obtain from a reduction in the rates charged by public service corporations, is as nothing compared with his share in the ruin which would be brought about by denying to private property its just reward, thus unsettling values and destroying confidence. On the other hand, the companies to be regulated will find it to their lasting interest to furnish freely the information upon which a just regulation can be based.

If hereafter it shall appear under the actual operation of the *ordinance, that the[19 returns allowed by it operate as a confiscation of property, nothing in this judgment will prevent another application to the courts of the United States or to the courts of the state of Tennessee. But, as the case now stands, there is no such certainty that the rates prescribed will necessarily have the effect of denying to the company such a return as would avoid confiscation. For these reasons—

The decree is reversed and the case remanded to the court below with directions to dismiss the bill without prejudice.

WILLIAM R. WILLCOX et al., Constituting the Public Service Commission, etc., of New York, Appts.,

v.

CONSOLIDATED GAS COMPANY OF NEW YORK. (No. 396.)

CITY OF NEW YORK, Appt.,

v.

CONSOLIDATED GAS COMPANY OF NEW YORK. (No. 397.)

WILLIAM S. JACKSON, as Attorney General of the State of New York, Appt.,

v.

CONSOLIDATED GAS COMPANY OF NEW YORK. (No. 398.)

(See S. C. Reporter's ed. 19-55.)

Federal courts — jurisdiction — enjoining enforcement of gas rates.

1. A Federal circuit court, if properly appealed to, cannot decline, on the ground

NOTE.—On legislative power to fix tolls, rates, or prices—see note to *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L.R.A. 177.

of discretion or comity, to take jurisdiction of a suit to enjoin the enforcement of state statutes fixing gas rates which are asserted to violate the Federal Constitution. [For other cases, see Courts, 1369-1372, in Digest Sup. Ct. 1908.]

Gas rates — legislative regulation — reasonableness.

2. Legislative regulation of gas rates is invalid, where such rates are plainly unreasonable to the extent that their enforcement will be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just, both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public.

Courts — enjoining enforcement of gas rates.

3. The case must be a clear one before the courts should be asked to interfere by injunction with state legislation regulating gas rates, in advance of any actual experience of the practical result of such rates.

[For other cases, see Courts, 205-219, in Digest Sup. Ct. 1908.]

Gas rates — legislative regulation — reasonableness — franchise valuation.

4. The valuation of the franchises of the constituent gas companies as fixed by them when organizing a consolidated corporation pursuant to N. Y. Laws 1884, chap. 367, which valuation was included in the total sum for which the consolidated corporation issued its stock, must be accepted by the courts in testing the reasonableness of legislative regulation of gas rates as conclusive of such value at the time of consolidation, where the validity of the agreement fixing the valuation has always been recognized, and the stock has earned large dividends and has been largely dealt in for many years on the basis of the validity of the valuation and of the stock.

Gas rates — legislative regulation — reasonableness — increase in franchise valuation.

5. Increase since consolidation of the tangible assets of a consolidated gas company and in the amount of gas supplied by it does not justify the court, when testing the reasonableness of the rates fixed by statute, in attributing a proportional increase to the value of the franchises as fixed by the constituent companies at the time of consolidation.

Rates — legislative regulation — reasonableness — income.

6. There is no particular rate of compensation which any corporation subject to legislative control respecting rates has the right to obtain without legislative interference.

On unconstitutional inequality or discrimination in regulation of tolls or rates—see note to *Cotting v. Godard*, 46 L. ed. U. S. 92.

As to right to question the reasonableness of statutory rate for gas—see note to 53 L. ed.

Gas rates — legislative regulation — reasonableness — income.

7. Gas rates which will yield to a corporation having a monopoly of the gas service in New York city a return of 6 per cent upon the fair value of the property actually used by such company in its business are not confiscatory.

Courts — enjoining enforcement of gas rates.

8. A court of equity ought not to interfere by injunction with state legislation fixing gas rates before a fair trial has been made of continuing the business under such rates, where the rates complained of show a very narrow line of division between possible confiscation and proper regulation, as based upon the findings as to the value of the property, and the division depends upon variant opinions as to value and upon the results in the future of operating under such rates.

[For other cases, see Courts, 205-219, in Digest Sup. Ct. 1908.]

Gas rates — legislative regulation — reasonableness — franchise valuation.

9. The assessed value for taxation of the franchises of a gas company furnishes no criterion by which to ascertain their value, when testing the reasonableness of gas rates as fixed by statute, where the taxes are treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount applicable to dividends can be ascertained.

Gas rates — legislative regulation — reasonableness — value of good will.

10. No allowance for the value of the good will should be made in estimating the value of the property of a gas company upon which it is entitled to earn a fair return, for the purpose of testing the reasonableness of the rates fixed by statute, where such company is secure from possible competition.

Gas rates — legislative regulation — reasonableness — valuation.

11. The valuation of the property of a gas company, upon which it is entitled to a fair return, must, as a general rule, be determined as of the time when the inquiry is made regarding the reasonableness of rates fixed by statute, giving the company the benefit of any increase in the value of the property since it was acquired.

Gas — legislative regulation of pressure — effect on reasonableness of rates.

12. The requirements as to gas pressure made by N. Y. Laws 1905, chap. 736, and Laws 1906, chap. 125, fixing gas rates in New York city, are confiscatory, where, to put this pressure upon the mains and other service pipes, in their present condition, is

Brooklyn Union Gas Co. v. New York, 15 L.R.A. (N.S.) 763.

On statutes part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L.R.A. 363, and *Fayette County v. People's & D. Bank*, 10 L.R.A. 196.

to run a great risk of explosion and consequent disaster, and to eliminate such danger requires an expenditure of many millions of dollars, from which no return can be had at the rates established by those acts.

Statutes — invalid in part.

13. The invalidity of the provisions as to gas pressure and penalties contained in N. Y. Laws 1905, chap. 736, and Laws 1906, chap. 125, regulating gas rates in New York city, does not invalidate the provisions of those acts respecting rates, from which the invalid provisions are clearly separable. [For other cases, see Statutes, I. d. 4, in Digest Sup. Ct. 1908.]

Gas rates — legislative regulation — reasonableness — discrimination.

14. A discrimination between the individual consumer and the city in the provisions of N. Y. Laws 1905, chap. 736, and Laws 1906, chap. 125, fixing gas rates in New York city, is not material to the inquiry as to the reasonableness of such rates if the total profits from the gas supplied to all consumers is sufficient to insure the requisite return upon the property used by the gas company in its business.

Judgment — dismissal without prejudice.

15. The dismissal of a bill which seeks to enjoin the enforcement of legislative regulation of gas rates as confiscatory in advance of any actual experience of the practical result of such rates should be without prejudice, where such practical experience may prevent the complainant from obtaining a fair return upon the property used by it in its business.

[For other cases, see Judgment, 70-74, in Digest Sup. Ct. 1908.]

[Nos. 396, 397, 398.]

Argued November 4, 5, 6, 1908. Decided January 4, 1909.

APPPEALS from the Circuit Court of the United States for the Southern District of New York to review a decree enjoining the enforcement of legislative regulation of gas rates. Reversed with directions to dismiss the bill without prejudice.

See same case below, 157 Fed. 849.

Statement by Mr. Justice Peckham:

The appellee, complainant below, filed its bill May 1, 1906, in the United States circuit court for the southern district of New York, against the city of New York, the attorney general of the state, the district attorney of New York county, and the gas commission of the state, to enjoin the enforcement of certain acts of the legislature of the state, as well as of an order made by the gas commission, February 23, 1906, to take effect May 1, 1906, relative to rates for gas in New York city.

Since the commencement of the suit, the gas commission has been abolished and the public service commission has been created by the legislature in its stead. The official term of Attorney General Meyer has also expired, and Attorney General Jackson, his successor, has been substituted in his place.

*The ground for the relief asked for in [24] the bill was the alleged unconstitutionality of the acts and the order, because the rates fixed were so low as to be confiscatory. Upon filing the bill a preliminary injunction was granted (146 Fed. 150), and, after issue was joined, the case was referred to one of the standing masters of the court to take testimony, in conformity to the practice indicated in *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 179, 44 L. ed. 417, 422, 20 Sup. Ct. Rep. 336.

A hearing was had before the master, who reported in favor of the complainant. The case then came before the circuit court, and, after argument, a final decree was entered, restraining defendants from enforcing the provisions of the acts and the order relating to rates or penalties. 157 Fed. 849. These various defendants, except the district attorney, have taken separate appeals directly to this court from the decree so entered. The acts which are declared void as unconstitutional are chapter 736 of the Laws of 1905, which limits the price of gas sold to the city of New York to a sum not to exceed 75 cents per thousand cubic feet. The act also requires that the gas sold shall have a specified illuminating power, and a certain pressure at all distances from the place of manufacture. Penalties are attached to a violation of the act. The other act is chapter 125 of the Laws of 1906, limiting the prices of gas in the boroughs of Manhattan and the Bronx, to other consumers than the city of New York, to 80 cents per thousand cubic feet, with like penalties as in the act of 1905, and with the same provisions as to illuminating power and the pressure in the service mains. The order which was declared invalid was one made by the gas commission created under and by virtue of chapter 737 of the Laws of 1905, the order providing that the price of gas in the city should be not more than 80 cents to consumers other than the city of New York. The order had the same provisions as to illuminating power and pressure as the acts above mentioned. The master and the court below found that the 80-cent rate was so low as to amount to confiscation, and hence the acts and the order were invalid as in violation of the Federal Constitution.

Mr. Edward B. Whitney argued the cause, and, with Mr. George S. Coleman, filed a brief for the Public Service Commission:

A simple allegation that a statute is unconstitutional is not sufficient to give jurisdiction to equity, even if the allegation be true. This is no exception to the rule that equity can only be resorted to when there is no adequate remedy at law.

Cruikshank v. Bidwell, 176 U. S. 73, 44 L. ed. 377, 20 Sup. Ct. Rep. 280; *Indiana Mfg. Co. v. Koehne*, 188 U. S. 681, 684, 47 L. ed. 651, 654, 23 Sup. Ct. Rep. 452.

A statute should never, if possible, be construed so as to be unconstitutional or so as to be absurd.

Oates v. First National Bank, 100 U. S. 244, 25 L. ed. 582; *Grenada County v. Brogden*, 112 U. S. 268, 269, 28 L. ed. 706, 707, 5 Sup. Ct. Rep. 125.

Only one penalty at a time could be sued for by the attorney general or the district attorney for failure to observe the requirements of the statute of 1906 as to candle power, or as to pressure, or for overcharging the consumer.

Cox v. Paul, 175 N. Y. 328, 67 N. E. 586; *Topham v. Interurban Street R. Co.* 96 App. Div. 325, 89 N. Y. Supp. 298; *Griffin v. Interurban Street R. Co.* 179 N. Y. 448, 72 N. E. 513; *Re Snow*, 120 U. S. 286, 30 L. ed. 663, 7 Sup. Ct. Rep. 556; *United States Condensed Milk Co. v. Smith*, 116 App. Div. 15, 101 N. Y. Supp. 129, 191 N. Y. 536, 84 N. E. 1114; *United States v. Patty*, 2 Fed. 664; *Armour Packing Co. v. United States*, 209 U. S. 56, 77, 52 L. ed. 681, 693, 28 Sup. Ct. Rep. 428; *United States v. Eagan*, 30 Fed. 498; *Taft v. Stevens Lithographing & Engraving Co.* 38 Fed. 28; *Central R. Co. v. Green*, 86 Pa. 425; *Gimbel v. Hogg*, 38 C. C. A. 419, 97 Fed. 791; *United States v. Central Vermont R. Co.* 157 Fed. 293; *Parks v. Nashville, C. & St. L. R. Co.* 13 Lea, 1, 49 Am. Rep. 655.

No principle of statutory construction is more familiar than the strictness of construction of a penalty law.

France v. United States, 164 U. S. 676, 682, 683, 41 L. ed. 595, 597, 598, 17 Sup. Ct. Rep. 219; *Bolles v. Outing Co.* 175 U. S. 262, 265, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94; *United States v. One Bay Horse & One Buggy*, 128 Fed. 207.

A succession of actions for penalties when only one penalty can be recovered in each action is not sufficient multiplicity of litigation to give jurisdiction to equity.

Wallack v. Society for the Reformation, 67 N. Y. 29.

Assuming equity to have had jurisdiction, it should not have been exercised, but jurisdiction should have been declined, and the controversy remitted to the state courts.

Ex parte Young, 209 U. S. 166, 167, 52 L. ed. 731, 732, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

A state may require of a public service corporation a certain service to be performed at a rate which, though affording a large margin over expenses of operation, does not pay its full share toward profit on capital, and may even require certain services to be rendered at a loss, provided the company is left, on the whole, with a fair profit.

Ruggles v. Illinois, 108 U. S. 526, 538, 27 L. ed. 812, 817, 2 Sup. Ct. Rep. 832; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 649, 665, 666, 39 L. ed. 567, 573, 15 Sup. Ct. Rep. 484; *Smyth v. Ames*, 169 U. S. 466, 541, 42 L. ed. 819, 847, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 760, 43 L. ed. 1154, 1162, 19 Sup. Ct. Rep. 804; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

The burden of proof is upon the complainant, and is so strong that it must show that the state authorities could not, fairly-mindedly, have come to the result which was reached.

United States v. Gettysburg Electric R. Co. 160 U. S. 668, 680, 40 L. ed. 576, 580, 16 Sup. Ct. Rep. 427; *Sweet v. Rechel*, 159 U. S. 380, 40 L. ed. 188, 16 Sup. Ct. Rep. 43; *Talbot v. Hudson*, 16 Gray, 417; *Re Wellington*, 16 Pick. 96, 26 Am. Dec. 631; *Illinois C. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 454, 51 L. ed. 1128, 1133, 27 Sup. Ct. Rep. 700; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 441, 442, 47 L. ed. 892, 894, 895, 23 Sup. Ct. Rep. 571.

The present case is the first in which this court has been called upon to deal with a case of appreciation,—with the case of a corporation which can win only by proving a capitalization vastly greater than its investment,—which can win only upon unearned increments. All of its discussions of rate questions have been in cases where the company has fought for the standard of actual cost, and where the state has fought for the standard of actual value,—where the case was one of depreciation.

While the language of the court in these discussions has been general in form, we

understand it to have been particularly directed to the facts in each case respectively, and that it should be read in the light of those facts.

Cohen v. Virginia, 6 Wheat. 264, 399, 5 L. ed. 257, 290; *Carroll v. Carroll*, 16 How. 275, 286, 14 L. ed. 936, 941; *Woodruff v. Parham*, 8 Wall. 123, 138, 19 L. ed. 382, 386; *Barney v. Rickard*, 157 U. S. 352, 364, 39 L. ed. 730, 734, 15 Sup. Ct. Rep. 642; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 574, 575, 39 L. ed. 759, 816, 817, 15 Sup. Ct. Rep. 673.

In all these discussions it has been recognized that the subject cannot be treated from the standpoint of the company alone, any more than from the standpoint of the consumer alone; but it has not been necessary to analyze this out further than to hold that the company can rely neither upon its nominal stock and bond capitalization nor upon its original cost of construction, if these standards would result in a rate unreasonably high from the consumer's point of view.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 596, 597, 41 L. ed. 560, 566, 567, 17 Sup. Ct. Rep. 198; *Smyth v. Ames*, 169 U. S. 466, 544, 547, 42 L. ed. 819, 848, 849, 18 Sup. Ct. Rep. 418; *San Diego Water Co. v. San Diego*, 118 Cal. 570, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

The land and improvements are to be valued as a unit, and not each independent of the other; so that, if the building does not enhance the value of the land, it is to be disregarded altogether.

Re New York, 118 App. Div. 272, 103 N. Y. Supp. 441; *Re New York*, 56 Misc. 318, 106 N. Y. Supp. 1003.

A simple franchise is the right to operate as a profitable going concern what would otherwise be a job lot of second-hand material.

People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; *Brunswick & T. Water Dist. v. Maine Water Co.* 99 Me. 375, 59 Atl. 537; *Beale & W. Railroads*, § 362.

That a simple franchise cannot be given a separate and independent value for the purpose of increasing the price of gas against the consumer is obvious.

A franchise valuation must be small, if at all allowable. The state can at any time authorize or direct the city to build its own lighting plant.

Skaneateles Waterworks Co. v. Skaneateles, 161 N. Y. 154, 46 L.R.A. 687, 55 N. E. 562, 184 U. S. 354, 46 L. ed. 585, 22 Sup. Ct. Rep. 400; *Newburyport Water Co. v. Newburyport*, 168 Mass. 541, 47 N. E. 533, 386

103 Fed. 584, 193 U. S. 561, 48 L. ed. 795, 24 Sup. Ct. Rep. 553.

It is only the annual value which is taxed under the special franchise tax, and the actual net profits are the basis of the valuation.

People ex rel. Jamaica Water Supply Co. v. Tax Comrs. 128 App. Div. 13, 112 N. Y. Supp. 392; *Chicago Union Traction Co. v. State Bd. of Equalization*, 114 Fed. 561.

Risk of depreciation over and above the past experience of the company should not be considered as a separate item of operating expense.

Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa, 234, 91 N. W. 1081; *San Diego Water Co. v. San Diego*, 118 Cal. 583, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; 1 Mill, *Political Economy*, chap. 15, § 1; *Laughlin, Elements of Political Economy*, 1902, ed. p. 202.

This court is as yet uncommitted on the subject of the rate of return, except that 6 per cent is high enough for a California water supply or irrigation company. The circuit courts disagree about it.

Dow v. Beidelman, 125 U. S. 680, 690, 31 L. ed. 841, 844, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *St. Louis & S. F. R. Co. v. Gill*, 156 U. S. 657, 39 L. ed. 570, 15 Sup. Ct. Rep. 484; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 397, 38 L. ed. 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 515, 547, 42 L. ed. 838, 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 442, 445, 446, 47 L. ed. 894-896, 23 Sup. Ct. Rep. 571; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 91, 46 L. ed. 101, 22 Sup. Ct. Rep. 30; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 213, 216, 48 L. ed. 406, 413, 414, 24 Sup. Ct. Rep. 238; *Milwaukee Electric R. & Light Co. v. Milwaukee*, 87 Fed. 577; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574; *Central R. Co. v. Railroad Commission*, 161 Fed. 992.

Too short a period was selected as the test.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Covington & L.* 212 U. S.

Turnp. Road Co. v. Sandford, 164 U. S. 578, 595, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198.

The Constitution does not guarantee a profit at every moment of time any more than it guarantees a profit at every mile of route or from every class of traffic.

Ruggles v. Illinois, 108 U. S. 526, 27 L. ed. 812, 2 Sup. Ct. Rep. 832; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400; Reagan v. Farmers' Loan & T. Co. 154 U. S. 412, 38 L. ed. 1028, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The experience of the other companies as well as of this complainant should have been shown.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 657, 39 L. ed. 570, 15 Sup. Ct. Rep. 484; Tenement House Department v. Moeschén, 89 App. Div. 538, 85 N. Y. Supp. 704, 179 N. Y. 330, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439.

The provision as to pressure is separable from the rest of the statute, and therefore does not affect the foregoing argument.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 501, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141.

The pressure clause is constitutional.

Tenement House Department v. Moeschén, 179 N. Y. 326, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439; Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; Com. v. Roberts, 155 Mass. 281, 16 L.R.A. 400, 29 N. E. 522; Health Department v. Trinity Church, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833.

The power to enjoin being discretionary, the court has the right to place any proper condition upon its exercise. What condition can be more proper than to say to the complainant—"It is discretionary with us to remit you to the state tribunal. It is discretionary with us to remit you to a trial at law. As a condition of coming into equity and having your case tried by the Federal procedure, you must do equity by charging no higher a sum than is found by that procedure to be constitutional?"

1 Pom. Eq. Jur. §§ 385, 386, 389-393; DeWalsh v. Braman, 160 Ill. 415, 43 N. E. 597; Veazie v. Williams, 8 How. 134, 161, 12 L. ed. 1018, 1029; Willard v. Tayloe, 8 Wall. 557, 567, 569, 19 L. ed. 501, 504; People's Nat. Bank v. Marye, 191 U. S. 272, 281, 282, 285, 48 L. ed. 180, 185, 187, 24 Sup. Ct. Rep. 68; Parmley v. St. Louis, I. M. & S. R. Co. 3 Dill. 34, Fed. Cas. No. 10,768; Farmers' Loan & T. Co. v. Denver L. & G. R. Co. 60 C. C. A. 588, 126 Fed. 46; Thomas 53 L. ed.

v. Evans, 105 N. Y. 615, 59 Am. Rep. 519, 12 N. E. 571; Fanning v. Dunham, 5 Johns. Ch. 142, 9 Am. Dec. 283; Stanley v. Gadsby, 10 Pet. 521, 9 L. ed. 518; Tiffany v. Boatman's Sav. Inst. 18 Wall. 375, 385, 21 L. ed. 868, 870; Knoth v. Manhattan R. Co. 109 App. Div. 807, 96 N. Y. Supp. 844, affirmed in 187 N. Y. 243, 79 N. E. 1015.

Mr. Alton B. Parker argued the cause, and, with Messrs. Francis K. Pendleton and William P. Burr, filed a brief for the city of New York:

There can be no such thing as a capitalization of the franchise by the appellee so as to enable it to exact a return thereon from its customers.

Beale & W. Railroads, § 362.

The company is entitled to a fair return upon all the money expended by it for the means employed in the service of the public (outside of what is included in operating expenses) and obligations incurred for such means, unless it plainly appears that such expenditures and obligations are in excess of what they should have been under all the circumstances, in which case they should be reduced.

Railroad Commission Cases, 116 U. S. 307, 344, 29 L. ed. 636, 648, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

It cannot be said that a corporation is entitled as of right, and without reference to the interest of the public, to realize a given per cent upon its capital stock.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 597, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198.

The question in each case is, as said the court in that case, whether the legislature, under the guise of regulating rates, exceeded its constitutional authority, and practically deprived the owner of property without due process of law.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 597, 41 L. ed. 566, 17 Sup. Ct. Rep. 198.

We suppose that this court judicially knows that a return of 4 to 5 per cent on investments not better secured than is the return to appellee is regarded as eminently satisfactory by the investing public. It certainly would seem to be a fair return for "the most favorably situated gas business in America."

Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co. 192 U. S. 216, 48 L. ed. 414, 24 Sup. Ct. Rep. 241.

All differences are not discriminatory.

Western U. Telc. Co. v. Call Pub. Co. 181 U. S. 92, 45 L. ed. 765, 21 Sup. Ct. Rep. 561.

All that is required is that rates must not discriminate without a just and reasonable ground for discrimination.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 276, 283, 284, 36 L. ed. 699, 703, 706, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Beale & W. Railroads*, §§ 735, 736.

Against proceedings by mandamus to enforce any of the provisions in either of the acts of the legislature of New York which are under consideration, the defense available in such proceedings affords appellee adequate protection; and, as to the penalties imposed, the provisions in regard thereto being separable, it has an adequate remedy by injunction.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Mr. William S. Jackson, *in propria persona*, argued the cause and filed a brief for the Attorney General:

A corporation engaged in a public service is entitled to a return only upon property necessarily devoted by it to that service by the operation of a reasonably efficient plant, conducted with reasonable economy and ability.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 543, 42 L. ed. 848, 18 Sup. Ct. Rep. 418; *San Diego Water Co. v. San Diego*, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 275, 50 Pac. 633; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198.

Only property necessary for the particular use may be valued.

Covington & L. Turnp. Road Co. v. Sandford and *Reagan v. Farmers' Loan & T. Co.* supra; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 43 L. ed. 1154, 19 Sup. Ct. Rep. 804; *San Diego Water Co. v. San Diego*, supra.

The question of the reasonableness of a rate involves the element of reasonableness, both as regards the company and as regards the public.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 450, 33 L. ed. 977, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Covington & L. Turnp. Road Co. v. Sandford*, supra.

The rate must be just to the public.

San Diego Land & Town Co. v. National City, 174 U. S. 757, 43 L. ed. 1161, 19 Sup. Ct. Rep. 804; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 442, 47 L. ed. 894, 23 Sup. Ct. Rep. 571; *Covington & L. Turnp. Road Co. v. Sandford*, supra; *Smyth v. Ames*, 169 U. S. 546, 42 L. ed. 849, 18 Sup.

Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

The public has the right to the benefit of progress in the art.

St. Louis & S. F. R. Co. v. Gill, 156 U. S. 657, 39 L. ed. 570, 15 Sup. Ct. Rep. 484.

The 80-cent rate will be held to yield complainant a fair return unless it is plainly and palpably confiscatory.

Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 444, 36 L. ed. 176, 179, 12 Sup. Ct. Rep. 400; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 529, 42 L. ed. 819, 843, 18 Sup. Ct. Rep. 418; *Henderson Bridge Co. v. Henderson*, 173 U. S. 592, 614, 615, 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 47 L. ed. 892, 23 Sup. Ct. Rep. 571; *Ball v. Rutland R. Co.* 93 Fed. 513; *Palatka Waterworks v. Palatka*, 127 Fed. 161; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804.

The provisions as to candle power, pressure, and penalties do not invalidate the acts and they are separable.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 394-396, 38 L. ed. 1014, 1022, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Consolidated Gas Co. v. Mayer*, 146 Fed. 155; *Griffin v. Interurban Street R. Co.* 179 N. Y. 438, 72 N. E. 513, 180 N. Y. 538, 72 N. E. 1142; *Jones v. Rochester Gas & Electric Co.* 168 N. Y. 68, 60 N. E. 1044; *Cox v. Paul*, 175 N. Y. 328, 67 N. E. 586; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962.

The right to impose burdens for the public good and in favor of the municipality upon public service corporations has been repeatedly held constitutional.

Rochester v. Rochester R. Co. 182 N. Y. 99, 70 L.R.A. 773, 74 N. E. 953, affirmed in 205 U. S. 236, 51 L. ed. 784, 27 Sup. Ct. Rep. 469; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465.

The failure to limit price in localities other than the city of New York does not invalidate N. Y. Laws 1906, chap. 125.

Hayes v. Missouri, 120 U. S. 68, 30 L.

ed. 578, 7 Sup. Ct. Rep. 350; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 25 L. ed. 989; *Munn v. Illinois*, 94 U. S. 126-135, 24 L. ed. 84-87.

Mr. James M. Beck argued the cause, and, with Messrs. Shearman & Sterling, filed a brief for appellee:

The complainant was without adequate remedy at law, and a court of equity had jurisdiction.

Cleveland v. Cleveland City R. Co. 194 U. S. 531, 48 L. ed. 1106, 24 Sup. Ct. Rep. 756; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Ex parte Young*, 209 U. S. 123, 163, 52 L. ed. 714, 730, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441.

The 11th Amendment does not apply to a suit against a state official who is seeking to enforce an unconstitutional statute.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265; *Prout v. Starr*, 188 U. S. 537, 47 L. ed. 584, 23 Sup. Ct. Rep. 398; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Scully v. Bird*, 209 U. S. 481, 52 L. ed. 899, 28 Sup. Ct. Rep. 597; *Smyth v. Ames*, supra; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30.

Where a state voluntarily becomes a party to a cause, and submits its rights for judicial determination, it will be bound thereby, and cannot escape the results of its own voluntary act by invoking the prohibitions of the 11th Amendment.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; *Clark v. Barnard*, 108 U. S. 436, 447, 27 L. ed. 780, 784, 2 Sup. Ct. Rep. 878.

The pressure provision is not severable from the body of the statute.

Pollock v. Farmers' Loan & T. Co. 158 U. S. 601, 39 L. ed. 1108, 15 Sup. Ct. Rep. 912; *Employers' Liability Cases* (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 501, 52 L. ed. 297, 310, 28 Sup. Ct. Rep. 141; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *People ex rel. Townsend v. Porter*, 90 N. Y. 68; *Saratoga Springs v. Saratoga Gas, Electric Light & P. Co.* 191 N. Y. 123, 83 N. E. 393.

The provision of said acts as to penalties

are unconstitutional on their face and invalidate both statutes.

Cotting v. Kansas City Stock Yards Co. and *Ex parte Young*, supra.

In previous cases the court had already held that where maximum rates were provided, and no opportunity was granted for judicial review of the reasonableness of those rates, the law as a whole was unconstitutional.

Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702.

There is no sound distinction between a statute which in terms denies any opportunity for a judicial review and makes a legislative law conclusive, and one which seeks to accomplish the same purpose by obstructing access to the courts, and thus compelling the corporation, by oppressive penalties, to accept the legislative rate rather than incur the hazard of litigating its rights.

In determining the severability of the penalty provisions, the decisions of the New York courts will be controlling upon this court; and these decisions leave no doubt that the New York courts would hold that the penalty provisions were not separable from the maximum-rate provisions.

People ex rel. Townsend v. Porter and Saratoga Springs v. Saratoga Gas, Electric Light, & P. Co.

Both statutes are unduly discriminatory and therefore unconstitutional upon their face.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *Beardsley v. New York L. E. & W. R. Co.* 162 N. Y. 230, 56 N. E. 488; *Wilson v. United Traction Co.* 72 App. Div. 233, 76 N. Y. Supp. 203.

A city, in contracting for a supply of gas for corporate purposes, acts as a private corporation.

Smith v. Brooklyn, 160 N. Y. 357, 45 L.R.A. 664, 54 N. E. 787; *People ex rel. Treat v. Coler*, 166 N. Y. 144, 59 N. E. 776; *Western Sav. Fund Soc. v. Philadelphia*, 31 Pa. 175, 72 Am. Dec. 730; *Bailey v. New York*, 3 Hill, 531, 38 Am. Dec. 669; *Byrnes v. Cohoes*, 67 N. Y. 204; *Lynch v. Springfield*, 174 Mass. 430, 54 N. E. 871.

It has been broadly held that where powers are given to a municipal corporation for merely corporate purposes, and not for strictly governmental purposes, the city acts as a private corporation.

Missano v. New York, 160 N. Y. 123, 54 N. E. 744; *Walsh v. New York*, 41 Hun, 299; *Scott v. New York*, 27 App. Div. 240, 50 N. Y. Supp. 191.

The rate-fixing power is one of prohibition. In strictness it does not fix rates, but simply provides that any sum beyond a given

maximum is unreasonable. In so doing, it, in effect, declares that the maximum is a reasonable price.

Brooklyn Union Gas Co. v. New York, 188 N. Y. 334, 15 L.R.A.(N.S.) 763, 117 Am. St. Rep. 868, 81 N. E. 141; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 695, 43 L. ed. 858, 863, 19 Sup. Ct. Rep. 565.

When, therefore, the state provides that, as to all other consumers, 80 cents per thousand feet is a reasonable charge, and provides that, as to one consumer, no greater charge than 75 cents shall be made, it in effect declares that, to the favored consumer, gas must be sold at less than a reasonable rate. This the state cannot do.

The finding of the circuit court that the rates prescribed would yield the complainant less than a just and reasonable rate of return is a finding of fact, and not a conclusion of law, and this court should therefore give to such finding the controlling weight of a special verdict of a jury, and not reverse such finding except for clear and indubitable error.

Covington & L. Turnp. Road Co. v. Sandford, 164 U. S. 578, 596, 41 L. ed. 560, 566, 17 Sup. Ct. Rep. 198; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 180, 44 L. ed. 417, 423, 20 Sup. Ct. Rep. 336; *Davis v. Schwartz*, 155 U. S. 631, 636, 39 L. ed. 289, 291, 15 Sup. Ct. Rep. 237; 1 *Foster*, Fed. Pr. p. 690, § 315; *Greene v. Bishop*, 1 Cliff. 194, Fed. Cas. No. 5,763; *Mason v. Crosby*, 3 Woodb. & M. 258, Fed. Cas. No. 9,236; *Donnell v. Columbian Ins. Co.* 2 Sumn. 371, Fed. Cas. No. 3,987; *Welling v. La Bau*, 34 Fed. 40; *Moline Plow Co. v. Carson*, 18 C. C. A. 606, 36 U. S. App. 449, 72 Fed. 388; *Fidelity & C. Co. v. St. Matthews Sav. Bank*, 44 C. C. A. 225, 104 Fed. 860; *Paddock v. Commercial Ins. Co.* 104 Mass. 531; *Richards v. Todd*, 127 Mass. 172; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571; *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. 114, 15 L.R.A.(N.S.) 108, 68 Atl. 676.

Where the rate is prescribed by the legislature, and not by an administrative body, it is equally subject to judicial review as to its confiscatory character.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 397, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 598, 41 L. ed. 560, 567, 17 Sup. Ct. Rep. 198; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 753, 43 L. ed. 1154, 1159, 19 Sup. Ct. Rep. 804; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 234, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581;

Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 91, 46 L. ed. 92, 101, 22 Sup. Ct. Rep. 30.

Legislative rates, to be constitutional, must yield a "compensation" that "full," "fair," "just," "reasonable," and "adequate," and one that is not less than the "market value" of such use.

Allnutt v. Inglis, 12 East, 527; *Railroad Commission Cases*, 116 U. S. 307, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 326, 37 L. ed. 463, 470, 13 Sup. Ct. Rep. 622; *Munn v. Illinois*, 94 U. S. 141, 24 L. ed. 89; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 458, 33 L. ed. 970, 981, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Reagan v. Farmers' Loan & T. Co.*, *Smyth v. Ames*, and *Covington & L. Turnp. Road Co. v. Sandford*,—supra; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; *Chicago, M. & St. P. R. Co. v. Tompkins*, supra; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 24, 51 L. ed. 933, 944, 27 Sup. Ct. Rep. 585; 11 A. & E. Ann. Cas. 398; *Central R. Co. v. Railroad Commission*, 161 Fed. 995; *Southern P. Co. v. Railroad Comrs.* 78 Fed. 261.

The rule that the fair return must not be less than the legal rate of interest is justified on reason and authority.

Brymer v. Butler Water Co. 179 Pa. 251, 36 L.R.A. 260, 36 Atl. 249; *Pennsylvania R. Co. v. Philadelphia County*, 220 Pa. 115, 15 L.R.A.(N.S.) 108, 68 Atl. 676; *Chicago Union Traction Co. v. State Bd. of Equalization*, 114 Fed. 561; *Louisville & N. R. Co. v. Brown*, 123 Fed. 951; *Central R. Co. v. Railroad Commission*, 161 Fed. 925; *Milwaukee Electric R. & Light Co. v. Milwaukee*, 87 Fed. 585; *Southern P. Co. v. Railroad Comrs.* supra; *People ex rel. Jamaica Water Supply Co. v. Tax Comrs.* 128 App. Div. 13, 112 N. Y. Supp. 392; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 598; *International Bridge Co. v. Canada Southern R. Co.* 7 Ont. App. Rep. 226, affirmed in L. R. 8 App. Cas. 723.

The basis of calculation is the present value of the property, and not its original cost.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804, affirming 74 Fed. 83; *Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard)* 183 U. S. 79, 91, 46

L. ed. 92, 101, 22 Sup. Ct. Rep. 30, reversing 82 Fed. 854; *Smyth v. Ames*, 169 U. S. 547, 42 L. ed. 849, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 47 L. ed. 892, 894, 22 Sup. Ct. Rep. 571, affirming 110 Fed. 714; *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.* 192 U. S. 201, 215, 48 L. ed. 406, 24 Sup. Ct. Rep. 241.

Mr. John A. Garver also argued the cause, and, with Messrs. Shearman & Sterling, filed a brief for appellee:

The term "special franchises" signifies the right to occupy with its mains the streets of its municipality where it carries on its business, as distinguished from the corporate franchise and the general franchise to engage in the business of manufacturing and supplying gas.

People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 417, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69.

The law of New York controls as to the nature of special franchises.

Ohio Oil Co. v. Indiana, 177 U. S. 190, 205, 207, 44 L. ed. 729, 737, 738, 20 Sup. Ct. Rep. 576; *Muhlker v. New York & H. R. Co.* 197 U. S. 544, 49 L. ed. 872, 25 Sup. Ct. Rep. 522; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 509, 51 L. ed. 1155, 1160, 27 Sup. Ct. Rep. 762.

In New York special franchises are property in every respect.

Sixth Ave. R. Co. v. Kerr, 72 N. Y. 330; *People v. O'Brien*, 111 N. Y. 40, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Suburban Rapid Transit Co. v. New York*, 128 N. Y. 520, 28 N. E. 525; *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 153 N. Y. 528, 532, 47 N. E. 787; *Parker v. Elmira, C. & N. R. Co.* 165 N. Y. 274, 59 N. E. 81; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* supra; *Re Long Acre Electric Light & P. Co.* 188 N. Y. 361, 80 N. E. 1101; *Water Comrs. v. Westchester County Waterworks Co.* 176 N. Y. 239, 68 N. E. 348; *Hatfield v. Straus*, 189 N. Y. 219, 82 N. E. 172; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 592, 44 N. Y. Supp. 825; *Rochester & C. Turnp. Road Co. v. Joel*, 41 App. Div. 45, 58 N. Y. Supp. 346; *Wakefield v. Theresa*, 125 App. Div. 38, 109 N. Y. Supp. 414.

That a special franchise, such as those under consideration in this case, is property, with all the attributes of property, is the law of nearly every state in the Union, and has repeatedly been recognized in this court.

West River Bridge Co. v. Dix, 6 How. 507, 534, 543, 12 L. ed. 535, 546, 549; *Wilmington & W. R. Co. v. Reid*, 13 Wall. 264, 20 L. ed. 568; *Morgan v. Louisiana*, 93 U. S.

217, 223, 23 L. ed. 860, 861; *New Orleans, S. F. & L. R. Co. v. Delamore*, 114 U. S. 501, 29 L. ed. 244, 5 Sup. Ct. Rep. 1009; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 394, 46 L. ed. 592, 610, 22 Sup. Ct. Rep. 410; *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* 199 U. S. 1, 39, 50 L. ed. 65, 76, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381.

A large portion of the wealth of the community consists of intangible property.

Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 218, 219, 41 L. ed. 965, 976, 977, 17 Sup. Ct. Rep. 604; *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* supra.

Even the value of the tangible property of public service corporations depends largely upon the special franchises owned by such corporations. Without such franchises, the right of way or tracks of a railway company would possess only a nominal value, and the pipes and mains of a gas company would be mere junk for the scrap heap.

People ex rel. Metropolitan Street R. Co. v. State Tax Comrs. 174 N. Y. 437, 63 L.R.A. 884, 105 Am. St. Rep. 674, 67 N. E. 69; *State Railroad Tax Cases*, 92 U. S. 575, 606, 23 L. ed. 663, 670.

In New York, special franchises cannot be repealed or impaired under the reserved power.

People v. O'Brien, 111 N. Y. 36, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

When authority is given by the state to a corporation to use the streets of a municipality, and the franchise has been accepted and acted upon by the corporation, a contract has been made which, during its continuance, cannot subsequently be impaired by the legislature.

People ex rel. Davis v. Sturtevant, 9 N. Y. 273, 59 Am. Dec. 536; *Milhau v. Sharp*, 27 N. Y. 620, 84 Am. Dec. 314; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 660, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252; *New Orleans Waterworks Co. v. Rivers*, 115 U. S. 674, 681, 29 L. ed. 525, 527, 6 Sup. Ct. Rep. 273.

But the contract thus entered into for the use of the streets is something more than a mere personal right. It is a grant of an incorporeal hereditament; it is an easement or right of way in the streets, and hence is real property.

Milhau v. Sharp, supra; *People v. O'Brien*, 111 N. Y. 40, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Ghee v. Northern Union Gas Co.* 158 N. Y. 510, 53 N. E. 692; *People ex rel. Metropolitan Street R. Co. v. State Tax Comrs.* 174 N. Y. 435, 63 L.R.A.

884, 105 Am. St. Rep. 674, 67 N. E. 69; *Water Comrs. v. Westchester County Waterworks Co.* supra; *Kronsbein v. Rochester*, 76 App. Div. 494, 78 N. Y. Supp. 813; *Re East River Gas Co.* 122 App. Div. 890, 106 N. Y. Supp. 1125; *Bowman v. Wathen*, 2 McLean, 376, Fed. Cas. No. 1,740; *Detroit Citizens' Street R. Co. v. Detroit*, 26 L.R.A. 667, 12 C. C. A. 365, 22 U. S. App. 570, 64 Fed. 643; *West River Bridge Co. v. Dix*, 6 How. 507, 534, 12 L. ed. 535, 546; *Gue v. Tide Water Canal Co.* 24 How. 257, 16 L. ed. 635; *East Alabama R. Co. v. Doe*, 114 U. S. 340, 353, 29 L. ed. 136, 141, 5 Sup. Ct. Rep. 869.

The same conclusion has been reached in other states where the question has arisen.

Chicago v. Baer, 41 Ill. 306; *Stockton Gas & Electric Co. v. San Joaquin County*, 148 Cal. 313, 5 L.R.A. (N.S.) 174, 83 Pac. 54, 7 A. & E. Ann. Cas. 511.

That a franchise of this kind is real property was decided in England in the early days of gas lighting.

R. v. Brighton Gaslight & Coke Co. 5 Barn. & C. 466.

A corporation cannot be deprived of its special franchises except under the power of eminent domain and upon payment of their full value.

Sixth Ave. R. Co. v. Kerr and Water Comrs. v. Westchester County Waterworks Co. supra; *Coney Island, Ft. H. & B. R. Co. v. Kennedy*, 15 App. Div. 588, 44 N. Y. Supp. 825; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 574; *Monongahela Nav. Co. v. United States*, supra.

Even the unlimited power to regulate commerce would not authorize the Federal government to destroy a franchise of this kind without making just compensation for it.

United States v. Bellingham Bay Boom Co. 176 U. S. 211, 216, 44 L. ed. 437, 20 Sup. Ct. Rep. 343; *Monongahela Nav. Co. v. United States*, supra.

Half a century ago this court refused to make a distinction in condemnation proceedings between tangible and intangible property.

West River Bridge Co. v. Dix, 6 How. 507, 12 L. ed. 535.

If special franchises are entitled to the same protection from invasion as any other species of property (*Parker v. Elmira, C. & N. R. Co.* 165 N. Y. 274, 59 N. E. 81), and if a corporation cannot be deprived of its special franchises except under the exercise of the power of eminent domain and upon payment of their full value, it necessarily follows that a corporation cannot be deprived of its special franchises indirectly, through the exercise of the legislative power regulating rates; for, as this court observed

in the *Railroad Commission Cases*, 116 U. S. 307, 331, 29 L. ed. 636, 644, 6 Sup. Ct. Rep. 334, 388, 1191, the power to regulate rates amounts to a taking of private property for public use.

While the point has not been directly passed upon by this court, yet, wherever it has been referred to in the general discussion on the subject of rate regulation, it has been stated or assumed that, in fixing a rate, the value of the special franchises must be included in valuing the property of a public service corporation.

Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

There is a marked difference between the exercise of the police power in the regulation of rates, and its exercise where the public health, safety, or morals are concerned. The regulation of rates is an exercise of the police power.

People v. Budd, 117 N. Y. 1, 5 L.R.A. 559, 15 Am. St. Rep. 460, 22 N. E. 670, 143 U. S. 517, 544, 545, 36 L. ed. 247, 255, 256, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

In all cases involving the public health, safety, or morals, the exercise of the police power is paramount to property or contract rights. All property is held subject to the exercise of that power; and the owner has no remedy if, as a result, his contract rights are changed or the value of his property is impaired.

Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co. 111 U. S. 746, 750, 751, 28 L. ed. 585-587, 4 Sup. Ct. Rep. 652; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 668-673, 29 L. ed. 516, 523-525, 6 Sup. Ct. Rep. 252; *New Orleans Gaslight Co. v. Drainage Commission*, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 50 L. ed. 596, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Northern P. R. Co. v. Minnesota*, 208 U. S. 583, 596, 52 L. ed. 630, 636, 28 Sup. Ct. Rep. 341.

But that principle is not recognized in the regulation of rates; and contract and property rights cannot be ignored in such cases. A contract for a specific rate will be protected.

Detroit v. Detroit Citizens' Street R. Co. supra; *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 536, 48 L. ed. 1102, 1108, 24 Sup. Ct. Rep. 756; *Vicksburg v. Vicksburg Waterworks Co.* 206 U. S. 496, 508-516, 51

L. ed. 1155, 1160, 1163, 27 Sup. Ct. Rep. 762.

All the decisions of this court in the rate regulation cases are based upon the proposition that the legislature cannot ignore property or contract rights in establishing a rate. A rate must be allowed which will permit a reasonable return upon the fair value of the property devoted to the public use.

San Diego Land & Town Co. v. National City, 174 U. S. 739, 753, 756, 43 L. ed. 1154, 1159, 1161, 19 Sup. Ct. Rep. 804.

In the lower Federal courts and in the state courts, wherever the point has been suggested, the conclusion has also been reached or intimated that special franchises cannot be ignored in fixing rates.

Ames v. Union P. R. Co. 64 Fed. 176; Spring Valley Waterworks v. San Francisco, supra; San Diego Water Co. v. San Diego, 118 Cal. 556, 38 L.R.A. 460, 62 Am. St. Rep. 261, 50 Pac. 633.

Rate regulation is merely the enforcement of a principle which has long been recognized at common law, and which has been the subject of legislation from the earliest days of parliamentary history. This principle is, that a business which, as Lord Hale long ago expressed it, is "affected with a public interest," by reason of the fact that the public are compelled to patronize it, must make a reasonable charge for its services or product. Legislation became necessary when the persons engaged in the business exceeded their legitimate rights, and made unreasonable charges. The legislature did not interfere so long as the charges were reasonable. It merely prohibited unreasonable charges by fixing a limit of reasonableness. It did not in any way attempt to interfere with property rights, but merely sought to prevent imposition and extortion.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 698, 43 L. ed. 858, 864, 19 Sup. Ct. Rep. 565.

At common law, however, the reasonableness of a rate had very little to do with the amount of return received by the owner of property upon the capital invested in the business. Whether or not a rate was reasonable depended principally upon the nature of the service rendered and the charges that were usual in that class of business. The value of the property employed or the return realized upon the property was so slight a factor that it was virtually ignored.

Canada Southern R. Co. v. International Bridge Co. L. R. 8 App. Cas. 731; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732; Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 53 L. ed.

12 Sup. Ct. Rep. 844; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 79, 95-97, 46 L. ed. 92, 103, 104, 22 Sup. Ct. Rep. 30.

Good will, or the added value derived from an established business, is property which, in the case of a partnership, constitutes a partnership asset, and does not pass to the surviving partner.

Slater v. Slater, 175 N. Y. 143, 61 L.R.A. 796, 96 Am. St. Rep. 605, 67 N. E. 224.

Even in the case of a waterworks company (a public service corporation), its good will must be paid for in condemnation proceedings.

Water Comrs. v. Westchester County Waterworks Co. 176 N. Y. 239, 68 N. E. 348.

In New York, under the system of taxation which exists, corporations are required to pay a state franchise tax, under which good will is taxable.

People ex rel. Wiebusch & H. Co. v. Roberts, 154 N. Y. 101, 47 N. E. 980.

The valuation placed upon the real estate and plant of the company was merely the market or reproductive value. Nothing was allowed for the fact that all of this property has a largely enhanced value by reason of the fact that it is operated as a single entity, although the parts are physically separated. It is the great value of this business as an organic whole, and not the nominal value of its dismembered and lifeless parts, upon which its owners are entitled to a return; and that principle is universally recognized in assessing property for taxation.

Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 38 L. ed. 1041, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 185, 41 L. ed. 960, 965, 17 Sup. Ct. Rep. 527; Western U. Teleg. Co. v. Missouri, 190 U. S. 412, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; San Francisco Bank v. Dodge, 197 U. S. 70, 49 L. ed. 669, 25 Sup. Ct. Rep. 384.

A similar conclusion has been reached by the Federal courts in rate regulation and other cases.

National Waterworks Co. v. Kansas City, 27 L.R.A. 827, 10 C. C. A. 653, 27 U. S. App. 165, 62 Fed. 865; Metropolitan Trust Co. v. Houston & T. C. R. Co. 90 Fed. 687; Spring Valley Waterworks v. San Francisco, 124 Fed. 595.

The universal practice to assess property for purposes of taxation at less than its actual value is a matter of general knowledge which has been recognized and rebuked by the courts.

People ex rel. Equitable Gaslight Co. v. Barker, 144 N. Y. 100, 39 N. E. 13; People

ex rel. Manhattan R. Co. v. Barker, 146 N. Y. 304, 40 N. E. 996; Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 308; Cummings v. Merchants' Nat. Bank, 101 U. S. 153, 25 L. ed. 903; New York v. Barker, 179 U. S. 279, 286, 45 L. ed. 190, 194, 21 Sup. Ct. Rep. 121.

For the year 1906, the special franchises of the company were assessed at about \$24,000,000, exclusive of the mains and connections. The tax law requires the state board to fix the value of these franchises, and to hear all complaints in regard to values so fixed before making them final. In the absence of any evidence to the contrary, that valuation should be accepted by this court as conclusive.

Railroad & Teleph. Cos. v. Board of Equalizers, 85 Fed. 302; Adams Exp. Co. v. Ohio State Auditor, 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604.

While true or full value is not a constitutional requirement in New York, it is a statutory requirement which has been enforced by the courts.

People ex rel. Manhattan R. Co. v. Barker, 146 N. Y. 312, 40 N. E. 996.

Even had exceptional and peculiar conditions not existed in New York, the continuous growth of the city and the occupation of all the available space in the streets would have rendered an existing occupation of the streets of constantly increasing value.

Western U. Teleg. Co. v. Electric Light & P. Co. 178 N. Y. 325, 70 N. E. 866; Ghee v. Northern Union Gas Co. 158 N. Y. 510, 53 N. E. 692; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453, 49 L. ed. 831, 25 Sup. Ct. Rep. 471.

There is no doubt that the combined property of the company has a value which is largely in excess of the separate values of the properties of its constituent companies.

Cleveland, C. C. & St. L. R. Co. v. Backus, 154 U. S. 439, 444, 38 L. ed. 1041, 1045, 4 Inters. Com. Rep. 677, 14 Sup. Ct. Rep. 1122.

Mr. Charles F. Mathewson argued the cause, and, with Messrs. Shearman & Sterling, filed a brief for appellee on the facts.

Mr. W. Bourke Cockran filed a brief as *amicus curiæ*:

The courts are concerned solely in maintaining the security of property, not with guaranteeing a profitable use of it.

Stone v. Farmers' Loan & T. Co. 116 U. S. 307, 331, 29 L. ed. 636, 6 Sup. Ct. Rep. 334, 388, 1191; Chicago, M. & St. P. R. Co. v. Minnesota, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; San Diego Land & Town Co. v. National City, 174 U. S. 739, 754, 43 L. ed. 1154, 1160, 19 Sup. Ct. Rep. 804.

Wherever the legislature is given author-

ity to deal with any subject, it is the fullest authority, including authority to decide for itself all matters of fact incident to the exercise of its functions.

Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co. 39 Fed. 143; Angle v. Chicago, St. P. M. & O. R. Co. 39 Fed. 912; Rankin v. Colgan, 92 Cal. 605, 28 Pac. 673; 2 Story, Const. § 1342.

This court, in all its decisions affecting legislative regulation of public service corporations, has always recognized the right of a legislature to ascertain for itself facts necessary to the effective discharge of this function.

Spring Valley Waterworks v. San Francisco, 82 Cal. 286, 6 L.R.A. 756, 16 Am. St. Rep. 116, 22 Pac. 910, 1046; San Diego Land & Town Co. v. National City, 174 U. S. 739, 750, 43 L. ed. 1154, 1158, 19 Sup. Ct. Rep. 804.

Where certain features of a law transcend the Constitution, yet others are within the power of the legislature to enact, those features that are constitutional will be upheld.

Cooley, Const. Lim. 7th ed. p. 247.

Mr. Nathan Matthews also filed a brief as *amicus curiæ*.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:†

At the outset it seems to us proper to notice the views regarding the action of the court below, which have been stated by [40] counsel for the appellants, the public service commission, in their brief in this court. They assume to criticize the court for taking jurisdiction of this case, as precipitate, as if it were a question of discretion or comity, whether or not that court should have heard the case. On the contrary, there was no discretion or comity about it. When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction (Cohen v. Virginia, 6 Wheat. 264, 404, 5 L. ed. 257, 291), and, in taking it, that court cannot be truthfully spoken of as precipitate in its conduct. That the case may be one of local interest only is entirely immaterial, so long as the parties are citizens of different states or a question is involved which, by law, brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice can-

†In announcing the decision on January 4, 1909, Mr. Justice Peckham read a memorandum giving the gist of the opinion now published, which was not filed until some days later.

not be properly denied. *Re Metropolitan R. Receivership*, 208 U. S. 90-110, 52 L. ed. 403-412, 28 Sup. Ct. Rep. 219; *Prentiss v. Atlantic Coast Line R. Co.* 211 U. S. 210, ante, 150, 29 Sup. Ct. Rep. 67. In the latter case it was said that a plaintiff could not be forbidden to try the facts upon which his right to relief is based before a court of his own choice, if otherwise competent. It is true an application for an injunction was denied in that case because the plaintiff should, in our opinion, have taken the appeal allowed him by the law of Virginia while the rate of fare in litigation was still at the legislative stage, so as to make it absolutely certain that the officials of the state would try to establish and enforce an unconstitutional rule,

The case before us is not like that. It involves the constitutionality, with reference to the Federal Constitution, of two acts of the legislature of New York, and it is one over which the circuit court undoubtedly had jurisdiction under the act of Congress, and its action in taking and hearing the case cannot be the subject of proper criticism.

An examination of the record herein, with reference to the questions involved in the merits, shows that the act under which the gas commission was appointed was, subsequently to the commencement and trial of 41] this suit, declared, on grounds *not here material, to be unconstitutional by the court of appeals of New York. *Saratoga Springs v. Saratoga Gas, Electric Light, & P. Co.* 191 N. Y. 123, 83 N. E. 693, February 18, 1908. The order made by the commission must therefore be regarded as invalid. It is not important in his case, because the act of the legislature of 1906 makes the same provision as to the price of gas to consumers other than the city that the order does. We have, as remaining to be considered, the above mentioned two acts of the legislature.

The question arising is as to the validity of the acts limiting the rates for gas to the prices therein stated. The rule by which to determine the question, is pretty well established in this court. The rates must be plainly unreasonable to the extent that their enforcement would be equivalent to the taking of property for public use without such compensation as, under the circumstances, is just both to the owner and the public. There must be a fair return upon the reasonable value of the property at the time it is being used for the public. *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 439, 442, 47 L. ed. 892, 894, 23 Sup. Ct. Rep. 571.

Many of the cases are cited in *Knoxville* 53 L. ed.

v. Knoxville Water Co. just decided. [212 U. S. 1, ante, 371, 29 Sup. Ct. Rep. 148.] The case must be a clear one before the courts ought to be asked to interfere with state legislation upon the subject of rates, especially before there has been any actual experience of the practical result of such rates. In this case the rates have not been enforced as yet, because the bill herein was filed and an injunction obtained restraining their enforcement, before they came into actual operation.

In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it, of course, becomes necessary to ascertain what that value is. A very great amount of evidence was taken before the master upon that subject, which is included in five large volumes of the record. Valuations by expert witnesses were given as to the value of the real estate owned by the complainant, and as to the value of the mains, service pipes, plants, meters, and miscellaneous personal property.

*The value of real estate and plant is, [42 to a considerable extent, matter of opinion; and the same may be said of personal estate when not based upon the actual cost of material and construction. Deterioration of the value of the plant, mains, and pipes is also, to some extent, based upon opinion. All these matters make questions of value somewhat uncertain; while added to this is an alleged prospective loss of income from a reduced rate,—a matter also of much uncertainty, depending upon the extent of the reduction and the probable increased consumption,—and we have a problem as to the character of a rate which is difficult to answer without a practical test from actual operation of the rate. Of course, there may be cases where the rate is so low, upon any reasonable basis of valuation, that there can be no just doubt as to its confiscatory nature; and, in that event, there should be no hesitation in so deciding and in enjoining its enforcement without waiting for the damage which must inevitably accompany the operation of the business under the objectionable rate. But, where the rate complained of shows, in any event, a very narrow line of division between possible confiscation and proper regulation, as based upon the value of the property found by the court below, and the division depends upon opinions as to value, which differ considerably among the witnesses, and also upon the results in the future of operating, under the rate objected to, so that the material fact of value is left in much doubt, a court of equity ought not to interfere by injunction before a fair trial has been made of continuing the business under that rate,

and thus eliminating, as far as is possible, the doubt arising from opinions as opposed to facts.

A short history of the complainant, as to its incorporation and its capital, and the method by which the value of its franchises was arrived at, will render the further examination of the case more intelligible.

Prior to 1884 there were seven gaslight companies in New York city, each operated under separate charters, granted at different times between the years 1823 and 1865 or 43]1871. They *each had the right to use the streets of certain portions of the city for the purpose of laying their mains and service pipes in order to furnish gas to the city and the citizens. Not one of the companies had ever been called upon to pay a penny for such right, but the grant to each was, in the aspect, a gratuity. It was not, at the time of granting franchises such as these, the custom to pay for them.

In 1884, by chapter 367 of the laws of that year, authority to consolidate manufacturing corporations was granted upon conditions mentioned in the act. The directors of the corporations proposing to consolidate were to make an agreement for consolidation, embracing, among other things, the amount of capital and the number of shares of stock into which it should be divided, the capital not to be in amount more "than the fair aggregate value of the property, franchises, and rights of the several companies to be consolidated." The agreement was not to be valid until submitted to the stockholders of each of the companies and approved by two-thirds of each. The constituent companies, which were afterwards consolidated under their agreement, and pursuant to the act mentioned, were six in number, the seventh, the Mutual Company, withdrawing. The companies agreed upon the valuation of their property, which was to be paid for in the stock of the consolidated company, and the original stock held by the stockholders of each company was surrendered to the consolidated company. The value of the franchise of all the companies was set at the figure of \$7,781,000. The court below said that the master reported there was little direct evidence before him as to the value of the franchises, to which the court added that if the master, by direct evidence, meant testimony of the same kind regarding their value as had been offered regarding every item of tangible property, there was none at all.

The court further stated that it does not appear in the evidence how the valuation of the franchises was measured, or why the figures selected were chosen, but that it was true that, when complainant was organized, 44]in 1884, under the consolidation *statute which, in terms, permitted it to acquire the

property and franchises of the other companies, it issued stock of the par value of \$7,781,000, representing the franchises it then acquired and nothing else, and that the stock was held by purchasers who, I am compelled to think, had a right to rely upon legal protection for legally issued stock. It is not, of course, contended there was special stock issued for this particular item, but it was included in the total sum for which the consolidated company issued its stock, and, upon its receipt, the stockholders in the various companies surrendered their stock in those companies. The result was that the amount of the stock issued by the consolidated company was increased by \$7,781,000, representing a value of franchises which was agreed upon by the stockholders in the companies, and which had never cost any of them a single penny.

It cannot be disputed that franchises of this nature are property and cannot be taken or used by others without compensation. *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *People v. O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692, and cases cited. The important question is always one of value. Taking their value in this case as arrived at by agreement of their owners, at the time of the consolidation, that value has been increased by the finding of the court below to the sum of \$12,000,000 at the time of the commencement of this suit. The trial court said: "If, however, complainant's franchises were worth \$7,781,000 in 1884, and its tangible property, at the same time, was appraised (as appears in evidence) at \$30,000,000 (in round figures), then since complainant's business (in sales volume) has, in twenty-three years, almost quadrupled, and its tangible assets grown to \$47,000,000, it appears to me that a fair method of fixing value of the franchises in 1905 is to assume the same growth in value for the franchise as is demonstrated by the evidence in the case of tangible property. If, therefore, the franchise valuation of 1884 was proportioned to personalty and realty of \$30,000,000, a franchise valuation proportioned to \$47,000,000 in 1905 would be over \$12,000,000. This, I think, a logical result *from the assumption I am compelled to[45 start with, i. e., that franchises have a separable and independent value. But there is, however, no method of valuing franchises, except by a consideration of earnings. Earnings must be proportioned to assets; and both kinds of assets, tangible and intangible, must stand upon the same plane of valuation. Having, therefore, a measure of growth of tangible assets from 1884 to 1905, the franchise assets must be assumed to have grown in the same proportion. I find that

the value of complainant's franchises at the date of inquiry was not less than \$12,000,000, making a total valuation of \$59,000,000, upon which the probable return is \$3,030,000, or very considerably less than 8 per cent." The judge stated his own views as opposed to including these franchises in the property upon the value of which a return is to be calculated in fixing the amount of rates, but held that he was bound by decided cases to hold against his personal views.

We are not prepared to hold with the court below as to the increased value which it attributes to the franchises. It is not only too much a matter of pure speculation, but we think it is also opposed to the principle upon which such valuation should be made. This corporation is one of that class which is subject to regulation by the legislature in the matter of rates, provided they are not made so low as to be confiscatory. The franchises granted the various companies and held by complainant consisted in the right to open the streets of the city and lay down mains and use them to supply gas, subject to the legislative right to so regulate the price for the gas as to permit not more than a fair return (regard being had to the risk of the business) upon the reasonable value of the property at the time it is being used for the public.

The evidence shows that from their creation, down to the consolidation in 1884, these companies had been free from legislative regulation upon the amount of the rates to be charged for gas. They had been most prosperous and had divided very large earnings in the shape of dividends to their stockholders,—dividends which are characterized 46] by the Senate committee, *appointed in 1885 to investigate the fact surrounding the consolidation, as enormous. The report of that committee shows that several of the companies had averaged, from their creation, dividends over 16 per cent., and the six companies in the year 1884 paid a dividend upon capital which had been increased by earnings, as in the case of the Manhattan and the New York, of 18 per cent; and, had it been upon the money actually paid in, it would have been nearly 25 per cent.

The committee also said in the same report that these "franchises were in force November 10, 1884, the time of the consolidation, and the money invested in them was earning the same enormous dividends. So far as the evidence shows, there was nothing in the condition of affairs on the 10th of November to indicate that these franchises would not be as valuable for the next twenty years as they had been in the past. There were gas companies enough in the city with a capacity capable of supplying the demands 53 L. ed.

for the next twenty years. A law was on our statute books that virtually prohibited the laying of any more gas pipes in the streets. The gas companies had an agreement among themselves, fixing the price of gas at a figure that paid these dividends. The people were paying this price, as they had in the past, without objection or protest. This price may have been too high, and the dividends were excessive, but they were not illegal, and the valuation of the franchises computed upon these dividends and that state of facts cannot be called a violation of a law that expressly authorized it to be done, unless such valuation was too high."

The committee, upon these facts, were of opinion that the valuation of \$7,781,000 for the franchises was not more than their fair aggregate value.

Assuming, as the committee did, that the company would be permitted to charge the same prices in the future which in the past had resulted in these "enormous" or "excessive" dividends, it need not be matter of surprise that a franchise by *means of 47 which such dividends had been possible was not regarded as overvalued at the sum stated in 1884.

We think that, under the above facts, the courts ought to accept the valuation of the franchises fixed and agreed upon under the act of 1884 as conclusive at that time. The valuation was provided for in the act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years past on the basis of the validity of the valuation and of the stock issued by the company.

But, although the state ought, for these reasons, to be bound to recognize the value agreed upon in 1884 as part of the property upon which a reasonable return can be demanded, we do not think an increase in that valuation ought to be allowed upon the theory suggested by the court below. Because the amount of gas supplied has increased to the extent stated, and the other and tangible property of the corporations has increased so largely in value, is not, as it seems to us, any reason for attributing a like proportional increase in the value of the franchise. Real estate may have increased in value very largely, as also the personal property, without any necessary increase in the value of the franchise. Its past value was founded upon the opportunity of obtaining these enormous and excessive returns upon the property of the company, without legislative interference with the price for the supply of gas; but that immunity for the future was, of course, uncertain; and the moment it ceased, and the

legislature reduced the earnings to a reasonable sum, the great value of the franchise would be at once and unfavorably affected, but how much so it is not possible for us now to see. The value would most certainly not increase. The question of the regulation of rates did, from time to time thereafter, arise in the legislature, and finally culminated in these acts which were in existence when the court below found this increased value of the franchises. We cannot, in any view of the case, concur in that finding.

48] *This increase in value did, however, form part of the sum upon which the court below held the complainant was entitled to a return. That court found the value of the tangible assets actually employed at the time of the commencement of this suit in the business of supplying gas by the complainant to be \$47,831,435, to which it added the \$12,000,000 as the value of the franchises as found by it, making the total of \$59,831,435, upon which it held that the company was entitled to a return of 6 per cent, being \$3,589,886.10. It also found its total net income for the year 1905 amounted to \$5,881,192.45, almost 10 per cent upon the sum above named. Altering the finding of the court so far only as to place the value of the franchises at the time agreed upon in 1884, \$7,781,000, the total value upon that basis of the property employed by the company would be \$55,612,435, upon which 6 per cent would be \$3,336,746.10, while the sum estimated as the return on 80-cent gas would have been \$3,024,592.14, which is nearly $5\frac{1}{2}$ per cent on the above total of \$55,612,435.

What has been said herein regarding the value of the franchises in this case has been necessarily founded upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally, where the facts are not similar to those in the case before us. We simply accept the sum named as the value under the circumstances stated.

There is no particular rate of compensation which must, in all cases and in all parts of the country, be regarded as sufficient for capital invested in business enterprises. Such compensation must depend greatly upon circumstances and locality; among other things, the amount of risk in the business is a most important factor, as well as the locality where the business is conducted, and the rate expected and usually realized there upon investments of a somewhat similar nature with regard to the risk attending them. There may be other matters which, in some cases, might also be properly taken into account in determining the rate which an investor might properly

expect *or hope to receive and which he[49 would be entitled to without legislative interference. The less risk, the less right to any unusual returns upon the investments. One who invests his money in a business of a somewhat hazardous character is very properly held to have the right to a larger return, without legislative interference, than can be obtained from an investment in government bonds or other perfectly safe security. The man that invested in gas stock in 1823 had a right to look for and obtain, if possible, a much greater rate upon his investment than he who invested in such property in the city of New York years after the risk and danger involved had been almost entirely eliminated.

In an investment in a gas company, such as complainant's, the risk is reduced almost to a minimum. It is a corporation which, in fact, as the court below remarks, monopolizes the gas service of the largest city in America, and is secure against competition under the circumstances in which it is placed, because it is a proposition almost unthinkable that the city of New York would, for purposes of making competition, permit the streets of the city to be again torn up in order to allow the mains of another company to be laid all through them to supply gas which the present company can adequately supply. And, so far as it is given us to look into the future, it seems as certain as anything of such a nature can be, that the demand for gas will increase, and, at the reduced price, increase to a considerable extent. An interest in such a business is as near a safe and secure investment as can be imagined with regard to any private manufacturing business, although it is recognized at the same time that there is a possible element of risk, even in such a business. The court below regarded it as the most favorably situated gas business in America, and added that all gas business is inherently subject to many of the vicissitudes of manufacturing. Under the circumstances, the court held that a rate which would permit a return of 6 per cent would be enough to avoid the charge of confiscation, and for the reason that a return of such an amount was the return ordinarily *sought and obtained on investments of[50 that degree of safety in the city of New York.

Taking all facts into consideration, we concur with the court below on this question, and think complainant is entitled to 6 per cent on the fair value of its property devoted to the public use. But, assuming that the company is entitled to 6 per cent upon the value of its property actually used for the public, the total fixed by the court below is, as we have seen, much too large. We must first strike out the in-

creased value of the franchises asserted by the court over the amount agreed upon in 1884, when the company was consolidated. We also find that the total value of the tangible property is made up of several items, two of which are—

Real Estate	\$11,985,435
Plants	15,000,000

Both depend largely upon the opinions of expert witnesses as to the value of that kind of property. Where a large amount of the total value of a mass of different properties consists in the value of real estate, which is only ascertained by the varying opinions of expert witnesses, and where the opinions of the plaintiffs' witnesses differ quite radically from those of the defendants, it is apparent that the total value must necessarily be more or less in doubt. It, in other words, becomes matter of speculation or conjecture to a great extent. It may be, as already suggested, that, in many cases, the rates objected to might be so low that there could be no reasonable doubt of their inadequacy upon any fair estimate of the value of the property. In such event the enforcement of the rates should be enjoined even in a case where the value of the property depends upon the value to be assigned to real estate by the evidence of experts. But there may be other cases where the evidence as to the probable result of the rates in controversy would show they were so nearly adequate that nothing but a practical test could satisfy the doubt as to their sufficiency.

In this case a slight reduction in the estimated value of the real estate, plants, and mains, as given by the witnesses for 51]*complainant, would give a 6 per cent return upon the total value of the property, as above stated. And again, increased consumption at the lower rate might result in increased earnings, as the cost of furnishing the gas would not increase in proportion to the increased amount of gas furnished.

The elevated railroads in New York, when first built, charged 10 cents for each passenger; but, when the rate was reduced to 5 cents, it is common knowledge that their receipts were not cut in two, but that, from increased patronage, the earnings increased from year to year, and soon surpassed the highest sum ever received upon the 10-cent rate.

Of course, there is always a point below which a rate could not be reduced, and, at the same time, permit the proper return on the value of the property; but it is equally true that a reduction in rates will not always reduce the net earnings, but, on the contrary, may increase them. The

question of how much an increased consumption under a less rate will increase the earnings of complainant, if at all, at a cost not proportioned to the former cost, can be answered only by a practical test. In such a case as this, where the other data upon which the computation of the rate of return must be based, are, from the evidence, so uncertain, and where the margin between possible confiscation and valid regulation is so narrow, we cannot say there is no fair or just doubt about the truth of the allegation that the rates are insufficient.

The complainant also contends that the state, having taxed it upon its franchises, cannot be heard to deny their existence or their value as taxed.

The fact that the state has taxed the company upon its franchises at a greater value than is awarded them here is not material. Those taxes, even if founded upon an erroneous valuation, were properly treated by the company as part of its operating expenses, to be paid out of its earnings before the net amount could be arrived at applicable to dividends, and, if such latter sums were not sufficient to permit the proper return on the property used by the company for the public, *then the rate would[52 be inadequate. The future assessment of the value of the franchises, it is presumed, will be much lessened if it is seen that the great profits upon which that value was based are largely reduced by legislative action. In that way the consumer will be benefited by paying a reduced sum (although indirectly) for taxes.

We are also of opinion that it is not a case for a valuation of "good will." The master combined the franchise value with that of good will, and estimated the total value at \$20,000,000.

The complainant has a monopoly in fact, and a consumer must take gas from it or go without. He will resort to the "old stand," because he cannot get gas anywhere else. The court below excluded that item, and we concur in that action.

And we concur with the court below in holding that the value of the property is to be determined as of the time when the inquiry is made regarding the rates. If the property which legally enters into the consideration of the question of rates has increased in value since it was acquired; the company is entitled to the benefit of such increase. This is, at any rate, the general rule. We do not say there may not possibly be an exception to it where the property may have increased so enormously in value as to render a rate permitting a reasonable return upon such increased value unjust to the public. How such facts

should be treated is not a question now before us, as this case does not present it. We refer to the matter only for the purpose of stating that the decision herein does not prevent an inquiry into the question when, if ever, it should be necessarily presented.

The matter of the increased cost of the gas, resulting from the provisions of the acts as to making the gas equal to 22 candle power, is also alleged as a reason for inadequacy of rate.

It appears that the average candle power actually produced in the first six months of the year 1905 was 22, while but 20 candle power was exacted by law, and, for the last six months of that year, while 22 candle power was enacted, the average amount was 24.19. This expense was included in the operating expense of that year, which resulted in the net earnings above mentioned, while the company was complying with the requirements of the act in this particular.

It is unnecessary, therefore, to further inquire as to the additional expense caused by this requirement.

Again, it has been asserted that the laws are unconstitutional because of the provision as to pressure, and also by reason of the penalties which a violation of the acts may render a corporation liable to.

The acts provide that the pressure of the gas in the service mains at any distance from the place of manufacture shall not be less than 1 inch nor more than 2½ inches.

The evidence shows that, to put a pressure such as is demanded by the acts upon the mains and other service pipes in their present condition would be to run a great risk of explosion, and consequent disaster. Before compliance with this provision would be safe, the mains and other pipes would have to be strengthened throughout their whole extent, and at an expenditure of many millions of dollars, from which no return could be obtained at the rates provided in the acts. This would take from the complainant the ability to secure the return to which it is entitled upon its property, used for supplying gas, and the provision as to the amount of pressure is therefore void. This particular duty imposed by the acts is, however, clearly separable from the enactments as to rates, and we have no doubt that the remainder of the statute would have been enacted, even with that provision omitted.

The obligation would remain upon the company to have a pressure sufficient to insure a light of 22 candle power, as provided in the acts.

We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly

construed by the court below, they are undoubtedly void, *within the principle decided in *Ex parte Young*, 209 U. S. 123. 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, and the cases there cited, because so enormous and overwhelming in their amount.

When the objectionable part of a statute is eliminated, if the balance is valid and capable of being carried out, and if the court can conclude it would have been enacted if that portion which is illegal had been omitted, the remainder of the statute thus treated is good. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 395, 38 L. ed. 1014, 1022, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Berea College v. Kentucky*, 211 U. S. 45-54, ante, 81, 29 Sup. Ct. Rep. 33. This is a familiar principle.

Lastly, it is objected that there is an illegal discrimination as between the city and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given. But neither the city nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether, by the reduced price to the city, the complainant is, upon the whole, unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.

We cannot see, from the whole evidence, that the price fixed for gas supplied to the city by wholesale, so to speak, would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant. So long as the total is enough to furnish such return, it is not important that, with relation to some customers, the price is not enough. *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585.

Upon a careful consideration of the case before us we are of opinion that the complainant has failed to sustain the burden cast upon it of showing beyond any just or fair doubt that the acts of the legislature of the state of New York are in fact confiscatory.

It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and, in that event, complainant ought to have the opportunity of again presenting its case to the court. To that end we reverse the decree with directions to dismiss the bill without prejudice; and it is so ordered.

W. E. RAKES, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 55-58.)

Error to district court — capital cases.

1. A conviction in a Federal district court of murder in the second degree, punishable only by imprisonment, is not reviewable in the Supreme Court under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517), § 5, as amended by the act of January 20, 1897 (29 Stat. at L. 492, chap. 68, U. S. Comp. Stat. 1901, p. 549), as a case of "conviction of capital crime," although the accused could have been convicted, under the indictment, of a capital offense.

[For other cases, see Appeal and Error, 962-966, in Digest Sup. Ct. 1908.]

Error to district court — frivolousness of constitutional question.

2. The constitutionality of the provision of U. S. Rev. Stat. § 5509, U. S. Comp. Stat. 1901, p. 3712, for such punishment of persons committing any other felony or misdemeanor, when conspiring contrary to the preceding section, as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed,—is too well settled to permit the question as to such constitutionality to serve as the basis of a writ of error from the Federal Supreme Court to a district court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

Error to district court — construction of Federal statute.

3. Assertions of errors of construction of Federal statutes furnish no basis for jurisdiction on constitutional grounds, under the act of March 3, 1891, § 5, of a writ of error from the Federal Supreme Court to a district court.

[For other cases, see Appeal and Error, 938-989, in Digest Sup. Ct. 1908.]

[No. 257.]

Argued January 4, 1909. Decided January 18, 1909.

IN ERROR to the District Court of the United States for the Western District of Virginia to review a conviction of conspiracy and of murder in the second degree. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Waller R. Staples argued the cause and filed a brief for plaintiff in error.

Assistant Attorney General Fowler argued the cause and filed a brief for defendant in error.

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.
53 L. ed.

Mr. Chief Justice Fuller delivered the opinion of the court:

This is a writ of error issued directly from this court to the *district court of [56 the United States for the western district of Virginia under § 5 of the act of March 3, 1891 (26 Stat. at L. 827, chap. 517), as amended by the act of January 20, 1897 (29 Stat. at L. 492, chap. 68, U. S. Comp. Stat. 1901, p. 549), and cannot be maintained unless this was a case of "conviction of a capital crime," or a case involving "the construction or application of the Constitution of the United States," or a case in which "the constitutionality of any law of the United States is drawn in question."

Plaintiff in error was indicted under §§ 5508 and 5509 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3712), for conspiracy, and for killing one Ann Hall in carrying out said conspiracy, and was found guilty of the conspiracy and of murder in the second degree, the jury fixing the punishment "for said last-mentioned offense at imprisonment in the penitentiary for fifteen (15) years." Judgment was rendered against him of imprisonment in the United States penitentiary at Atlanta, Georgia, for a period of fifteen years and one day, commencing on the day of his committal to the penitentiary, and fined \$100.

By § 5508 of the Revised Statutes it is made an offense against the United States for two or more persons to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, the punishment prescribed being a fine of not more than \$5,000, imprisonment not more than ten years, and ineligibility to any office or place of honor, profit, or trust created by the Constitution or laws of the United States. And by § 5509 it is provided that if, in committing the above offense, any other felony or misdemeanor be committed, the offender shall suffer such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed.

Section 3664 of the Code of Virginia enacts that "murder of the second degree shall be punished by confinement in the penitentiary not less than five nor more than eighteen years."

Clause 3 of § 5 gives the writ directly in "cases of conviction of a capital crime," and this case does not fall within it, because, *under the verdict, capital punish-[57 ment could not be inflicted. The jurisdiction of this court, in this regard, does not depend upon the crime charged in the indictment, and it is clear that, as the accused was found guilty of murder in the

second degree, for which the sentence of death could not be imposed, he was not convicted of a capital offense.

In *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944, Fitzpatrick was indicted for murder in the first degree, and the jury returned a verdict of guilty "without capital punishment," as permitted by the statute. The United States insisted that this was not "conviction of a capital crime," but Mr. Justice Brown, speaking for the court, said that the qualification "does not make the crime of murder anything less than a capital offense or a conviction for murder anything less than a conviction for a capital crime, by reason of the fact that the punishment actually imposed is imprisonment for life. The test is not the punishment which is imposed, but that which may be imposed under the statute." And see *Good Shot v. United States*, 179 U. S. 87, 45 L. ed. 101, 21 Sup. Ct. Rep. 33. But in the present case the accused was found guilty of murder in the second degree, for which the sentence of death could not be imposed, and it was not a case where the penalty of death was escaped by qualification of the verdict.

In *Davis v. United States*, 46 C. C. A. 619, 107 Fed. 753, the defendant could have been convicted under the indictment for a capital offense, but was in fact found guilty only of a conspiracy, and the circuit court of appeals for the sixth circuit correctly held that that court had jurisdiction. And, speaking through Severens, J., said: "Only the conspiracy is of Federal cognizance, and it is that offense which is made punishable. If, in the prosecution of it, a thing is done which is a crime by the laws of the state, the conspiracy is punishable by a measure of punishment equal to that prescribed by the law of the state for such other crime. But it is an aggravation merely of the substantive offense of conspiracy. If the latter is not proven there can be no conviction for the offense which constitutes the aggravating circumstance, and the proceedings falls to 58] the ground. It is *plainly indicated in *Motes v. United States*, 178 U. S. 458, 44 L. ed. 1150, 20 Sup. Ct. Rep. 993, that this is the view taken of these sections by the Supreme Court. It cannot be doubted that it was within the power of Congress to deal with such a conspiracy and impose such punishment therefor as it should deem proper; and, having such authority, it was competent to take notice of such incidents of violence and wrong as were likely to happen in the prosecution of such combinations, and to measure the punishment by that which is prescribed by the local law for such acts when made, of themselves, the

subject of punishment. Though measured by those laws, the penalty is imposed by the law of the United States."

Nor can we see that the case involved the construction or application of the Constitution of the United States, or drew in question the constitutionality of a law of the United States, because no definite issue was raised in regard thereto; and while in the brief of counsel for plaintiff in error it was suggested that § 5509 was unconstitutional, that contention, however presented, was long since put at rest. *Motes v. United States*, supra; *Logan v. United States*, 144 U. S. 263, 36 L. ed. 429, 12 Sup. Ct. Rep. 617; *Re Quarles*, 158 U. S. 532, 39 L. ed. 1080, 15 Sup. Ct. Rep. 959. And assertion of errors of construction furnishes no basis for jurisdiction on constitutional grounds under § 5 of the act of March 3, 1891.

Writ of error dismissed.

COUNTY OF PRESIDIO, Texas, Petitioner,
v.
NOEL-YOUNG BOND & STOCK COMPANY.

(See S. C. Reporter's ed. 58-78.)

Bonds — bona fide holder — notice of infirmities.

1. A purchaser of county bonds, even if bound to examine the order of the county commissioners' court referred to therein as authorizing the issue, is not charged with the knowledge that such court exceeded its power in issuing the bonds purchased by him because the numbers which such bonds bear show that the amount authorized by the court's order had already been issued, where the statutes recited in the bonds do not name any specific amount beyond which the court cannot go, but merely forbid an issue of a larger number than a specified annual tax will liquidate in ten years, and there is nothing in the court's order which

NOTE.—On the rights of holders of municipal bonds—see notes to *Citizens' Sav. & L. Asso. v. Perry County*, 39 L. ed. U. S. 585; *Sutliff v. Lake County*, 37 L. ed. U. S. 145; *Rich v. Mentz*, 33 L. ed. U. S. 1075; and *Chelsea Sav. Bank v. Ironwood*, 66 C. C. A. 235.

On estoppel by recitals in negotiable bonds—see notes to *Mercer County v. Hackett*, 17 L. ed. U. S. 548, and *Daviess County v. Dickinson*, 29 L. ed. U. S. 1026.

As to bona fide purchasers of municipal bonds—see note to *Pickens Twp. v. Post*, 41 C. C. A. 6.

On the doctrine of *lis pendens*—see notes to *Green v. Rick*, 2 L.R.A. 48; *Houston v. Timmerman*, 4 L.R.A. 716; and *Benton v. Shafer*, 7 L.R.A. 812.

requires the bonds to be numbered consecutively from one upward.

[For other cases, see Bonds, 491-508, in Digest Sup. Ct. Rep. 1908.]

Bonds — estoppel by recitals.

2. Recitals in county bonds which fairly import a compliance in all respects with the statutes specified therein as empowering the county commissioners' court to issue bonds for courthouse and jail purposes relieve a purchaser from the necessity of examining the order of such court referred to in the bonds as authorizing the issue, and estop the county to assert, as against a bona fide holder, that his bonds were issued in excess of the authorized amount, or were not issued for the purposes contemplated by the statutes.

[For other cases, see Bonds, 388-440, in Digest Sup. Ct. Rep. 1908.]

Evidence — presumption as to bona fides — holders of county bonds.

3. The holder of negotiable county bonds is presumed, in the absence of proof to the contrary, to have obtained them underdue or before maturity, in good faith, for a valuable consideration, and without notice of any circumstances impeaching their validity.

[For other cases, see Evidence, 655-663, in Digest Sup. Ct. Rep. 1908.]

Lis pendens — purchasing bonds pending suit on coupons.

4. One who purchases negotiable county bonds in good faith and for value after a suit on the interest coupons attached to such bonds has been brought, not being himself a party or having notice of that suit, will not be concluded by the judgment invalidating the coupons, although the issue in that suit as to the validity of the coupons may have incidentally involved an inquiry as to the validity of the bonds to which they were attached.

[For other cases, see Lis Pendens, 25-36, in Digest Sup. Ct. Rep. 1908.]

[No. 41.]

Argued and submitted December 4, 1908.

Decided January 18, 1909.

ON WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Texas in favor of plaintiff in an action on county bonds. Affirmed.

The facts are stated in the opinion.

Mr. T. J. Bcall argued the cause and filed a brief for petitioner:

The judgment of the state court in which the bonds sued on in the instant case were held void was, under the pleadings and evidence, a bar to plaintiff's action.

Louis v. Brown Twp. 109 U. S. 162-168, 27 L. ed. 892-894, 3 Sup. Ct. Rep. 92; Ball v. Presidio County, 88 Tex. 60, 29 S. W. 1042.

53 L. ed.

A judgment is conclusive not only upon those who are actual parties to the litigation, but also upon all persons who are in privity with them, in law or estate; and a person is bound by a judgment as a privy to one of the parties when he has succeeded to some right, title, or interest of that party in the subject-matter of the litigation.

2 Black, Judgm. § 549; Calderwood v. Brooks, 28 Cal. 151; Thompson v. Clark, 4 Hun, 164.

The bonds sued on were issued without lawful authority, not being supported or authorized by any order of the commissioners' court.

Ball v. Presidio County, supra; Caruthers v. State, 67 Tex. 132, 2 S. W. 91; Francis v. Howard County, 50 Fed. 62.

The bonds were issued and delivered for the illegal purpose of furnishing a courthouse which had already been constructed; and were issued without any lawful authority, the power of the county to issue bonds to erect a courthouse and jail having been exhausted, as appears from the order of the commissioners' court, which is recited on the face of the bonds; and the contracts mentioned in the order of the court, and the registry of the bonds affected with notice the purchasers of the bonds in this suit that the bonds were issued without authority of law.

Caruthers v. State, supra; Nolan County v. State, 83 Tex. 183, 17 S. W. 823; Francis v. Howard County, 50 Fed. 62, 4 C. C. A. 460, 13 U. S. App. 126, 54 Fed. 487; Daviess County v. Dickinson, 117 U. S. 657, 29 L. ed. 1026, 6 Sup. Ct. Rep. 897; Brenham v. German-American Bank, 144 U. S. 173, 36 L. ed. 390, 12 Sup. Ct. Rep. 559; Nesbit v. Independent Dist. 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; Dixon County v. Field, 111 U. S. 83, 28 L. ed. 360, 4 Sup. Ct. Rep. 315; Ogden v. Daviess County, 102 U. S. 634, 26 L. ed. 263; Sutliff v. Lake County, 147 U. S. 230, 37 L. ed. 145, 13 Sup. Ct. Rep. 318; Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138; Knox County v. Aspinwall, 21 How. 539, 16 L. ed. 208; Lake County v. Graham, 130 U. S. 675, 32 L. ed. 1065, 9 Sup. Ct. Rep. 654; Claiborne County v. Brooks, 111 U. S. 400, 28 L. ed. 470, 4 Sup. Ct. Rep. 489; Lewis v. Shreveport, 180 U. S. 283, 27 L. ed. 729, 2 Sup. Ct. Rep. 634; Dill. Mun. Corp. § 546.

There is no authority of law under the Constitution and laws of Texas to issue bonds for the purpose of furnishing courthouses, and payment thereof for the purpose of furnishing courthouses, and payment therefor could only have been legally made out of the general fund.

Polly v. Hopkins, 74 Tex. 147, 11 S. W. 1084; Tex. Rev. Stat. art. 1527; Brown v.

Reese, 67 Tex. 318, 3 S. W. 292; *Barnett v. Denison*, 145 U. S. 141, 36 L. ed. 654, 12 Sup. Ct. Rep. 819; *Anthony v. Jasper County*, 101 U. S. 693, 25 L. ed. 1005; *Independent School Dist. v. Stone*, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84; *Harshman v. Bates County*, 92 U. S. 569, 23 L. ed. 747; *Bates County v. Winters*, 97 U. S. 85, 24 L. ed. 933; *Coler v. Clcburne*, 131 U. S. 162, 33 L. ed. 146, 9 Sup. Ct. Rep. 720; *East Oakland Twp. v. Skinner*, 94 U. S. 255, 24 L. ed. 125; *Martin v. Neblett*, 86 Tenn. 383, 7 S. W. 123; *Lewis v. Bourbon County*, 12 Kan. 186; *Wells v. Pontotoc County*, 102 U. S. 625, 26 L. ed. 122.

The recitals of the laws under which the bonds purport to be issued are not the recitals of any facts, but only conclusions of law.

Daviess County v. Dickinson, *supra*, and *Francis v. Howard County*, 4 C. C. A. 460, 13 U. S. App. 126, 54 Fed. 487.

Mr. Millard Patterson submitted the cause for respondent:

The Texas judgment is not a bar to this suit.

Nesbit v. Independent Dist. 144 U. S. 610-621, 36 L. ed. 562-566, 12 Sup. Ct. Rep. 746; *Cromwell v. Sac County*, 94 U. S. 351, 371, 24 L. ed. 195, 204; *Wilmington & W. R. Co. v. Alsbrook*, 146 U. S. 279, 302, 36 L. ed. 972, 981, 13 Sup. Ct. Rep. 72; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 314, 315, 38 L. ed. 456, 14 Sup. Ct. Rep. 592.

The holder of a negotiable instrument is presumed to have taken it before maturity, for a valuable consideration, and without notice of any objection to which it is liable; and this presumption stands until overcome by sufficient proof.

Pickens Twp. v. Post, 41 C. C. A. 1, 99 Fed. 659; *Swift v. Tyson*, 16 Pet. 1, 10 L. ed. 865; *Chambers County v. Clews*, 21 Wall. 317, 22 L. ed. 517; *San Antonio v. Mehaffy*, 96 U. S. 312, 24 L. ed. 816.

The bonds sued upon recite that they were issued for a lawful purpose, to wit: to build a courthouse; and the county is estopped by the full recitals about their purpose.

Chaffee County v. Potter, 142 U. S. 355, 366, 35 L. ed. 1040, 1041, 12 Sup. Ct. Rep. 216; *Nolan County v. State*, 83 Tex. 201, 17 S. W. 823; *Waite v. Santa Cruz*, 184 U. S. 302, 329, 46 L. ed. 522, 568, 22 Sup. Ct. Rep. 327; *Marshall County v. Schenck*, 5 Wall. 772, 18 L. ed. 556; *Evansville v. Dennett*, 161 U. S. 434-446, 40 L. ed. 760-764, 16 Sup. Ct. Rep. 613; *Stanley County v. Coler*, 190 U. S. 442-444, 47 L. ed. 1130, 1131, 23 Sup. Ct. Rep. 811; *Venice v. Murdock*, 92 U. S. 494-502, 23 L. ed. 583-585; *Pine Grove Twp. v. Talcott*, 19 404

Wall. 666-679, 22 L. ed. 227-234; *Scotland County v. Hill*, 132 U. S. 107-117, 33 L. ed. 261-265, 10 Sup. Ct. Rep. 26; *Orleans v. Platt*, 99 U. S. 676, 25 L. ed. 404; *Haskell County v. National L. Ins. Co.* 32 C. C. A. 591, 61 U. S. App. 53, 90 Fed. 231; *Kent v. Dana*, 40 C. C. A. 281, 100 Fed. 60; *Risley v. Howell*, 12 C. C. A. 218, 22 U. S. App. 635, 64 Fed. 453.

Mr. Justice Harlan delivered the opinion of the court:

By an act of the legislature of Texas approved February 11th, 1881, the county commissioners' court of every county that had no courthouse was authorized and empowered to issue county bonds, with interest coupons attached, in such amount as *might be necessary* to erect a suitable building for a *courthouse*,—such bonds to run not exceeding fifteen years, redeemable at the pleasure of the county, and bearing interest at a rate not exceeding 8 per cent per annum. The act provided that the bonds should be signed by the county judge, countersigned by the county clerk, and registered by the county treasurer before being delivered. It also provided that the county should not issue a larger number of bonds than a tax of $\frac{1}{4}$ of 1 per cent annually would liquidate in ten years, and that the bonds should be sold only at par value. Gen. Laws (Tex.) 1881, p. 5.

This act was amended in 1884, at a called session of the eighteenth legislature of Texas, so as to authorize the commissioners' court to issue county bonds (running not exceeding fifteen years) with interest coupons attached in such amount as *might be necessary* to erect a suitable courthouse building or jail, or both. Gen. Laws (Tex.) 1884, p. 28.

By another act passed March 27th, 1885, the power given by the act of 1884 to issue bonds for courthouse and jail purposes, or both, in such amount as might be necessary, was recognized, and, in addition, county bonds theretofore issued for jail purposes under the act of 1881, as amended by the act of 1884, were validated. Gen. Laws (Tex.) 1885, p. 56.

The present action was brought July 26th, 1904, by the Noel-Young Bond & Stock Company, a Missouri corporation, as *hold-[64 er, owner, and bearer, to recover the amount of certain bonds—numbered 90, 91, 92, 94, 95, and 96, respectively—with interest coupons attached.

Each of the bonds sued on is in the name of the county, is for \$1,000, and payable to bearer fifteen years after date, at 8 per cent per annum interest, on the 10th of April at the state treasury. It recites that it was "issued by virtue of an act of the

legislature of the state of Texas, entitled 'An Act to Authorize the County Commissioners' Court of the Several Counties of the State to Issue Bonds for the Erection of a Courthouse and to Levy a Tax to Pay for the Same,' approved February 11, 1881, and by virtue of the provisions of chapter 17, laws of called session of the eighteenth legislature, which said chapter has since been validated by the act of March 27, 1885, authorizing the county commissioners' court of the several counties of the state to issue bonds for the erection of a county jail, and by order of the county commissioners' court of said county of Presidio, on the 9th day of February, 1886, and is redeemable before maturity at the pleasure of the county."

To each bond was affixed the seal of the county commissioners' court and was signed by the county judge, countersigned by the clerk of the county court and by the county treasurer, the latter certifying that it had been registered.

At the trial the court instructed the jury that the suit on the coupons was barred by the Texas statute of limitations, but it directed a verdict for the amount of the bonds, with interest, from December 6th, 1900. That judgment was affirmed in the circuit court of appeals, but without any opinion.

The county insists that although the bonds purport to have been issued by order of the county commissioners' court in virtue of certain legislative enactments referred to on the face of the bonds, and which authorizes that court to issue bonds for the erection of a courthouse or jail, or both, and although each bond is attested by the seal of the commissioners' court and the signatures of the officers who alone could attest and sign bonds issued for courthouse and jail purposes, the court *exceeded its powers in issuing the present bonds in that, by its order of February 9th, 1886, bonds to the extent of only \$86,000 were authorized,—\$60,000 for a courthouse and \$26,000 for a jail; whereas, that amount of bonds for such purposes had in fact been issued before the bonds in suit. This contention means that the bonds in suit are to be deemed void if they were in fact in excess of the amount authorized by the order of February 9th, 1886. But that view cannot be maintained consistently with a long line of decisions.

Whether the commissioners' court, which had statutory authority to issue such bonds as were necessary for courthouse and jail purposes, had previously made the requisite order therefor, was a matter peculiarly within the knowledge of its officers. They knew whether they had or had not directed bonds to be issued for such purposes. They knew, or ought to have known, whether the

bonds ordered to be issued were in excess of the amount authorized by the legislature.

They had authority to determine whether the precedent conditions had been fully performed. When, therefore, the county, acting by the commissioners' court, did issue bonds, attested by the seal of the court and the signatures of its officers, and reciting that they were issued under the order of the court, *in virtue* of the statute named, and were registered,—such recitals fairly importing a compliance, in all substantial respects, with the statute giving authority to issue bonds,—a bona fide purchaser was entitled to accept the recitals as stating the truth, and the county cannot, as against such purchaser, allege the contrary. It will not be heard to say that the bonds were in excess of the amount authorized, or that they were not issued for the purposes contemplated by the statutes referred to. These principles have become firmly established, as will be seen by an examination of the adjudged cases, some of which are cited in the margin.†

*The county, however, insists that an[66 examination of the order of the commissioners' court of February 9th, 1886, referred to in the bonds, would have informed any purchaser (1) that that court on that day ordered only \$86,000 in bonds to be issued,—\$60,000 for a courthouse and \$26,000 for a jail; (2) that the particular bonds now in suit, dated December 6th, 1886, and numbered 91 to 96 inclusive, were not covered by that order and therefore were in excess of the amount so ordered for courthouse and jail buildings. Assuming for the moment, but only for the moment, that the purchaser was bound to ascertain what the order of

†Coloma v. Eaves, 92 U. S. 484, 23 L. ed. 579; Buchanan v. Litchfield, 102 U. S. 278, 26 L. ed. 138; Independent School Dist. v. Stone, 106 U. S. 183, 27 L. ed. 90, 1 Sup. Ct. Rep. 84; Douglas County v. Bolles, 94 U. S. 104, 24 L. ed. 46; Anderson County v. Beal, 113 U. S. 227, 238, 239, 28 L. ed. 966, 970, 5 Sup. Ct. Rep. 433; Chaffee County v. Potter, 142 U. S. 355, 364, 35 L. ed. 1040, 1043, 12 Sup. Ct. Rep. 216; Gunnison County v. E. H. Rollins & Sons, 173 U. S. 255, 270, 43 L. ed. 689, 696, 19 Sup. Ct. Rep. 390; Mercer County v. Hackett, 1 Wall. 83, 17 L. ed. 548; Cairo v. Zane, 149 U. S. 122, 37 L. ed. 673, 13 Sup. Ct. Rep. 803; Venice v. Murdock, 92 U. S. 494, 23 L. ed. 583; Marcy v. Oswego Twp. 92 U. S. 637, 23 L. ed. 748; Wilson v. Salamanca Twp. 99 U. S. 499, 25 L. ed. 330; Sherman County v. Simons, 109 U. S. 735, 737, 27 L. ed. 1093, 1094, 3 Sup. Ct. Rep. 502; Hackett v. Ottumwa, 99 U. S. 86, 95, 25 L. ed. 363, 365; Ottaway v. First Nat. Bank, 105 U. S. 342, 26 L. ed. 1127, and authorities cited in each of the above cases.

February 9th, 1886, contained, we observe that the statutes recited in the bonds did not name a specific amount beyond which the commissioners' court could not go in issuing bonds for courthouse and jail purposes. They were authorized to issue for those purposes such an amount in bonds as was necessary up to the point that no more be issued than could be liquidated in ten years by a tax of $\frac{1}{4}$ of 1 per cent for any one year. It was for the commissioners' court in the first instance to determine what amount of bonds on that basis was required. We observe, also, as did the civil court of appeals of Texas in a case to be presently referred to (27 S. W. 702, 707), that the order of February 9th, 1886, did not require that the bonds issued for courthouse and jail purposes should be numbered consecutively from 1 to 86; that the bonds in suit bore numbers above 86 was immaterial in face of the recital in them that they were issued by order of the commissioners' court and in virtue of the statutes conferring the power to issue bonds for courthouse and jail purposes; and that that order gave no [68] information that the bonds *here in suit were in excess of the \$86,000 in bonds directed by that order to be issued.

Apart from this view, it is pertinent to inquire whether the purchaser was bound to examine the order of February 9th, 1886, and, at his peril, to know what that order contained? Was he not entitled, without special or further inquiry, to accept as true what the recitals in the bonds plainly imported, namely, that the bonds were issued for courthouse or jail purposes by order of the county commissioners' court, in conformity with specified acts of the legislature? Was he not entitled to act on the belief that the bonds issued under date of December 6th, 1886, were within the limit authorized by the legislature?

These questions find an answer in *Evansville v. Dennett*, 161 U. S. 434, 441, 443, 446, 40 L. ed. 760, 764, 765, 16 Sup. Ct. Rep. 613, 616-618. That was an action involving the validity of two series of bonds, issued by the city of Evansville, Indiana, for subscription to certain railroads. Each bond of the two series contained recitals to the effect that the bonds were issued in pursuance of certain legislative enactments, and by virtue of certain resolutions and ordinances passed by the city council. What was the effect of these recitals? This court said: "It is true that the city charter provided that 'no stock shall be subscribed or taken by the common council in such company, unless it be on the petition of two thirds of the residents of said city, who are freeholders of the city, distinctly setting forth the company in which stock is to be

taken, and the number and amount of shares to be subscribed.' But these were only conditions which the statute required to be performed or met before the power given was exercised. That there was legislative authority to subscribe to the stock of these companies cannot be questioned, although the statute declared that the power should not be exercised except under the circumstances stated in the statute. Was a bona fide purchaser of bonds issued in payment of a subscription of stock—the power to subscribe being clearly given—bound to know that the conditions precedent to the exercise of the power were *not performed? If the [68] bonds had not contained any recitals importing a performance of such conditions before the power to subscribe was exercised, then it would have been open to the city to show, even as against a bona fide purchaser, that the bonds were issued in disregard of the statute, and, therefore, did not impose any legal obligation upon it. *Buchanan v. Litchfield*, 102 U. S. 278, 26 L. ed. 138; *Independent School Dist. v. Stone*, 106 U. S. 183, 187, 27 L. ed. 90, 91, 1 Sup. Ct. Rep. 84. But the bonds issued on account of subscription to the stock of the *Evansville, Henderson, & Nashville Railroad Company* recite that the subscription was 'made in pursuance of an act of the legislature and ordinances of the city council passed in pursuance thereof.' This imports not only compliance with the act of the legislature, but that the ordinances of the city council were in conformity with the statute. It is as if the city had declared, in terms, that all had been done that was required to be done in order that the power given might be exercised. . . . As therefore the recitals in the bonds import compliance with the city's charter, purchasers for value having no notice of the nonperformance of the conditions precedent were not bound to go behind the statute conferring the power to subscribe, and to ascertain, by an examination of the ordinances and records of the city council, whether those conditions had, in fact, been performed. With such recitals before them they had the right to assume that the circumstances existed which authorized the city to exercise the authority given by the legislature. . . . The city having authority, under some circumstances, to put these bonds upon the market, and having issued them under the corporate seal of the city, and under the attestation of its highest officer, certifying that they were issued in payment of a subscription of stock made in pursuance of the city's charter the principles of justice demand that the bonds, in the hands of bona fide holders for value, should be met according to their terms, unless some

clear, well-settled rule of law stands in the way. No such obstacle exists.

In the same case the court expressed its approval of the decision *in *Van Hostrup v. Madison*, 1 Wall. 291, 297, 17 L. ed. 538, 539,—a suit on municipal bonds, in which Mr. Justice Nelson, speaking for the court, said: "Another objection taken is, that the proviso requiring a petition of two thirds of the citizens, who were freeholders of the city, was not complied with. As we have seen, the bonds signed by the mayor and clerk of the city recite on the face of them that they were issued by virtue of an ordinance of the common council of the city, passed September 2, 1852. This concludes the city as to any irregularities that may have existed in carrying into execution the power granted to subscribe the stock and issue the bonds, as has been repeatedly held by this court."

In *Waite v. Santa Cruz*, 184 U. S. 302, 320, 46 L. ed. 552, 565, 22 Sup. Ct. Rep. 327, 333, which was also a suit on municipal bonds and involved the effect of recitals importing compliance with law, the court referred to and followed *Evansville v. Dennett*. It said: "The city of Santa Cruz had power, under the Constitution and laws of California, to refund its outstanding indebtedness, evidenced by bonds and warrants. The nature and extent of such indebtedness were matters peculiarly within the knowledge of its constituted authorities. When, therefore, the refunding bonds in suit were issued with the recitals therein contained, the city thereby represented that it issued them under and in pursuance of and in conformity with the act of 1893 and the Constitution of the state. As nothing on the face of the bonds suggested that such representations were false, purchasers had the right to assume that they were true, especially in view of the broad recital that everything required by law to be done and performed before executing the bonds had been done and performed by the city. As there was power in the city to issue refunding bonds to be used in discharging its outstanding indebtedness of a specified kind, purchasers were entitled to rely upon the truth of the recitals in the bonds that they were of the class which the act of 1893 authorized to be refunded. They were under no duty to go further and examine the ordinances of the city to ascertain whether the recitals were false. On the contrary, *purchasers could assume that the ordinances would disclose nothing in conflict with the recitals in the bonds."

In the more recent case of *Stanley County v. Coler*, 190 U. S. 437, 47 L. ed. 1126, 23 Sup. Ct. Rep. 811, the court reviewed many of the adjudged cases, and, in support of the conclusion there reached, cited, among others

cases, that of *Evansville v. Dennett*. See also the recent case of *Quinlan v. Green County*, 205 U. S. 410, 51 L. ed. 860, 27 Sup. Ct. Rep. 505.

Our conclusion on this branch of the case is that the county of Presidio is estopped by the recitals in its bonds to deny, as against a legal holder of the bonds, that they were issued conformably, in all respects, with the acts of legislation referred to.

It is, however, contended that this principle only affords protection to bona fide purchasers for value. But clearly the plaintiff is to be taken, upon the present record, as belonging to that class; for, there was no evidence that it had knowledge or notice of any facts impeaching the validity of the bonds, or that were inconsistent with their recitals, nor was there any evidence showing that the plaintiff was not a bona fide purchaser for value of these bonds. In the absence of such proof the presumption was that the plaintiff obtained the bonds under due, or before maturity, in good faith, for a valuable consideration, without notice of any circumstances impeaching their validity. The production of a negotiable instrument sued on, with proof of its genuineness, if its genuineness be not denied, makes a prima facie case for the holder. In other words, the possession of the bonds in this case, their genuineness not being disputed, made a prima facie case for the plaintiff. These views are in accordance with accepted doctrines of the law relating to negotiable securities.

Swift v. Tyson, 16 Pet. 1, 16, 10 L. ed. 865, 870; *Murray v. Lardner*, 2 Wall. 110, 121, 17 L. ed. 857, 859; *Chambers County v. Clews*, 21 Wall. 317, 323, 22 L. ed. 517, 519; *San Antonio v. Mehaffy*, 96 U. S. 312, 314, 24 L. ed. 816, 817; *Montclair Twp. v. Ramsdell*, 107 U. S. 147, 158, 27 L. ed. 431, 434, 2 Sup. Ct. Rep. 391; 2 *Parsons, Bills & Notes*, 9; *Pinkerton v. Bailey*, 8 Wend. 600; *Story, Promissory Notes*, § 196; 1 *Dan. Neg. Inst.* 5th ed. § 812, and the authorities there cited; *Chitty, Bills*, 11th *Am. ed. [71 69; *Arbouin v. Anderson*, 1 Q. B. 498, 504.

But there is another defense by the county which must be noticed. It is, that the validity of these bonds has been adjudicated by the courts of Texas, and that that adjudication concludes the plaintiff in the present action. The facts upon which that defense is based are these: On the 28th of March, 1893, Ball, Hutchins, & Company sued Presidio county on certain coupons of bonds, numbered from 90 to 96, inclusive, and dated December 6th, 1886,—the same bonds here sued on, except bond numbered 93, which is not involved in this suit. The county, among other defenses, alleged that

the bonds were issued and delivered to contractors for the purpose of obtaining *furniture* for the courthouse; that the contractors therefore had notice of the purpose for which the bonds were issued; that their issue for the purpose of supplying the courthouse with furniture was illegal, fraudulent, and void; and, therefore, no judgment could be rendered for the amount of the coupons sued on. The state court rendered a judgment for the county. From that judgment an appeal was prosecuted to the civil court of appeals of Texas, which reversed the judgment and ordered one against the county. 27 S. W. 702-707. That court, among other things, held that there was nothing in the order of February 9th, 1886, indicating that the bonds numbered 90 to 96 were not of the bonds therein ordered to be issued for courthouse and jail purposes; that no question was made that the amount of all the bonds issued for building a courthouse and jail and for furniture and waterworks was not within the county's statutory limit for the issuing of bonds for the building of a courthouse and jail; and that it was not inconsistent with their being part of the bonds ordered for courthouse and jail purposes that they were numbered from 90 to 96. That court further said: "These bonds purport on their face to have been issued by virtue of the acts authorizing bonds for the erection of a courthouse and jail, and by virtue of a certain order of the proper court, which 72] was, upon its face, authority *for the issuance of a bonded debt for said purpose, in the sum of \$86,000; and there is nothing in the order to indicate to the mind that there had been an overissue, or that these particular bonds were not a part of the \$86,000. . . . In fact, these bonds would seem to have been prepared and issued in a manner that concealed their true character, and to mislead investors in that class of securities; and we are of opinion, on the whole case, that the county is estopped to deny its liability to the purchasers."

This last observation of the Texas civil court of appeals had, no doubt, reference to the fact (which evidence in this suit tended to establish) that, although the particular bonds in suit were issued pursuant to an order of the commissioners' court made December 4th, 1886, to pay for courthouse *furniture*, they contained recitals fairly implying that they were issued under the order of February 9th, 1886, and the statutes, for the purpose of building a courthouse and jail.

That case was taken to the supreme court of Texas, which reversed the judgment of the civil court of appeals and affirmed the judgment of the court of original jurisdiction. 88 Tex. 60-66, 29 S. W. 1042. The supreme court of Texas assumed, for the purposes of

its opinion, that the county commissioners' court had the power, under the acts of the legislature, to issue bonds of the county for courthouse and jail purposes to the full amount of \$96,000. Yet, it said, the order of February 9th, 1886, referred to in the bonds, showed that only \$86,000 of bonds were authorized by that order to be issued for such purposes, and, therefore, that the bonds in suit were issued without any order to support them; that "the law requires" a dealer in county bonds to know the provisions of the act of the legislature and *the order of the county commissioners' court*, under and by virtue of which such bonds were issued, whether referred to on the face of the bonds or not; that the facts made known by the order of February 9th, 1886, were sufficient to put a purchaser on inquiry as to whether the coupons of the bonds now in suit were in *excess of the amount authorized [73 by that order; that the burden of proof being upon Ball, Hutchins, & Company to show that they were bona fide holders, it was incumbent on them, as plaintiffs, to prove that proper diligence had been used to ascertain the facts; and that, having made no such proof, they were not entitled to judgment.

It is apparent that the supreme court of Texas proceeded in part upon grounds inconsistent with the decisions of this court in cases involving the rights of the holders of commercial paper. We allude here particularly to that part of its opinion holding that, whatever the import of the recitals in the bonds, a purchaser was bound to ascertain what were the provisions of the order of February 9th, 1886, under and by virtue of which the bonds purport to have been issued. In that view we do not concur, as what has been said in this opinion sufficiently indicates. Since the decision in *Swift v. Tyson*, 16 Pet. 1, 19, 10 L. ed. 865, 871, it has been the accepted doctrine of this court that, in respect of the doctrines of commercial law and general jurisprudence, the courts of the United States will exercise their own independent judgment, and, in respect to such doctrines, will not be controlled by decisions based upon local statutes or local usage, although, if the question is balanced with doubt, the courts of the United States, for the sake of harmony, "will lean to an agreement of views with the state courts." To that effect are *Burgess v. Seligman*, 107 U. S. 20, 33, 34, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Pana v. Bowler*, 107 U. S. 529, 27 L. ed. 424, 2 Sup. Ct. Rep. 704; and *Oates v. First Nat. Bank*, 100 U. S. 239, 246, 25 L. ed. 580, 583, and authorities cited in each case. But in the present suit and upon the particular question now under consideration it is, perhaps, immaterial that the learned supreme court of Texas did not pro-

ceed on grounds consistent with the settled doctrines of this court on questions of commercial law; for that court having jurisdiction of the case before it, the question to be met is whether the judgment actually rendered by that court in *Ball v. Presidio County*, as matter of law, concludes the plaintiff in this suit.

In determining that question certain facts [74] may be taken as *established by the proof introduced by the county and which it deemed material, namely: 1. That the suit in the state court was upon interest coupons, and not upon the bonds to which they were attached. 2. That on December 10th, 1886, after the bonds were issued, F. M. Ball purchased those here in suit from the contractor to whom they were delivered on account of *furniture* supplied for the courthouse, and, on the same day, one League purchased from Ball four of the bonds. 3. Both Ball and League purchased in good faith, at par and interest, without notice of any facts impeaching the validity of the bonds. 4. That their purchases were before the action in the state court, which was not commenced until August 15th, 1902. 5. That when that suit was begun, the bonds, so far as appears from the record, belonged to Ball and League, and remained under their control during the pendency of that suit, and were not produced in court. 6. Ball, Hutchins, & Company, the plaintiffs in that suit, were only the agents for the collection of the interest coupons. 7. It does not appear from the present record when the Noel-Young Bond & Stock Company, the present plaintiff, became the holder and owner of the bonds, whether during the pendency of the suit in the state court or after the final judgment on March 4th, 1895, in the supreme court of Texas.

The argument in support of the conclusiveness of the judgment necessarily rests on the ground that the suit on the coupons created a *lis pendens* that prevented anyone from purchasing the bonds except subject to such judgment as might be rendered on that suit. But, clearly, the negotiability of the bonds was not destroyed by the mere bringing or pendency of the suit on the coupons, although the issue in that suit as to the validity of the coupons may have incidentally involved an inquiry as to the validity of the bonds to which they were attached. It may be that the holder of negotiable coupons sued on, being also, at the time, the holder and owner of the bonds, may be concluded, *as between him and the county*, in a subsequent suit on the bonds, by a previous judgment on the coupons in the suit, in which the coupons were held invalid because [75] *attached to invalid bonds. But one who became a bona fide purchaser for value

of the bonds, after the institution of the suit on the coupons, not being himself a party to or having notice of that suit, will not be concluded by the judgment as to the coupons. A suit on coupons and a suit on the bonds are based on different causes of action. The coupons and bonds were capable of separate ownership and of separate suits. Judgment might be rendered on coupons without producing the bonds to which they were originally attached. In *Nesbit v. Independent District*, 144 U. S. 611, 618, 36 L. ed. 562, 565, 12 Sup. Ct. Rep. 746, which was an action on county bonds, and in which it was a question whether a judgment in a former suit on coupons of certain bonds of the same issue barred an action on the bonds, this court said: "Now, the present suit is on causes of action different from those presented in the suit at Des Moines. Bonds 16, 17 and 18 were not presented or known in that suit; and while bonds 14 and 15 were presented, alleged to be the property of plaintiff, and judgment asked upon six coupons attached thereto, yet the cause of action on the six coupons is distinct and separate from that upon the bonds or the other coupons. Each matured coupon is a separable promise, and gives rise to a separate cause of action. It may be detached from the bond and sold by itself. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. So, while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond as though the two promises were placed in different instruments, upon different paper." To the same effect is *Edwards v. Bates County*, 163 U. S. 269, 271, 41 L. ed. 155, 156, 16 Sup. Ct. Rep. 967. A purchaser, when buying the bonds, was not bound at his peril to know of the pendency of the suit on the coupons. He could buy without being concluded by a judgment rendered on coupons involved in a suit to which he was not a party, and of the pendency of which he had no notice.

*An instructive case on this subject is [76] *Warren County v. Marcy*, 97 U. S. 96, 24 L. ed. 977. That was an action on coupons attached to negotiable bonds issued by a county. The facts on which the defense was based were these: A taxpayer brought a suit against a county on behalf of himself and all other taxpayers for an injunction to prevent the county from making a subscription to the stock of a certain railroad company. A temporary injunction was granted, which was afterwards dissolved, and the bill was dismissed. The plaintiff ap-

pealed to the supreme court of the state, which reversed the judgment and a decree was ordered to be entered, and was entered, enjoining the county from making the proposed subscription. Pending the suit and after the dissolution of the temporary injunction, and while the case was pending on appeal, the county made the subscription sought to be enjoined, and issued and delivered to the railroad company the bonds to which the coupons there in suit were attached. Marcy purchased some of the bonds for value before maturity, and without any actual notice of their alleged invalidity, or of any suit in relation thereto. The question in the case was whether the pendency of the equity suit to prevent the subscription and an issue of bonds was constructive notice to all persons of the invalidity of the bonds issued in payment for the subscription.

This court, speaking by Mr. Justice Bradley, held the bonds to be valid in the hands of a bona fide purchaser for value upon these grounds, saying: "That if a municipal body has lawful power to issue bonds or other negotiable securities, dependent only upon the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith has a right to assume that such preliminary proceedings have taken place, if the fact be certified on the face of the bonds themselves, by the authorities whose primary duty it is to ascertain it." On the question of *lis pendens* the court said: "It is a general rule that all persons dealing with property are bound to take notice of a suit pending with regard to the title thereto, and will, on their 77] peril, *purchase the same from any of the parties to the suit. But this rule is not of universal application. It does not apply to negotiable securities purchased before maturity, nor to articles of ordinary commerce sold in the usual way. This exception was suggested by Chancellor Kent, in one of the leading cases on the subject in this country, and has been confirmed by many subsequent decisions,"—citing *Murray v. Ballou*, 1 Johns. Ch. 566; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Kieffer v. Ehler*, 18 Pa. 388; *Winston v. Westfeldt*, 22 Ala. 760, 58 Am. Dec. 278; *Stone v. Elliott*, 11 Ohio St. 252; *Mims v. West*, 38 Ga. 18, 95 Am. Dec. 379; *Leitch v. Wells*, 48 N. Y. 585; *Durant v. Iowa County*, 1 Woolw. 69, Fed. Cas. No. 4,189. The court also referred to *Lexington v. Butler*, 14 Wall. 283, 20 L. ed. 809, saying: "In that case irregularities had occurred in the preliminary proceedings, and the city authorities refused to issue the bonds. A mandamus was applied for by the railroad company, for whose use the bonds were intended; and judgment of mandamus was

rendered to compel the city to issue them, and it issued them accordingly. Subsequently, this judgment was reversed by the court of appeals of Kentucky, and an injunction was obtained to prevent the railroad company from parting with the bonds. The injunction was not obeyed; the bonds were negotiated whilst proceedings were still pending, and were purchased by the plaintiff for value before maturity, without any knowledge of these circumstances. This court held that the bonds were valid in his hands. . . . Whilst the doctrine of constructive notice arising from *lis pendens*, though often severe in its application, is, on the whole, a wholesome and necessary one, and founded on principles affecting the authoritative administration of justice, the exception to its application is demanded by other considerations equally important, as affecting the free operations of commerce and that confidence in the instruments by which it is carried on which is so necessary in a business community." In *Orleans v. Platt*, 99 U. S. 676, 682, 25 L. ed. 404, 405, the court said: "The doctrine of *lis pendens* has no application to commercial securities." See also *Cass County v. Gillett*, 100 U. S. 585, 593, 25 L. ed. 585, 586; and **Carroll County v. Smith*, 111 U. S. 556, 562, 28 L. ed. 517, 519, 4 Sup. Ct. Rep. 539, to the same effect.

We hold that, upon the present record, the plaintiff company is to be taken as having purchased the bonds here in suit before maturity and for value, without notice of any circumstances indicating that their validity was or could be impeached; consequently, the judgment in favor of the county in the suit brought in the state court by Ball, Hutchins, & Company on some of the coupons of the bonds now in suit—in which suit the present plaintiff company was not a party and of which it is not shown to have had notice—does not preclude a judgment in its favor against the county on the bonds.

For the reasons stated, the judgment of the Circuit Court of the United States must be affirmed.

It is so ordered.

The CHIEF JUSTICE dissents.

CHARLES H. MOYER, Plff. in Err.,
v.

JAMES H. PEABODY, Sherman M. Bell,
and Bulkeley Wells.

(See S. C. Reporter's ed. 78-86.)

Pleading — complaint — incorporating
record of other proceeding.

1. Averments of the petition for a writ
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of habeas corpus are not made averments of a complaint by an agreement making the record of habeas corpus proceedings part of the complaint.

Constitutional law — liberty — due process of law.

2. Imprisonment for two and one-half months under the order of the governor of a state, without sufficient reason, but in good faith, in the exercise of his power under the state Constitution and laws to call upon the military arm of the state government to suppress an insurrection, does not deprive the person imprisoned of his liberty without due process of law.

[For other cases, see *Constitutional Law*, 436-440, in *Digest Sup. Ct.* 1908.]

Federal courts — jurisdiction — suit for deprivation of Federal rights.

3. A suit against the governor and certain officers of the national guard of a state, founded on imprisonment for two and one-half months under the order of the governor, without sufficient reason, but in good faith in the exercise of his power under the state Constitution and laws to call upon the military arm of the government to suppress an insurrection, is not within the original jurisdiction of a Federal circuit court under U. S. Rev. Stat. § 629, U. S. Comp. Stat. 1901, p. 506, as a suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States.

[For other cases, see *Courts*, 529-532, in *Digest Sup. Ct.* 1908.]

[No. 55.]

Argued January 5, 6, 1909. Decided January 18, 1909.

IN ERROR to the Circuit Court of the United States for the District of Colorado to review a judgment dismissing the complaint in an action founded on an imprisonment under the order of the governor of that state in the course of suppressing an insurrection. Affirmed.

See same case below, 148 Fed. 870.

The facts are stated in the opinion.

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to Federal question as conferring jurisdiction on United States courts—see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7, and *Bailey v. Mosher*, 11 C. C. A. 308.

53 L. ed.

Mr. Edmund F. Richardson argued the cause, and, with Mr. Horace N. Hawkins, filed a brief for plaintiff in error:

An allegation in the complaint showing that one has been deprived of the constitutional guaranty of liberty without due process of law, setting up and defining in his complaint what constitutes due process of law in the state courts, coupled with an averment that those state courts were in the untrammelled exercise of their jurisdiction, except in so far as they were interfered with by the defendants themselves, gives to the Federal courts jurisdiction to determine whether or not the statement of facts contained in the complaint is true, and, if it is true, a right and duty devolves upon those courts to remedy that deprivation.

Hemsley v. Myers, 45 Fed. 283; *Ex parte Virginia*, 100 U. S. 339, 25 L. ed. 676; *Ames v. Kansas*, 111 U. S. 449, 470, 28 L. ed. 482, 490, 4 Sup. Ct. Rep. 437.

The action is one which is sought to be maintained against those who purported, as officers of the state, to act for the state, and under its sanction and authority; but that is no reason why the suit should not be maintained.

Poindexter v. Greenhow, 114 U. S. 270, 285, 29 L. ed. 185, 191, 5 Sup. Ct. Rep. 903, 962; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064.

If it shall be argued that no Federal question is involved because the act complained of is one which has been taken by officers of the state in respect to a matter in which they were authorized to act under the Constitution and laws of the state, then the following authorities are in point:

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; *Re Ayers*, 123 U. S. 443, 506, 31 L. ed. 216, 230, 8 Sup. Ct. Rep. 164; *Pennoyer v. McConaughy*, 140 U. S. 10, 35 L. ed. 365, 11 Sup. Ct. Rep. 699; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 390, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 262; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *Tuchman v. Welch*, 42 Fed. 548; *Milligan v. Hovey*, 3 Biss. 13, Fed. Cas. No. 9,605.

The complaint states facts sufficient to constitute a cause of action.

Luther v. Borden, 7 How. 1, 14, 12 L. ed. 581, 587; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Holt v. Indiana Mfg. Co.* 176 U. S. 68, 44 L. ed. 374, 20 Sup. Ct. Rep. 272; *Giles v. Harris*, 189 U. S. 475, 47 L. ed. 909, 23 Sup. Ct. Rep. 639; *Tuchman v. Welch* and *Hemsley v.*

Myers, *supra*; *Aultman & T. Co. v. Brumfield*, 102 Fed. 15; *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Poindexter v. Greenhow*, 114 U. S. 270, 288, 29 L. ed. 185, 192, 5 Sup. Ct. Rep. 903, 962; *Re Ayers*, 123 U. S. 443, 506, 507, 31 L. ed. 216, 230, 8 Sup. Ct. Rep. 164; *Re Tiburcio Parrott*, 6 Sawy. 349, 1 Fed. 520; *Ex parte Milligan*, *supra*.

No officer can escape liability for causing the arrest and imprisonment of a civilian who is not amenable to military law. The utmost that he can do in a state of war is to arrest such civilian and turn him over to the civil authorities if the civil authorities are in operation. If not, he must be turned over to the civil authorities the minute that such authorities are in operation, and the first duty of the military is to see that the civil authorities are placed in operation.

McCall v. McDowell, *Deady*, 233, 1 Abb. (U. S.) 212, Fed. Cas. No. 8,673; *Ex parte Merryman*, *Taney*, 246, Fed. Cas. No. 9,487; *Cochran v. Tucker*, 3 Coldw. 186, 91 Am. Dec. 276; *Caperton v. Martin*, 4 W. Va. 138, 6 Am. Rep. 270.

An unlawful act can never be justified by the assertion of an unlawful authority, or by the command of such an unlawful authority; and an authority is just as unlawful after it has received the sanction of the supreme court of the state as it was before, if it is inhibited by the Constitution of the United States, and the statutes made pursuant thereto.

Little v. Barreme, 2 Cranch, 170, 2 L. ed. 243; *Christian County Ct. v. Rankin*, 2 Duv. 502, 87 Am. Dec. 505; *Raymond v. Thomas*, 91 U. S. 712, 716, 23 L. ed. 434, 435; *Beckwith v. Bean*, 98 U. S. 266, 25 L. ed. 124; *Jones v. Com.* 1 Bush, 34, 89 Am. Dec. 605; *Wilson v. Mackenzie*, 7 Hill, 95, 42 Am. Dec. 51; *Witherspoon v. Farmers' Bank*, 2 Duv. 496, 87 Am. Dec. 503; *Taylor v. Jenkins*, 24 Ark. 337, 88 Am. Dec. 773; *Farmer v. Lewis*, 89 Am. Dec. 610, and note, 1 Bush, 66; *Ela v. Smith*, 5 Gray, 121, 66 Am. Dec. 356; *Riggs v. State*, 3 Coldw. 85, 91 Am. Dec. 272; *Eifort v. Bevins*, 1 Bush, 460; *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75.

The executive can never, by determining a so-called political question, conclude the rights of either persons or property.

Little v. Barreme, *supra*; *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. ed. 425, 428, 7 Sup. Ct. Rep. 234.

The rights guaranteed by the Constitution are paramount. "Color" as used in this connection, must mean any device which is in contravention of the right so guaranteed.

Chicago, R. I. & P. R. Co. v. Allfree, 64 Iowa, 500, 20 N. W. 779; *Berks County v.*

Reading City Pass. R. Co. 167 Pa. 102, 31 Atl. 474, 663; *Broughton v. Haywood*, 61 N. C. (Phill. L.) 380; *McCain v. Des Moines*, 174 U. S. 168, 43 L. ed. 936, 19 Sup. Ct. Rep. 644.

Counsel are attempting to have this court substitute for the issue of an interference with the liberty of the plaintiff in error without due process of law, a question which is not in the case; to wit, whether or not the Federal government is authorized to interfere with the determination of a question which is political in its nature. Because this court is not authorized to interfere with a question which is political in its nature, it does not follow that it is not authorized to interfere with the effects claimed to flow from the determination of such a question, when they interfere with an immunity given by the Constitution of the United States.

Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811; *Gibbons v. Ogden*, 9 Wheat. 1, 210, 6 L. ed. 23, 73; *Henderson v. New York (Henderson v. Wickham)* 92 U. S. 259, 272, 23 L. ed. 543, 549; *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650-661, 29 L. ed. 516-520, 6 Sup. Ct. Rep. 252.

Process of some kind is required in order to deprive a person of his liberty.

Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

It is essential in every judicial or quasi-judicial proceeding that a hearing should be provided for.

Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Ex parte Garland*, 4 Wall. 333, 18 L. ed. 366.

The object of a construction applied to a constitution is to give effect to the intent of its framers and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

Lake County v. Rollins, 130 U. S. 662, 670, 32 L. ed. 1060, 1063, 9 Sup. Ct. Rep. 651.

It devolves upon the governor to assert, and to justify the assertion, that the civil magistrates were disloyal and insurrectionary.

Re Kemp, 16 Wis. 362.

Under the *Milligan Case* it rests upon the governor to show that the civil courts were wholly incompetent to punish with adequate promptitude and certainty the guilty conspirators. It devolves upon the governor to show that the judges and marshals of the

court are in active sympathy with the insurgents. This can only be done under an answer. Certainly not by demurring to a complaint which states that none of these conditions exist, and which are only claimed to exist as a "legal sequence," as counsel has elsewhere termed it.

The President or the executive officer may order a man into imprisonment, provided the necessity of the case warrants such action, but, in all these cases, they are bound to be careful to exercise their power within the law.

Miller, Constitution.

The true test of whether a military power exists in contradistinction to the civil power is found in the fact of whether the courts are in the exercise of their functions. Wherever a court is ready to do business under the law which creates it, and where it has jurisdiction of the subject-matter, that court, both in times of war and in times of peace, is the superior of the military, and the military must act in strict subordination to it.

Ex parte Milligan, 4 Wall. 2, 18 L. ed. 281; Johnson v. Jones, 44 Ill. 142, 92 Am. Dec. 159; 1 Bl. Com. 135.

The executive cannot suspend the writ of habeas corpus.

Ex parte Bollman, 4 Cranch, 75, 2 L. ed. 554; Johnson v. Duncan, 3 Mart. (La.) 530, 6 Am. Dec. 675; Wright v. Johnson, 5 Ark. 687; Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487; United States ex rel. Murphy v. Porter, 2 Hayw. & H. 394, Fed. Cas. No. 16,074a; Ex parte Benedict, Fed. Cas. No. 1,292; Ex parte Field, 5 Blatchf. 63, Fed. Cas. No. 4,761; Re Kemp, supra; Griffin v. Wilcox, 21 Ind. 370; McCall v. McDowell, Deady, 233, Fed. Cas. No. 8,673; Ex parte Moore, 64 N. C. 802; Cooley, Const. Law, p. 316; Andrews, Am. Law, p. 412; Davis, Treatise Military Law, p. 321; Ordranax, Constitutional Legislation, p. 220; Winthrop, Military Law, p. 1294; Bishop, Crim. Law, 7th ed. § 64; Church, Habeas Corpus, §§ 51, 56; Wharton, Crim. Pl. & Pr. § 979; Rapalje, Crim. Process, § 477; Story, Const. p. 214; 25 Am. & Eng. Enc. Law, p. 217.

Mr. Horace Phelps argued the cause, and, with Messrs. William H. Dickson and John M. Waldron, filed a brief for defendants in error:

The real cause of complaint here is that the defendants were trespassers,—no more, no less. When the defendants acted beyond authority of law,—beyond all color of law (assuming, for the purpose of argument, that they did),—they acted and could have acted only as individuals, and their action was not the action of the state. They are

here sought to be held for their acts upon that theory, and none other. The most that can be claimed is that they acted by virtue of office, and a sound distinction exists between acts done by virtue of office and acts done under color of law.

Virginia v. Rives (Ex parte Virginia) 100 U. S. 313, 334, 25 L. ed. 667, 675; Barney v. New York, 193 U. S. 430, 437, 48 L. ed. 737, 739, 24 Sup. Ct. Rep. 502; St. Louis, I. M. & S. R. Co. v. Davis, 132 Fed. 639; Dawson v. Columbia Ave. Sav. Fund, S. D. Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

The Federal judicial power does not extend to a case of this kind; this is not a case arising under the Constitution; there is no statute of the United States which covers the case; if the statutes relied upon by plaintiff in error were to be given the effect which must be claimed for them, they would be invalid.

United States v. Cruikshank, 92 U. S. 542, 553-555, 23 L. ed. 588, 591, 592; United States v. Harris, 106 U. S. 629, 637-639, 644, 27 L. ed. 290, 293-295, 1 Sup. Ct. Rep. 601; Civil Rights Cases, 109 U. S. 3, 10-15, 27 L. ed. 835, 839-841, 3 Sup. Ct. Rep. 18; Logan v. United States, 144 U. S. 263, 293, 36 L. ed. 429, 439, 12 Sup. Ct. Rep. 617; Hodges v. United States, 203 U. S. 1, 14-16, 51 L. ed. 65, 68, 69, 27 Sup. Ct. Rep. 6; Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; Carter v. Greenhow, 114 U. S. 317, 29 L. ed. 202, 5 Sup. Ct. Rep. 928, 962; New Orleans v. Benjamin, 153 U. S. 411, 424, 38 L. ed. 764, 769, 14 Sup. Ct. Rep. 905.

The states possess the inalienable right of protection and self-preservation from the acts of lawless, disorderly persons who may be banded together for the purpose of opposing its civil or political authority or the execution of its laws, when the local civil authorities are inadequate to put them down.

Luther v. Borden, 7 How. 1, 45, 46, 12 L. ed. 581, 600, 601; 2 Hare, Am. Const. Law, p. 969; Griffin v. Wilcox, 21 Ind. 380; Com. ex rel. Wadsworth v. Shortall, 206 Pa. 171, 65 L.R.A. 193, 98 Am. St. 759, 55 Atl. 952; Re Boyle, 6 Idaho, 609, 45 L.R.A. 832, 96 Am. St. Rep. 286, 57 Pac. 706; Houston v. Moore, 5 Wheat. 1, 54, 5 L. ed. 19, 32; Sutherland, Const. pp. 202, 458; Ordranax, Constitutional Legislation, p. 332.

Nor was this power surrendered or abridged by the adoption of the 14th Amendment.

Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Re Rahrer (Wilkinson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; Mugler v. Kan-

sas, 123 U. S. 623, 664, 31 L. ed. 205, 211, 8 Sup. Ct. Rep. 273; Minneapolis & St. L. R. Co. v. Beckwith, 129 U. S. 26, 29, 32 L. ed. 585, 586, 9 Sup. Ct. Rep. 207.

The necessary powers of the state are not to be destroyed nor their efficient exercise prevented.

Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787.

The questions sought to be litigated in this case are purely political,—Federal courts are not clothed by the Constitution or laws of the United States with any jurisdiction over such questions.

Black, Const. Law, pp. 64, 85, 86; 1 Bryce, American Constitution, pp. 262, 397; Phillips v. Hatch, 1 Dill. 571, Fed. Cas. No. 11,094; United States v. 129 Packages, Fed. Cas. No. 15,941; County Ct. v. United States, 38 Ct. Cl. 205; Keely v. Sanders, 99 U. S. 441, 446, 25 L. ed. 327, 329; Re Moyer, 35 Colo. 159, 12 L.R.A. (N.S.) 979, 117 Am. St. Rep. 189, 85 Pac. 190; Hawkins v. The Governor, 1 Ark. 586, 33 Am. Dec. 346; Louisiana v. Texas, 176 U. S. 1, 44 L. ed. 347, 20 Sup. Ct. Rep. 251.

The interference, under state executive authority, either with persons or with property, in the due course of enforcing quarantine regulations or suppressing insurrection, does not constitute a deprivation of liberty or property without due process of law, within the meaning of the Constitution.

Compagnie Française de Navigation à Vapeur v. State Bd. of Health, 186 U. S. 380, 46 L. ed. 1209, 22 Sup. Ct. Rep. 811.

If the Constitution of Colorado vests the executive department of the state with duties which, in strictness, may be said to be legislative in their character, or if the Constitution of the state casts upon the executive department the discharge of duties judicial in their nature, this delegation of legislative or of judicial power to the executive department does not present nor involve a Federal question, either statutory or constitutional.

Dreyer v. Illinois, 187 U. S. 71, 47 L. ed. 79, 23 Sup. Ct. Rep. 28; Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; Satterlee v. Matthewson, 2 Pet. 380, 413, 7 L. ed. 458, 469; Murray v. Louisiana, 163 U. S. 101, 41 L. ed. 87, 16 Sup. Ct. Rep. 990; Livingston v. Moore, 7 Pet. 469, 546, 8 L. ed. 751, 779; Baltimore & S. R. Co. v. Nesbit, 10 How. 395, 13 L. ed. 469; Carfer v. Caldwell, 200 U. S. 293, 297, 50 L. ed. 488, 489, 26 Sup. Ct. Rep. 264.

We are not, however, to be taken as conceding that the construction placed upon the Constitution of Colorado by the supreme court of that state was erroneous. On the contrary, it was correct.

Story, Const. § 1491. 1 Kent, Com. p. 283.

The term "insurrection" is one in a large measure incapable of exact legal definition, more or less elastic in its meaning, and the constitutional officer vested with the power of ascertaining its existence and exercising the necessary military power and constraint to suppress it is vested with a broad discretion, to be exercised under the exigencies of each particular occasion as the same may present itself to his judgment and determination.

11 Am. & Eng. Enc. Law, p. 356; Soule's Dict. Eng. Synonyms, 226; Anderson's Law Dict.; Re Charge, 4 Inters. Com. Rep. 781, 62 Fed. 828; Hickman v. Jones, 9 Wall. 197, 200, 19 L. ed. 551, 553; Prize Cases, 2 Black, 635, 666, 17 L. ed. 459, 476; McCargo v. New Orleans Ins. Co; 10 Rob. (La.) 202, 43 Am. Dec. 180; Re Kemp, 16 Wis. 360.

During the continuance of a state of insurrection in a given county in a state, the inhabitants of such county are, for the time being, to be treated and regarded as insurgents; and as such, until the insurrection is suppressed and the ordinary civil authorities resume their customary functions, the courts of justice of the state can be lawfully closed against the inhabitants residing within such insurgent territory.

Ford v. Surget, 97 U. S. 594, 304, 24 L. ed. 1018, 1021; 11 Am. & Eng. Enc. Law, p. 363.

The mere fact, if such be the fact, that the state district judge of the district including the county of San Miguel may have gone through the form of opening and adjourning court, and the transaction of some judicial business therein, is entirely compatible with the existence of a state of insurrection in such county, requiring the military arm of the government for its suppression.

Re Kemp, 16 Wis. 392; Ex parte Milligan, 4 Wall. 140, 18 L. ed. 302; 1 Bishop, Crim. Law, § 52.

The allegation in the amended complaint that, during all the time of the arrest, detention, and imprisonment, the courts of the state were open and in the free and undisturbed administration of justice, except in so far as the defendants prevented such courts from administering judicially the laws of the state, is without force, and it will be disregarded upon demurrer.

Jones v. United States, 137 U. S. 214, 215, 34 L. ed. 696, 697, 11 Sup. Ct. Rep. 80.

The same rule which forbids the taking of testimony to show the invalidity of an enactment of the legislature forbids judicial inquiry into the finding of the state's execu-

tive touching a matter within the exercise of his discretionary power.

Cooley, Const. Lim. p. 258.

The possibility that power may be abused furnishes no argument against the existence of the power.

Anderson v. Dunn, 6 Wheat. 204-226, 5 L. ed. 242-247; 1 Bailey, Jurisdiction, pp. 303, 309, 312; 1 Bishop, Crim. Law, §§ 62, 68; 1 Story, Const. § 425; Martin v. Mott, 12 Wheat. 32, 6 L. ed. 541.

Strictly speaking, no right is absolute. All rights are relative. There is no such thing, either in law or in fact, as unrestrained liberty. Liberty is always held and enjoyed subject to the rights of others, and, in the final analysis, "the safety of the people is the supreme law."

Jacobson v. Massachusetts, 197 U. S. 11, 26, 27, 49 L. ed. 643, 650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; Adair v. United States, 208 U. S. 161, 173, 52 L. ed. 436, 442, 28 Sup. Ct. Rep. 277; Miller, Const. p. 349.

Due process of law does not invariably require judicial proceedings.

United States v. Ju Toy, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; Donahue v. Will County, 100 Ill. 94; Nishimura Ekiu v. United States, 142 U. S. 651, 660, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336.

The courts recognize that there exists a well-defined distinction between the power to try, convict, and punish for violation of a penal statute, and the power to arrest and hold as preliminary to further proceedings. The exercise of the one power in times of peace is judicial in its nature, while the exercise of the power to arrest and commit may be lawfully delegated to nonjudicial officers without transgressing constitutional provisions.

State v. LeClair, 86 Me. 522, 30 Atl. 7; Allor v. Wayne County, 43 Mich. 100, 4 N. W. 492; Daniels v. People, 6 Mich. 390.

In the case at bar it is not alleged that the defendants assumed to try, convict, or punish the plaintiff. They but held him in military custody for a reasonable period as a measure which, in their final judgment, and in the exercise of political and executive discretion was essential for the public safety and the success of the efforts of the military forces of the state to restore public tranquility. What was done constituted a lawful exercise of power, invaded no constitutional right, and gives no right of action.

Re Bergen, 2 Hughes, 517, Fed. Cas. No. 1,338.

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the discharge of his constitutional and political duty of suppressing an insurrection are not reviewable in any judicial tribunal.

Louisiana v. Texas, 176 U. S. 1, 18, 44 L. ed. 347, 354, 20 Sup. Ct. Rep. 251; Spalding v. Vilas, 161 U. S. 483, 40 L. ed. 780, 16 Sup. Ct. Rep. 631; Brown v. Maryland, 12 Wheat. 419, 439, 440, 6 L. ed. 678, 685, 686; Luther v. Borden, 7 How. 1, 43, 12 L. ed. 581, 599; Druecker v. Salomon, 21 Wis. 628, 94 Am. Dec. 571.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the plaintiff in error against the former governor of the state of Colorado, the former adjutant general of the national guard of the same state, and a captain of a company of the national guard, for an imprisonment of the plaintiff by them while in office. The complaint was dismissed on demurrer, and the case comes here on a certificate that the demurrer was sustained solely on the ground that there was no jurisdiction in the circuit court. 148 Fed. 870.

The complaint alleges that the imprisonment was continued from the morning of March 30, 1904, to the afternoon of June 15, and that the defendants justified under the Constitution of Colorado, making the governor commander in chief of the state forces, and giving him power to call them out to execute laws, suppress insurrection, and repel invasion. It alleges that his imprisonment was without probable cause, that no complaint was filed against the plaintiff, and that (in that sense) he was prevented from having access to the courts of the state, although they were open during the whole time; but it sets out proceedings on habeas corpus, instituted by him before the supreme court of the state, in which that court refused to admit him to bail and ultimately discharged the writ. 35 Colo. 154, 91 Pac. 738, and 35 Colo. 159, 12 L.R.A.(N.S.) 979, 117 Am. St. Rep. 189, 85 Pac. 190. In those proceedings it appeared that the governor had declared a county to be in a state of insurrection, had called out troops to put down the trouble, and *had ordered that the plaintiff[83 should be arrested as a leader of the outbreak, and should be detained until he could be discharged with safety, and that then he should be delivered to the civil authorities, to be dealt with according to law.

The jurisdiction of the circuit court, if it exists, is under Rev. Stat. § 629, U. S. Comp. Stat. 1901, p. 506, Sixteenth. That clause gives original jurisdiction "of all suits authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance,

regulation, custom, or usage of any state, of any right, privilege, or immunity secured by the Constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." The complaint purports to be founded upon the Constitution and on Rev. Stat. § 1979, U. S. Comp. Stat. 1901, p. 1262, which authorizes suit to be brought for such deprivation as above described. Therefore the question whether the complaint states a case upon the merits under § 1979 in this instance is another aspect of the question whether it states a case within the jurisdiction of the court under § 629, cl. 16. Taken either way, the question is whether this is a suit authorized by law,—that is, by § 1979, or the Constitution, or both.

The plaintiff's position, stated in a few words, is that the action of the governor, sanctioned to the extent that it was by the decision of the supreme court, was the action of the state and therefore within the 14th Amendment; but that, if that action was unconstitutional, the governor got no protection from personal liability for his unconstitutional interference with the plaintiff's rights. It is admitted, as it must be, that the governor's declaration that a state of insurrection existed is conclusive of that fact. It seems to be admitted also that the arrest alone would not necessarily have given a right to bring this suit. *Luther v. Borden*, 7 How. 1, 45, 46, 12 L. ed. 581, 600, 601. But it is said that a detention for so many days, alleged to be without probable cause, at a time when the courts were open, without an attempt to bring the plaintiff before them, makes a case on which he has a right to have a jury pass.

84] *We shall not consider all of the questions that the facts suggest, but shall confine ourselves to stating what we regard as a sufficient answer to the complaint, without implying that there are not others equally good. Of course, the plaintiff's position is that he has been deprived of his liberty without due process of law. But it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation. Thus, summary proceedings suffice for taxes, and executive decisions for exclusion from the country. *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *United States v. Ju Toy*, 198 U. S. 253, 263, 49 L. ed. 1040, 1044, 25 Sup. Ct. Rep. 644. What, then, are the circumstances of this case? By agreement the record of the proceedings upon habeas corpus was made part of the complaint, but that did not make the aver-

ments of the petition for the writ averments of the complaint. The facts that we are to assume are that a state of insurrection existed and that the governor, without sufficient reason, but in good faith, in the course of putting the insurrection down, held the plaintiff until he thought that he safely could release him.

It would seem to be admitted by the plaintiff that he was president of the Western Federation of Miners, and that, whoever was to blame, trouble was apprehended with the members of that organization. We mention these facts not as material, but simply to put in more definite form the nature of the occasion on which the governor felt called upon to act. In such a situation we must assume that he had a right, under the state Constitution and laws, to call out troops, as was held by the supreme court of the state. The Constitution is supplemented by an act providing that "when an invasion of or insurrection in the state is made or threatened, the governor shall order the national guard to repel or suppress the same." Laws of 1897, chap. 63, art. 7, § 2, p. 204. That means that he shall make the ordinary use of the soldiers to that end; that he may kill persons who resist, and, of course, that he may use the milder measure of seizing the bodies of those whom he considers to stand in the way of restoring peace. Such arrests are not necessarily *for punishment, but are by way of precaution, to prevent the exercise of hostile power. So long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off, the governor is the final judge and cannot be subjected to an action after he is out of office, on the ground that he had not reasonable ground for his belief. If we suppose a governor with a very long term of office, it may be that a case could be imagined in which the length of the imprisonment would raise a different question. But there is nothing in the duration of the plaintiff's detention or in the allegations of the complaint that would warrant submitting the judgment of the governor to revision by a jury. It is not alleged that his judgment was not honest, if that be material, or that the plaintiff was detained after fears of the insurrection were at an end.

No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. That is the position of the captain of a ship. But, even in that case, great weight is given to his determination, and the matter is to be judged on the facts

as they appeared then, and not merely in the light of the event. *Lawrence v. Minturn*, 17 How. 100, 110, 15 L. ed. 58, 62; *The Star of Hope*, 9 Wall. 203, 19 L. ed. 638; *The Germanic* (*Oceanic Steam Nav. Co. v. Aitken*) 196 U. S. 589, 594, 595, 49 L. ed. 610, 613, 25 Sup. Ct. Rep. 317. When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Keely v. Sanders*, 99 U. S. 441, 446, 25 L. ed. 327, 328. This was admitted with regard to killing men in the actual clash of arms; and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. As no one would deny that there was immunity for ordering a company to fire upon a mob in insurrection, and that a state law authorizing the governor to deprive citizens of life under such circumstances was consistent with the 86]14th Amendment, *we are of opinion that the same is true of a law authorizing by implication what was done in this case. As we have said already, it is unnecessary to consider whether there are other reasons why the circuit court was right in its conclusion. It is enough that, in our opinion, the declaration does not disclose a "suit authorized by law to be brought to redress the deprivation of any right secured by the Constitution of the United States." See *Dow v. Johnson*, 100 U. S. 158, 25 L. ed. 632.

Judgment affirmed.

Mr. Justice Moody took no part in the decision of this case.

WATERS-PIERCE OIL COMPANY, Plff.
in Err.,
v.

STATE OF TEXAS. //

(See S. C. Reporter's ed. 86-112.)

Error to state court — scope of review.

1. The Federal Supreme Court, on a writ of error to a state court, has not the jurisdiction of a general reviewing court in error, but is limited to a consideration of the specific instances of denials of Federal rights.

[For other cases, see *Appeal and Error*, 2072-2226, in *Digest Sup. Ct.* 1908.]

Error to state court — review of facts.

2. Findings of fact are accepted as conclusive by the Federal Supreme Court on writ of error to a state court.

[For other cases, see *Appeal and Error*, 2175-2208, in *Digest Sup. Ct.* 1908.]

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Error to state court — Federal question — decision on non-Federal ground.

3. The judgment of a state court does not involve the decision of a Federal question, so as to sustain a writ of error from the Federal Supreme Court, if the record shows that the verdict and judgment of the state court can stand upon other grounds, free from objection so far as Federal rights are concerned.

[For other cases, see *Appeal and Error*, 1465-1528, in *Digest Sup. Ct.* 1908.]

Constitutional law — police power of state — monopolies — procedure.

4. State legislatures, in the exercise of their power to deal with monopolies and combinations in restraint of trade, may provide their own methods of procedure and determine the methods and means by which their legislation may be made effective, subject only to the qualifications that such procedure must not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution.

[For other cases, see *Constitutional Law*, IV. c, in *Digest Sup. Ct.* 1908.]

Constitutional law — ex post facto laws.

5. A retroactive effect, in violation of U. S. Const. art. 1, § 10, is not given to the Texas anti-trust laws of May 25, 1899, and March 31, 1903, by construing them to authorize a conviction of a foreign corpora-

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Dockery*, 63 L.R.A. 571.

On review of questions of fact on writ of error to state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689.

On police power of states generally—see note to *Barbier v. Connolly*, 28 L. ed. U. S. 923.

As to what laws are *ex post facto*—see notes to *State v. Cooler*, 3 L.R.A. 181; *Anderson v. O'Donnell*, 1 L.R.A. 632; *Calder v. Bull*, 1 L. ed. U. S. 654; *Sturges v. Crowninshield*, 4 L. ed. U. S. 529; *Re Medley*, 33 L. ed. U. S. 835; *Otoe County v. Baldwin*, 28 L. ed. U. S. 331; *Barnitz v. Beverly*, 41 L. ed. U. S. 94.

As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

tion for carrying out, after the passage of those laws, an agreement for division of territory in suppression of competition, entered into before the enactment of those laws and before the creation of the defendant corporation, and at a time when such agreement was legal.

[For other cases, see Constitutional Law, IV. 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — indefiniteness of criminal statute.

6. Due process of law is not denied a corporation convicted of violating the Texas anti-trust laws of May 25, 1899, and March 31, 1903, because the legislation permits and the trial court charged that there may be a conviction not only for acts which accomplish the prohibited result, but also for those which "tend" or are "reasonably calculated" to bring about such result. [For other cases, see Constitutional Law, 779-830, in Digest Sup. Ct. 1908.]

Constitutional law — police power of state — excessive fines.

7. Fixing the amount of fines for the violation of state legislation is within the police power of the state, subject only to the limitation that such fines must not be so grossly excessive as to amount to a deprivation of property without due process of law.

[For other cases, see Constitutional Law, IV. c. 4, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — excessive fines.

8. Penalties imposed by the jury and confirmed by the state courts at the rate of \$1,500 and \$50 per day for violating respectively, through a series of years, the Texas anti-trust laws of May 25, 1899, and March 31, 1903, are not so excessive as to deprive the defendant corporation of its property without due process of law, where such property amounts to more than \$40,000,000, and its dividends have been as high as 700 per cent per annum.

[For other cases, see Constitutional Law, 779-830, in Digest Sup. Ct. 1908.]

[No. 359.]

Argued October 30, November 2, 3, 1908.

Decided January 18, 1909.

IN ERROR to the court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Travis County, in that state, penalizing a foreign corporation for violations of the anti-trust act, and forfeiting its permit to do business in the state except as to its interstate business. Affirmed.

See same case below (Tex. Civ. App.) 106 S. W. 918.

The facts are stated in the opinion.

Mr. Moorfield Storey argued the cause, and, with Mr. J. L. Thorndike, filed a brief for plaintiff in error:

The state courts, by imposing on the de-

fendant a liability on account of an agreement made by the old Waters-Pierce Company, have undertaken to deprive the defendant of its property without due process of law.

Woodward v. Central Vermont R. Co. 180 Mass. 599, 62 N. E. 1051; Davidson v. New Orleans, 96 U. S. 102, 24 L. ed. 618.

In 1878 there was no law in Texas forbidding such an agreement as that by which the old Waters-Pierce Company agreed not to do business outside of Texas or other specified places, and the agreement was perfectly legal, whether it was one that the Standard Oil Company could have enforced or not.

Mogul S. S. Co. v. McGregor [1892] A. C. 39.

It was impossible for the state of Texas in 1899 to impose a penalty upon that company for having previously entered into such a contract, and any law enacted for that purpose would have been an *ex post facto* law and invalid.

Kring v. Missouri, 107 U. S. 228, 27 L. ed. 508, 2 Sup. Ct. Rep. 443.

Although the words of the act refer to the future, yet the state courts have given it the effect of applying to an agreement made before its passage, and the defendant has thereby been deprived of its constitutional right.

General Oil Co. v. Crain, 209 U. S. 211, 228, 52 L. ed. 754, 764, 28 Sup. Ct. Rep. 475.

It was necessary first to carry the oil to Texas before it could be sold there, and this was interstate commerce.

General Oil Co. v. Crain, 209 U. S. 228, 229, 52 L. ed. 764, 765, 28 Sup. Ct. Rep. 475.

As the agreement related only to interstate commerce so far as Texas was concerned, that state had no authority to interfere with it, or to impose penalties on account of it.

Caldwell v. North Carolina, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229; Leisy v. Hardin, 135 U. S. 100, 119, 34 L. ed. 128, 136, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Rearick v. Pennsylvania, 203 U. S. 507, 51 L. ed. 295, 27 Sup. Ct. Rep. 159.

According to the effect given to the statute by the state courts, the corporation whose shares are acquired by another is liable to the penalties and forfeiture of its right to do business. This is nothing less than taking the property of one corporation to pay the penalties for the acts of another. A statute that produces such an effect does not differ in principle from one that assumes to provide that the property of A shall be the property of B, which has

been used as an example of a statute that would deprive a person of his property without due process of law.

Davidson v. New Orleans, *supra*.

The jury, under the directions in the judge's charge, and in accordance with the allegations of the petition, have convicted the defendant under the act of 1899 on account of a combination that was effected long before that act was passed, and the act has thus been given retroactive effect, and the defendant is deprived of its property without due process of law.

Kring v. Missouri, *supra*.

Whatever may be the proper construction of the statute, the effect that has been given to it is to make the defendant liable to penalties for what the Standard Oil Company has done.

General Oil Co. v. Crain, 209 U. S. 211, 228, 52 L. ed. 754, 764, 28 Sup. Ct. Rep. 475.

This action is a proceeding by the government of Texas to recover penalties for an offense that the defendant is charged with having committed; and, although it is in the form of a civil action, the object is to inflict punishment for the offense, and the action is criminal in its nature.

Huntington v. Attrill, 146 U. S. 667-669, 36 L. ed. 1127, 1128, 13 Sup. Ct. Rep. 224; Chaffee v. United States, 18 Wall. 516, 545, 21 L. ed. 908, 913; United States v. Shapleigh, 4 C. C. A. 237, 12 U. S. App. 26, 54 Fed. 134; State ex rel. Atty. Gen. v. Waters-Pierce Oil Co. (Tex. Civ. App.) 67 S. W. 1057.

A statute that makes it a criminal offense and imposes penalties if anyone enters into or becomes a party to an agreement that may be reasonably calculated to affect or increase the price of any article is so indefinite and uncertain that nobody can say in advance what might be found by a jury to constitute an offense.

Tozer v. United States, 4 Inters. Com. Rep. 245, 52 Fed. 917; Ex parte Jackson, 45 Ark. 158; Louisville & N. R. Co. v. Com. 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; Railroad Commission Cases, 116 U. S. 336, 29 L. ed. 646, 6 Sup. Ct. Rep. 334, 388, 1191; United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538.

The penalties imposed upon the defendant for the offense of which it has been convicted are so excessive as to constitute a deprivation of its property without due process of law.

Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 100, 46 L. ed. 105, 22 Sup. Ct. Rep. 30; Ex parte Young, 209 U. S. 144, 148, 52 L. ed. 722, 53 L. ed.

724, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; State v. Laredo Ice Co. 96 Tex. 468, 73 S. W. 951; State v. Galveston, H. & S. A. R. Co. 100 Tex. 175, 97 S. W. 71; State ex rel. Garvey v. Whitaker, 48 La. Ann. 527, 35 L.R.A. 561, 19 So. 457; Porter v. Dawson Bridge Co. 157 Pa. 379, 27 Atl. 730.

It is not contended that this court can revise the decisions of the state courts merely on the ground that those decisions are erroneous in law or fact. If the proceedings were conducted according to the regular course of judicial procedure, and not in reckless disregard of the defendant's rights, the decisions of the state courts are conclusive except upon questions arising under the Constitution or laws of the United States, and do not deprive him of his property without due process of law.

Re Converse, 137 U. S. 631, 34 L. ed. 799, 11 Sup. Ct. Rep. 191; A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 566, 42 L. ed. 858, 18 Sup. Ct. Rep. 445; Smiley v. Kansas, 196 U. S. 453, 454, 49 L. ed. 550, 25 Sup. Ct. Rep. 289; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 234, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Tracy v. Ginzberg, 205 U. S. 170, 178, 51 L. ed. 755, 760, 27 Sup. Ct. Rep. 461; Hovey v. Elliott, 167 U. S. 409, 415, 42 L. ed. 215, 220, 17 Sup. Ct. Rep. 841; Ex parte Virginia, 100 U. S. 367, 25 L. ed. 686.

But, in order that the decision may have this effect, it is necessary that there be, not only the form, but the substance, of a trial according to the regular course of procedure, and not in reckless disregard of defendant's rights.

A. Backus Jr. & Sons v. Fort Street Union Depot Co. 169 U. S. 565, 566, 42 L. ed. 857, 858, 18 Sup. Ct. Rep. 445; Fayerweather v. Ritch, 195 U. S. 297, 299, 49 L. ed. 209, 210, 25 Sup. Ct. Rep. 58; Patterson v. Colorado, 205 U. S. 461, 51 L. ed. 880, 27 Sup. Ct. Rep. 556, 10 A. & E. Ann. Cas. 689.

The prohibitions of the 14th Amendment extend to all acts of the state, whether done through its legislative, executive, or judicial authorities; and whoever, by his public position, deprives another of any right protected by those provisions, violates the Constitution, and, as he represents the state, his act is that of the state.

Scott v. McNeal, 154 U. S. 45, 38 L. ed. 901, 14 Sup. Ct. Rep. 1108; Owensboro Waterworks Co. v. Owensboro, 200 U. S. 45, 50 L. ed. 363, 26 Sup. Ct. Rep. 249; Londoner v. Denver, 210 U. S. 386, 52 L. ed. 1112, 28 Sup. Ct. Rep. 708; Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52 L. ed. 246, 248, 28 Sup. Ct. Rep. 130; Yick Wo v. Hopkins, 118 U. S. 373, 30 L. ed. 227, 6 Sup. Ct. Rep. 1064.

It cannot be reasonably said that any of the doings or agreements of the old Waters-Pierce Company had any such fair relation to the question whether the defendant had violated the Texas anti-trust laws as to make it evidence upon that question. There was no such relation between them as might have justified the legislature in providing that they should be evidence against the defendant.

People v. Cannon, 139 N. Y. 45, 36 Am. St. Rep. 668, 34 N. E. 759; *Com. v. Anselvich*, 186 Mass. 379, 104 Am. St. Rep. 590, 71 N. E. 790.

The defendant did not succeed to the liabilities or obligations of the old Waters-Pierce Company (*Armour v. E. Bement's Sons*, 62 C. C. A. 142, 123 Fed. 56), and the legislature could not have imposed those liabilities or obligations upon the defendant (*Woodward v. Central Vermont R. Co.* 180 Mass. 599, 62 N. E. 1051).

The permit to do business in Texas, issued upon payment of the fees and taxes required by law, constituted a contract on the part of the state that the defendant should have a right to do business in Texas during the term specified in it, and the state was not at liberty to revoke the permission so given unless the defendant gave sufficient cause for its revocation.

American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 47, 44 L. ed. 665, 20 Sup. Ct. Rep. 518; *Cosmopolitan Club v. Virginia*, 208 U. S. 378, 52 L. ed. 536, 28 Sup. Ct. Rep. 394.

Mr. E. B. Perkins also argued the cause, and, with Mr. J. D. Johnson, filed a brief for plaintiff in error:

The anti-trust laws of Texas are too vague and indefinite to be enforced.

Missouri, K. & T. R. Co. v. State, 100 Tex. 424, 100 S. W. 766; *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 876; *United States v. Brewer*, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538; *Queen Ins. Co. v. State*, 86 Tex. 262, 22 L.R.A. 483, 24 S. W. 397; *Gulf, C. & S. F. R. Co. v. Dwyer*, 84 Tex. 194, 19 S. W. 470; *Louisville & N. R. Co. v. Railroad Commission*, 19 Fed. 679; *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129.

The anti-trust laws of 1899, 1903, and of 1907, as construed herein, are *ex post facto* laws.

Kring v. Missouri, 197 U. S. 221-228, 27 L. ed. 506-508, 2 Sup. Ct. Rep. 443; *Calder v. Bull*, 3 Dall. 386, 387, 1 L. ed. 648, 649; *Fletcher v. Peck*, 6 Cranch, 138, 3 L. ed. 178; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356.

The law of 1907 violated the property rights of the defendant oil company which were vested by its contract in acquiring its property in Texas, and such deprivation and the fixing of the lien upon said property increased the punishment of the defendant oil company for acts done prior to the passage thereof.

Ex parte Mayer, 27 Tex. 723; *United States v. Hall*, 6 Cranch, 174, 3 L. ed. 190; *Cummings v. Missouri*, supra.

It may be that the anti-trust laws of the state of Texas of 1899 and 1903, as well as the act of 1907, are, in some of their provisions, constitutional so far as the wording of the acts is concerned; but the construction placed upon such laws by the trial court, which is approved by the higher courts of Texas, renders them unconstitutional.

Louisville & N. R. Co. v. Eubank, 184 U. S. 34, 46 L. ed. 419, 22 Sup. Ct. Rep. 277.

The judgment against the Waters-Pierce Oil Company, plaintiff in error, for \$1,323,900 and for the cancelation of its permit to do business in Texas, and the judgment appointing a receiver, are void under the due process clause of the 14th Amendment to the Constitution of the United States, for the reason that they assess such excessive penalties and punishments, when considered in connection with the character of the business done and the offense charged, as shocks the conscience of mankind.

Missouri, K. & T. R. Co. v. State, 100 Tex. 422, 100 S. W. 766; *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441.

Mr. H. S. Priest also argued the cause and filed a brief for plaintiff in error:

In declaring it unlawful for the Standard Oil Company to own stock in the Waters-Pierce Oil Company, the latter is not only deprived of its property without due process of law, and denied the equal protection of the laws, but such directly impairs the obligation of a contract, in that it denies a stockholder in the Waters-Pierce Oil Company the right to transfer his stock to whom he pleases.

Trisconi v. Winship, 43 La. Ann. 45, 26 Am. St. Rep. 175, 9 So. 29; *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954; *Weston's Case*, L. R. 4 Ch. 20; *Farmers' Loan & T. Co. v. Chicago, P. & S. R. Co.* 163 U. S. 31, 41 L. ed. 60, 16 Sup. Ct. Rep. 917; *Rice v. Rockefeller*, 134 N. Y. 174, 17 L.R.A. 237, 30 Am. St. Rep. 658, 31 N. E. 907.

To punish the Waters-Pierce Oil Company because part of its stock was held by the Standard Oil Company, the same having been acquired long before the passage of the Texas anti-trust acts of 1903 and 1899, and

when such acquisition was wholly lawful, is to subject the Waters-Pierce Oil Company to an *ex post facto* law, and deprive it of its property without due process of law.

Calder v. Bull, 3 Dall. 386, 1 L. ed. 648; *Fletcher v. Peck*, 6 Cranch, 87, 3 L. ed. 162; *Watson v. Mercer*, 8 Pet. 88, 8 L. ed. 876; *Coffin v. Rich*, 45 Me. 507, 71 Am. Dec. 559; *American Bldg. & L. Asso. v. Rainbolt*, 48 Neb. 434, 67 N. W. 493; *Stephens v. Southern P. Co.* 109 Cal. 86, 29 L.R.A. 751, 50 Am. St. Rep. 17, 41 Pac. 783.

The *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.

Huntington v. Attrill, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224; *Wisconsin v. Pelican Ins. Co.* 127 U. S. 265, 32 L. ed. 239, 8 Sup. Ct. Rep. 1370; *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Lees v. United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; *United States v. Shapleigh*, 4 C. C. A. 237, 12 U. S. App. 26, 54 Fed. 126; *Burgess v. Salmon*, 97 U. S. 381, 24 L. ed. 1104; *United States v. Hughes*, 8 Ben. 29, Fed. Cas. No. 15,416; *Wilson v. Ohio & M. R. Co.* 64 Ill. 542, 16 Am. Rep. 565; *Cooley, Const. Lim.* 7th ed. p. 375.

The state of Texas cannot constitutionally enact a law which denounces as an offense an act committed in another state, and punish this plaintiff in error for an alleged offense committed wholly outside of the jurisdiction of the state of Texas.

The *Apollon*, 9 Wheat. 362, 6 L. ed. 111; *State v. Knight*, 1 N. C. pt. 2, p. 44 (*Taylor*, 65); *Re Grice*, 79 Fed. 627; *State v. Cutshall*, 110 N. C. 538, 16 L.R.A. 130, 15 S. E. 261; *Allgeyer v. Louisiana*, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; 1 *Lewis's Sutherland*, Stat. Constr. § 13; *Cooley, Const. Lim.* 7th ed. p. 176; *Story, Confl. L.* 1834, § 620.

Admitting the ownership of a portion of the stock of the Waters-Pierce Oil Company by the Standard Oil Company of New Jersey, this fact is not enough to establish the existence of a "combination" between the two corporations, within the meaning of that term as used in the Texas anti-trust acts of 1899 and 1903; and to hold the Waters-Pierce Oil Company, because of such ownership of stock by the Standard Oil Company, guilty of entering into a combination with the Standard Oil Company, and punishing it therefor, is to deprive the Waters-Pierce Oil Company of its property without due process of law, deny it the equal protection of the laws, and hold it liable under *ex post facto* and retrospective laws.

Com. v. Punxsutawney Water Co. 197 Pa. 569, 47 Atl. 843; *Gates v. Hooper*, 90 53 L. ed.

Tex. 563, 39 S. W. 1079; *State ex rel. Crow v. Continental Tobacco Co.* 177 Mo. 1, 75 S. W. 737.

In the admission of incompetent, frivolous, and immaterial evidence wholly foreign to any issues to the cause, arbitrarily admitted, and without regard for the rules of law and constitutional rights of plaintiff in error to a fair and impartial trial of the issues raised, such evidence being calculated to excite, inflame, and prejudice the minds of the jury against the plaintiff in error, the constitutional right of plaintiff in error to a fair and impartial trial was denied, and, by the judgment upon the verdict in the cause, plaintiff in error was deprived of its property without due process of law.

Robinson, American Jurisprudence, pp. 238-257, 259; *Re Ziebold*, 23 Fed. 791; *Ex parte Virginia*, 100 U. S. 346, 25 L. ed. 679; *Bank of Columbia v. Okely*, 4 Wheat. 235, 4 L. ed. 559; *Cooley, Const. Lim.* 7th ed. p. 506; *State v. Bates*, 14 Utah, 293, 43 L.R.A. 33, 47 Pac. 78; *San José Ranch Co. v. San José Land & Water Co.* 126 Cal. 322, 58 Pac. 824; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565.

The fine imposed is so grossly excessive as to deprive plaintiff in error of its property without due process of law.

Cooley, Const. Lim. 7th ed. p. 471; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*), 183 U. S. 101, 46 L. ed. 105, 22 Sup. Ct. Rep. 30; *Gates v. Hooper*, 90 Tex. 563, 39 S. W. 1079; *State v. Shippers' Compress & Warehouse Co.* 95 Tex. 603, 69 S. W. 58; *Ft. Worth & D. C. R. Co. v. State*, 99 Tex. 34, 70 L.R.A. 950, 87 S. W. 336; *State v. Bates*, *supra*.

The Texas anti-trust acts of 1890 and 1903 are so vague, indefinite, ambiguous, and uncertain in terms as to fail to designate any offense with such certainty as to inform the public in advance of the constituents of the offense sought to be defined and punished, and the punishment of this plaintiff in error under such statutes deprives it of its property without due process of law.

Augustine v. State, 41 Tex. Crim. Rep. 59, 96 Am. St. Rep. 765, 52 S. W. 77; *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397; *Missouri, K. & T. R. Co. v. State*, 100 Tex. 420, 100 S. W. 766; *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 917; *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129; *Hughes, Crim. Law & Proc.* § 2429; *Com. v. Bradford*, 9 Met. 268; *Cutter v. State*, 36 N. J. L. 125; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup.

Ct. Rep. 663; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 816.

The denial of any period of limitation in bar of a suit against plaintiff in error to recover fines or penalties or forfeit its permit is a denial of the equal protection of the laws, and deprives plaintiff in error of its property without due process of law.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cutting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Re Converse*, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191.

The appointment of a receiver and transfer to him of the property of plaintiff in error pending proceedings by way of appeal was wholly without authority and an arbitrary exercise of judicial power, and deprived plaintiff in error of its property without due process of law, and denied it the equal protection of the laws.

Pom. Eq. Jur. §§ 62, 71, 118, 1330: *Texas Trunk R. Co. v. Jackson Bros.* 85 Tex. 605, 22 S. W. 1030; *Havemeyer v. Superior Ct.* 84 Cal. 327, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 134; *Tex. Rev. Stat. arts.* 1177, 1181, 1191, 1337; *Hall v. Jackson*, 3 Tex. 305; *Nye v. Gribble*, 70 Tex. 458, 8 S. W. 608; *May v. Taylor*, 22 Tex. 348; *Mann v. Falcon*, 25 Tex. 276; *Bledsoe v. Wills*, 22 Tex. 650.

The appointment of a receiver of plaintiff in error's property for the purpose of depriving it of the capacity for further or continued violation of the anti-trust laws of Texas, without evidence of any such intended violation, and without evidence that it could not use its property in compliance with law, constitutes a deprivation of such property of plaintiff in error without due process of law.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; *Bigelow v. Forrest*, 9 Wall. 351, 19 L. ed. 700; *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841.

The Texas act of April 11, 1907, is null and void—

(1) In so far as it attempts to create a lien upon the property of plaintiff in error for acts committed before such act took effect.

(2) In so far as, under it, the right to appoint a receiver is limited to suits against corporations only.

(3) In so far as it attempts to create a lien upon the property of plaintiff in error, in that the lien is not created by the terms of the act, based alone upon the commission of the offense, but is left to be created by the action of the prosecuting officer in filing suit to recover the prescribed penalties.

Calder v. Bull, 3 Dall. 388, 1 L. ed. 649; *Cummings v. Missouri*, 4 Wall. 277, 18 L. ed. 356; *Fletcher v. Peck*, 6 Cranch, 137, 3 L. ed. 178; *Wilson v. Ohio & M. R. Co.* 64 Ill. 542, 16 Am. Rep. 565; *Havemeyer v. Superior Ct.* 84 Cal. 347, 10 L.R.A. 627, 18 Am. St. Rep. 192, 24 Pac. 121; *Texas Trunk R. Co. v. Jackson Bros.* supra; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Baltimore v. Radecke*, 49 Md. 217, 33 Am. Rep. 239; *Yick Wo v. Hopkins*, 118 U. S. 366, 30 L. ed. 225, 6 Sup. Ct. Rep. 1064; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357.

Messrs. G. W. Allen, R. L. Batts, and Robert Vance Davidson argued the cause, and, with Messrs. Jewel P. Lightfoot, John W. Brady, T. W. Gregory, and Allen & Hart, filed a brief for defendant in error:

No substantial Federal question requiring the exercise of the jurisdiction of this court is involved in this case.

Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 275, 52 L. ed. 203, 28 Sup. Ct. Rep. 78; *Leathe v. Thomas*, 207 U. S. 98, 52 L. ed. 120, 28 Sup. Ct. Rep. 30; *Thomas v. Iowa*, 209 U. S. 263, 52 L. ed. 783, 28 Sup. Ct. Rep. 487; *Bachtel v. Wilson*, 204 U. S. 36, 52 L. ed. 357, 27 Sup. Ct. Rep. 243; *Stickney v. Kelsey*, 209 U. S. 422, 52 L. ed. 865, 28 Sup. Ct. Rep. 508.

Neither the act of 1899 nor the act of 1903 is an *ex post facto* law, nor is either retroactive, nor was either given a retroactive effect in this case.

Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 47 L. ed. 328, 23 Sup. Ct. Rep. 206; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Pearsall v. Great Northern R. Co.* 161 U. S. 646, 40 L. ed. 838, 16 Sup. Ct. Rep. 705; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Doyle v. Continental Ins. Co.* 94 U. S. 535, 24 L. ed. 148; *Mugler v. Kansas*, 123 U. S. 668, 31 L. ed. 212, 8 Sup. Ct. Rep. 273; *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 941; *Ford v. Chicago Milk Shippers' Asso.* 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651; *State v. Missouri, K. & T. R. Co.* 99 Tex. 516, 5 L.R.A. (N.S.) 783, 91 S. W. 214.

Neither the act of 1899 nor the act of 1903, as construed by the highest state courts of Texas, deny to plaintiff in error the equal protection of the laws.

National Cotton Oil Co. v. Texas, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed.

546, 25 Sup. Ct. Rep. 289; *Mugler v. Kansas*, 123 U. S. 665, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; *Gundling v. Chicago*, 177 U. S. 188, 44 L. ed. 728, 20 Sup. Ct. Rep. 633; *Soon Hing v. Crowley*, 113 U. S. 708, 28 L. ed. 1146, 5 Sup. Ct. Rep. 730; *Nutting v. Massachusetts*, 183 U. S. 553, 46 L. ed. 327, 22 Sup. Ct. Rep. 238; *Wurts v. Hoagland*, 114 U. S. 615, 29 L. ed. 232, 5 Sup. Ct. Rep. 1086; *Duncan v. Missouri*, 152 U. S. 382, 38 L. ed. 487, 14 Sup. Ct. Rep. 570; *Eldridge v. Trezevant*, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 345; *Lowe v. Kansas*, 163 U. S. 88, 41 L. ed. 80, 16 Sup. Ct. Rep. 1031; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *Pacific Exp. Co. v. Seibert*, 142 U. S. 352, 35 L. ed. 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Powell v. Pennsylvania*, 127 U. S. 687, 32 L. ed. 257, 8 Sup. Ct. Rep. 992, 1257; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 95, 45 L. ed. 105, 21 Sup. Ct. Rep. 43; *Booth v. Illinois*, 184 U. S. 429, 46 L. ed. 626, 22 Sup. Ct. Rep. 425; *Capital City Dairy Co. v. Ohio*, 183 U. S. 246, 46 L. ed. 175, 22 Sup. Ct. Rep. 120.

Neither the act of 1899 nor the act of 1903 deprived plaintiff in error of its property without due process of law.

Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Remington Paper Co. v. Watson*, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *St. Louis, G. & Ft. S. R. Co. v. Misspuri*, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U. S. 320, 45 L. ed. 550, 21 Sup. Ct. Rep. 378; *Rothschild v. Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178; *Cosmopolitan Club v. Virginia*, 208 U. S. 384, 52 L. ed. 539, 28 Sup. Ct. Rep. 394; *Caldwell v. Texas*, 137 U. S. 697, 34 L. ed. 818, 11 Sup. Ct. Rep. 224; *Miller v. Texas*, 153 U. S. 539, 38 L. ed. 813, 14 Sup. Ct. Rep. 874; *Minder v. Georgia*, 183 U. S. 559, 46 L. ed. 328, 22 Sup. Ct. Rep. 224.

If there was any error in the charge of the trial court upon the matter of stock ownership, the error is immaterial, and any Federal question that might have been predicated of it has been eliminated from the case by the action of the court of civil appeals in basing a judgment of affirmance upon other grounds.

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Missouri, K. & T. R. Co. v. Ferris, 179 U. S. 602, 45 L. ed. 337, 21 Sup. Ct. Rep. 231; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Diamond Glue Co. v. United States Glue Co.*; *United States v. Trans-Missouri Freight Asso.*, and *State v. Missouri, K. & T. R. Co.*,—*supra*; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 9 Sup. Ct. Rep. 193.

The combination effected between the Standard Oil Company and the Waters-Pierce Oil Company by the acquisition of the stock of the latter by the former for the purposes for which the acquisition was made and with the effect intended violated the laws of Texas, and the infliction of penalties therefor would not have given the laws either an extraterritorial effect or a retroactive effect, or otherwise have violated the Constitution of the United States.

Ibid.

Neither the act of 1899 nor that of 1903 is vague, uncertain, or indefinite.

Swift & Co. v. United States, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 325, 41 L. ed. 1022, 17 Sup. Ct. Rep. 540; *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Smiley v. Kansas*, 196 U. S. 454, 49 L. ed. 550, 25 Sup. Ct. Rep. 289; *State v. Laredo Ice Co.* 96 Tex. 461, 73 S. W. 952; *State v. Missouri, K. & T. R. Co.* *supra*; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289; *People v. Sheldon*, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. Rep. 690, 34 N. E. 785; *Drake v. Siebold*, 81 Hun, 178, 30 N. Y. Supp. 697; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834.

The jurisdiction of the legislature of Texas to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade in Texas, or the carrying out in Texas of such agreements or combinations, is absolute and complete.

Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518, 19 Tex. Civ. App. 1, 44 S. W. 936; *National Cotton Oil Co. v. Texas*, *supra*; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. ed.

136, 20 Sup. Ct. Rep. 96; *Mugler v. Kansas*, 123 U. S. 665, 31 L. ed. 211, 8 Sup. Ct. Rep. 273; *Barbier v. Connolly*, 113 U. S. 31, 28 L. ed. 924, 5 Sup. Ct. Rep. 357; *Carroll v. Greenwich Ins. Co.* 199 U. S. 410, 50 L. ed. 250, 26 Sup. Ct. Rep. 66; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Anheuser-Busch Brewing Asso. v. Houck* (Tex. Civ. App.) 27 S. W. 692; *State v. Laredo Ice Co.* supra; *Texas & P. Coal Co. v. Lawson*, 89 Tex. 394, 32 S. W. 871, 34 S. W. 919; *State v. Missouri, K. & T. R. Co. and People v. North River Sugar Ref. Co.* supra; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 137, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *Harding v. American Glucose Co.* 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; *Arnot v. Pittston & E. Coal Co.* 68 N. Y. 558, 23 Am. Rep. 190; *Slaughter-House Cases*, 16 Wall. 63, 21 L. ed. 404.

Having complete jurisdiction to pass laws prohibiting the making of agreements or the forming of combinations in restraint of trade in Texas, or the carrying out in Texas of such agreements or combinations, the legislature has the absolute right to prescribe the punishment for a violation of such laws; and the laws under consideration are open to no constitutional objections on account of the penalties.

National Cotton Oil Co. v. Texas, supra; *Rippey v. Texas*, 193 U. S. 504, 48 L. ed. 767, 24 Sup. Ct. Rep. 516; *Ohio ex rel. Lloyd v. Dollison*, 194 U. S. 445, 48 L. ed. 1062, 24 Sup. Ct. Rep. 703; *Marvin v. Trout*, 199 U. S. 212, 50 L. ed. 157, 26 Sup. Ct. Rep. 31; *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561; *Devine v. Los Angeles*, 202 U. S. 322, 50 L. ed. 1049, 26 Sup. Ct. Rep. 652; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 29 L. ed. 463, 6 Sup. Ct. Rep. 110; *Western U. Teleg. Co. v. Indiana*, 165 U. S. 304, 41 L. ed. 725, 17 Sup. Ct. Rep. 345; *Coffey v. Harlan County*, 204 U. S. 659, 51 L. ed. 666, 27 Sup. Ct. Rep. 305; *Seaboard Air Line R. Co. v. Seegers*, 207 U. S. 73, 52 L. ed. 108, 28 Sup. Ct. Rep. 28; *Northwestern Nat. L. Ins. Co. v. Riggs*, 203 U. S. 251, 51 L. ed. 172, 27 Sup. Ct. Rep. 126, 7 A. & E. Ann. Cas. 1104; *O'Neil v. Vermont*, 144 U. S. 323, 36 L. ed. 450, 12 Sup. Ct. Rep. 693.

Mr. Justice Day delivered the opinion of the court:

This case was begun in the state district court of Travis county, Texas, to forfeit the permit of the plaintiff in error, the Waters-Pierce Oil Company, a corporation of the state of Missouri, to conduct business in the state of Texas, and to assess penalties

against it for violation of the anti-trust laws of that state. The prosecution was under two laws of the state,—one of 1899 and one of March 31, 1903. The proceeding was brought by the attorney general of Texas and the county attorney of Travis county, to recover penalties, under the act of [May 25] 1899, from the 31st day of May, 1900, until the 31st day of March, 1903, at the rate of \$5,000 per day, and under the act of 1903, from the 31st of March, 1903, till the 29th of April, 1907, at the rate of \$50 per day, and to cancel the permit of the defendant to do business, other than interstate, in Texas.

The jury returned a verdict against the defendant, and assessed *penalties, under[97 the act of 1899, from May 31, 1900, to March 31, 1903,—1,033 days. Such penalties were assessed at the rate of \$1,500 a day during that period, being the total sum of \$1,549,500. The jury also found against the defendant under the act of 1903, and assessed the penalties for each day between April 1, 1903, and April 29, 1907,—1,480 days,—at the rate of \$50 per day, making a total of \$74,000. The jury further found that the permit of the defendant to do business in the state of Texas should be canceled. Thereupon the court rendered a judgment for the state of Texas for the sum of the penalties assessed, \$1,623,500, and ordered a cancelation of the defendant's permit to do business in the state except as to its interstate commerce business. This judgment was affirmed upon appeal to the court of civil appeals of Texas (106 S. W. 918), and, upon application to the supreme court of Texas, that court refused to grant a writ of error, and the case was brought here.

The case was submitted upon oral arguments and elaborate briefs and a voluminous record. It was argued, in many aspects, as though this were a proceeding in error to review the weight of the evidence adduced in the state courts, to re-examine the rulings of the court upon the admissibility of testimony, and to determine the effect of the statute of limitations in the state.

The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities, and privileges of Federal origin, specially set up in the state court, and denied by the rulings and judgment of that court. U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575. Nor does this court

sit to review the finding of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. *Quinby v. Boyd*, 128 U. S. 489, 32 L. ed. 503, 9 Sup. Ct. Rep. 147; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Downer v. Richards*, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Thayer v. Spratt*, 98]189 *U. S. 346, 47 L. ed. 845, 23 Sup. Ct. Rep. 576. We shall not, therefore, undertake to follow counsel in the consideration of all the questions argued, but shall limit our review to questions of a Federal nature which we deem to be properly made in this record and essential to the decision of the case.

Epitomizing the Texas anti-trust statutes for the purposes of his charge, the learned judge who presided in the district court, speaking first of the act of 1899, stated them as follows:

"For the purposes of this charge you are instructed that this act made it unlawful for any corporation transacting or conducting any kind of business in this state to enter into, or become a party to, any agreement or understanding with any other corporation or individual to fix or regulate the price in Texas of any article of manufacture or merchandise, or to control or limit in Texas the trade in any article of manufacture or merchandise.

"You are further instructed that said statute also made it unlawful for any corporation transacting or conducting any kind of business in this state to bring about or permit any union or combination of its capital, property, trade, or acts with the capital, property, trade, or acts of any other person or corporation, whereby the price in Texas of any article of manufacture or merchandise would be fixed or sought to be fixed, regulated or sought to be regulated; or whereby the price in Texas of any article of manufacture or merchandise would be reasonably calculated to be fixed, or regulated, or whereby the trade in such article of manufacture or merchandise in Texas would be sought to be controlled or limited, or would be reasonably calculated to be controlled or limited.

"The statute known as the anti-trust law of 1903 became effective on March 31, 1903, and has since continued in force. For the purposes of this charge you are instructed that this statute defines a trust to be a combination of capital, skill, or acts by two or more persons, firms, corporations, or associations of persons, or either two or more of them, for either, any, or all of the following purposes, viz.:

*"(1) To create or which may tend to create or carry out restrictions in trade or commerce in Texas, or to create or carry out restrictions in the free pursuit in Texas of any business authorized or permitted by the laws of this state.

"(2) To fix, maintain, or increase the price of merchandise in Texas.

"(3) To prevent or lessen competition in Texas in the sale of merchandise.

"(4) To abstain from engaging in business or in the sale of merchandise in Texas, or any portion thereof.

"Said statute of 1903 further defines a monopoly to be a combination or consolidation of two or more corporations when effected in any of the following methods, viz:

"(1) When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create, a trust, as above defined.

"(2) When any corporation acquires the shares or certificates of stock, franchise, or other rights, or the physical properties or any part thereof of any other corporation for the purpose of preventing or lessening, or where the effect of such acquisition tends to affect or lessen, competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise.

"(3) Oil, all other products of petroleum, and goods, wares, or merchandise of any character which the defendant or its agents may have purchased or acquired in any manner outside of the state of Texas, and caused to be transported to its agents or others within the state, are the subjects of interstate commerce when they enter this state, and so remain until such commodities are removed from the original tanks, vessels, or other packages in which they are imported into the state and become mixed with the common mass of property of similar character in this state. The anti-trust laws of Texas have no reference to agreements or pools or arrangements of any character concerning subjects of interstate commerce, and no agreement, *pool, or other arrangement, if any, which the defendant may have entered into with reference to the sale of any subject of interstate commerce can be considered by you as violating any anti-trust law of Texas. But neither oil purchased by the defendant from the Corsicana Refinery or elsewhere in Texas, nor other merchandise purchased by defendant at points in Texas, nor such oil or other merchandise purchased by defendant at points outside of the state, and transported into the state, and removed

from the original packages or vessels in which it was brought into the state, and mingled with other property of similar character in the state, is the subject of interstate commerce, but, on the contrary, is the subject of local commerce, and any agreement or pool or arrangement entered into by defendant with reference to such property or the sale thereof, if any such sale there were, would be unlawful, if in violation of the anti-trust laws of this state."

The penalties denounced by the act of 1899 were not less than \$200 nor more than \$5,000 for each day the defendant might be found to have violated the law; under the act of 1903 the penalty was fixed at \$50 for each day, and a forfeiture of the right to do business within the state of Texas was declared.

The complaint in the case is voluminous, and its averments contain the history of the so-called conspiracy between the Waters-Pierce Oil Company and a number of persons composing the Standard Oil Company, beginning in January, 1870, for the purpose of monopolizing and controlling the business of refining and transporting and selling petroleum and similar products throughout the United States and in the state of Texas. It charges that the Waters-Pierce Oil Company, incorporated in 1878, and the predecessor of the defendant company, was a party to that conspiracy, and, for the purpose of carrying out the same, had entered into contracts with corporations and individuals engaged in the business of selling petroleum and similar products within the state, and suppressed competition therein. It charges that the Waters-Pierce Oil Company had entered into an agreement with the Standard Oil Company of New Jersey 101]*for the purpose of monopolizing the trade in petroleum and for the purpose of carrying out certain contracts and conspiracies, entered into for the purposes aforesaid, and permitted the Standard Oil Company to acquire a majority of the shares of stock of the Waters-Pierce Company.

The original Waters-Pierce Oil Company, it states, had been dissolved, and the new company, the present defendant, organized on May 29, 1900, had assumed all the contracts and agreements of its predecessor, and it was averred that the dissolving of the old Waters-Pierce Company and the forming of the new company, the defendant in this case, was in further pursuance of the conspiracy for the purpose of continuing the monopoly and control which had been acquired by the old company, and for the purpose of rendering ineffective the judgments of the state court and of this court (177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep.

518), wherein the right of the Waters-Pierce Company to do business in Texas was forfeited.

It was further averred that the new corporation was of the same name as the old one, with the same amount of stock, which was distributed to the holders of stock in the new corporation in the same proportion among the shareholders as it was in the old corporation. It is charged that a major part of the capital stock, although in fact owned by the Standard Oil Company of New Jersey, stood for a time in the name of H. C. Pierce, but was in fact owned by the Standard Oil Company. That the conduct of the business in the new corporation was not changed, and that it was controlled by the Standard Oil Company of New Jersey in the same manner as the old company had been; that the old contract, whereby there was a division of territory and the limitation of the operations of the Waters-Pierce Oil Company to the state of Texas and some other territory, was maintained and enforced. That other concerns had been acquired in the carrying out of the scheme charged; that said companies had been put out of business or were used in controlling and monopolizing the trade and business aforesaid; that the defendant, the new corporation, was a party to these arrangements, *participated in them, and[102 was engaged in carrying them out.

The things charged were alleged to have the effect to control the defendant and a large number of other companies by the same corporation and persons, with the acquiescence and consent of the defendant; that all competition in Texas between companies was destroyed; that certain sections and parts of the United States were assigned to the various companies; that the defendant was permitted to do business in Texas, and that, with its knowledge and consent, upon its instance and demands, all other companies had been excluded from doing business in the state of Texas; that, by the agreement, the defendant was obliged to secure all the oil sold by certain named refiners at prices determined by the Standard Oil Company and those interested in it, with the effect of monopolizing and controlling the business in oil and the production of petroleum in Texas by fixing the prices of such products in that state.

The plaintiff summarizes the unlawful results accomplished as follows:

"(1) The plaintiff in error is dominated and controlled by, and its business dictated by, the Standard Oil Company of New Jersey.

"(2) A large number of individuals and corporations doing business in the sale of petroleum products are excluded from do-

ing business in the state, and competition is lessened.

"(3) The price of oil had been maintained at an exorbitant figure, being from 10 to 25 per cent higher than that of oil sold in the territory not claimed by plaintiff in error.

"(4) Competition had been suppressed and business destroyed in the state by unconscionable and unfair means.

"(5) A substantially complete monopoly in petroleum products had been established, the plaintiff in error having sold, during the period of ten years past, at least 95 per cent of all petroleum products sold."

The defendant answered and filed a large number of special pleas and exceptions, taking issue upon the charges made in the 103]*petition, and alleging the unconstitutionality of the acts of 1899 and 1903, and alleging that, if the petition of the state of Texas be granted, it would be denied the equal protection of the laws, be subjected to *ex post facto* laws, deprived of its property without due process of law, and have the obligations of its contracts impaired, contrary to the provisions of the Constitution of the United States.

At the trial at the May term of the district court of Travis county a verdict was rendered in favor of the state, and penalties were assessed, and the judgment rendered, as herein before stated. In the court of civil appeals of the state of Texas that court found the facts to be as found by the verdict in the trial court, and, in concluding its opinion upon the question of fact, said:

"In appellant's motion for a new trial in the court below, and in its presentation of the case here, the verdict of the jury has been challenged, the contention being that the testimony fails to show that appellant has violated any of the anti-trust laws of this state. The evidence is very voluminous, and it is not necessary that it be set out or epitomized in this opinion. It is sufficient, we think, to show that from the date of its permit to do business in this state, May 31, 1900, appellant has been a party to an agreement or understanding with the Standard Oil Company of New Jersey, one object of which was to create a monopoly and control the price of petroleum oil and prevent competition in its sale in a large and specified territory, including the state of Texas; and that, to a large extent, such object has been accomplished. In so far as that agreement related to this state, appellant, acting by its agents, performed it within this state; and such performance within the limits of the state constitutes violations of Texas laws and renders appellant amenable to such laws, although the agreement between it and the Standard Oil Company may not have been
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made in this state. To a large extent the case rests upon circumstantial evidence; but we cannot say that the jury were not warranted in the conclusions drawn from it. Hence we hold that the verdict is supported *by testimony, and no error was[104 committed in overruling the motion for a new trial." [106 S. W. 930.]

The court left the case to the jury upon a charge which permitted them to find whether the defendant company, acting through its duly authorized agents, had entered into or had become a party to an agreement or understanding with the Standard Oil Company of New Jersey on June 1, 1900, to fix or regulate the price of oil in Texas, and whether the company remained or continued to be a party to such agreement, and carried out the same in Texas on dates subsequent to June 1, 1900, and prior to March 31, 1903, and whether the oil, in reference to which such agreement was made and carried out was the subject of local, as distinguished from interstate, commerce.

And the court further charged that if, within the time above stated, the defendant had brought about or permitted any combination or union of its capital with that of the Standard Oil Company of New Jersey, whereby the price of such oil in Texas was found to be controlled or limited, fixed or regulated, or whereby such price would be reasonably calculated to be fixed or regulated, or whereby the trade in such oil in Texas was sought to be controlled or limited, they might return a verdict for the state.

And the court charged that if they should find that the defendant, through its duly authorized agents, had entered into a combination of its capital with the capital of the Standard Oil Company of New Jersey for the purpose of creating in Texas, or which tended to create in Texas, or carry out in Texas, restrictions in the free pursuit of selling oil, or having the effect of increasing the price of such oil in Texas, or to prevent or lessen competition in selling the same in said state; and that the defendant remained or was a party to and acted under such combination, if such there was, on March 31, 1903, and thereafter prior to April 29, 1907, they might return a verdict of guilty.

The jury was further instructed that, if they found from the evidence that the direction of the affairs of the Standard Oil Company of New Jersey and those of the defendant company *were under the same[105 management or control after March 31, 1903, and prior to April 29, 1907, and that they were placed under such common management or control by their respectively au-

thorized officers, and if such management or control created or tended to create or to carry out restrictions in the sale of oil in Texas, as above stated, or to fix, maintain, or increase the prices of such oil in said state, or to prevent or lessen competition in the sale of such oil, they might return a verdict for the state. The jury found each of the issues submitted against the defendant. The court of civil appeals affirmed this finding of fact, and we must accept the same as established for the purposes of this proceeding in error.

Numerous exceptions were taken to the charge at the trial and are the subjects of assignments of error in the state court and in this court. We are concerned with such as relate to the Federal questions involved in this proceeding.

In the eleventh paragraph of the charge the court instructed the jury as follows:

"(11) If you find from a preponderance of the evidence that the Standard Oil Company of New Jersey had, on March 31, 1903, or on any date subsequent thereto and prior to April 29th, 1907, acquired a majority of the capital stock of the defendant corporation, and thereby effected a combination of said two corporations, and if you further find from a preponderance of the evidence that said stock was acquired and combination effected, if any, with the purpose and intention on the part of the managing officers and directors of said Standard Oil Company of New Jersey, of preventing or lessening the competition in the sale in Texas of the character and kind of oil above mentioned, or that the effect of said combination, if such there were, tended to affect or lessen the competition in the sale in Texas of said oil, you will return a verdict for the state, and say by your verdict: 'We, the jury, find for the state on the issues submitted for our consideration in paragraph eleven of the court's charge.' In this connection you are instructed that, if the defendant entered into a monopoly of the character mentioned in this paragraph 106]* of the charge, each day between March 30, 1903 and April 29th, 1907, that it remained a party to such monopoly, if there were any such days, constituted a separate violation of the anti-trust laws of Texas."

The judges of the court of civil appeals differed in their views as to the correctness of this charge, the learned justice who wrote the opinion holding the view that it was calculated to mislead the jury to the belief that they might convict upon this issue regardless of whether the defendant had any knowledge of, participated in, or aided the Standard Oil Company in acquiring the stock of the defendant for the purposes stated.

But the court agreed that, if wrong, this part of the charge afforded no ground for reversal, because the jury found that the appellant had violated other provisions of the act, and assessed but one penalty for each day's violation, and therefore the judgment would have been the same, and the error, if any, was harmless.

In thus deciding, the court of civil appeals did not determine a Federal question, nor necessarily decide one adversely to the plaintiff in error, controlling in character, if it appears upon this record that the verdict and judgment can stand upon other grounds free from objection, so far as Federal rights are concerned.

Much of the argument for plaintiff in error is predicated upon the contention that the acquiring of the stock of the Waters-Pierce Company by the Standard Oil Company and the making of the agreement charged were not shown to have been acts done in Texas. It is contended that such acquiring of stock, and agreement, if any, were acts beyond the jurisdiction of the state. But an inspection of the record discloses that the court charged that no agreement made by the defendant outside of the state of Texas could be made the basis of forfeiting its permit to do business in the state, unless such agreement was executed, or attempted to be executed, in the state, by the duly authorized agents of the defendant. And, in the findings which we have above quoted as to the evidence, the state court has *found that the defendant has[107 been, since May 31, 1900, a party to an agreement with the Standard Oil Company of New Jersey, to create a monopoly and to control prices and prevent competition in Texas, and that, to a large extent, the object has been accomplished. These findings of facts are conclusive upon us, and show that the conviction was had for acts and transactions committed and carried out within the state of Texas.

The argument to the effect that the rulings of the court as to the admission of testimony, and upon questions of general law, deprived the defendant of its property and rights without due process of law, requires us to notice the limitations upon the authority of this court when dealing with legislative acts and proceedings to enforce the same in the state courts. That state legislatures have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question. *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289. Having the pow-

er to pass laws of this character, of course the state may provide for proceedings to enforce the same. The state, keeping within constitutional limitations, may provide its own method of procedure and determine the methods and means by which such laws may be made effectual. "The limit of the full control which the state has in the proceedings of its courts, both in civil and criminal cases, is subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution." *West v. Louisiana*, 194 U. S. 258, 263, 48 L. ed. 965, 969, 24 Sup. Ct. Rep. 650; and see *Davis v. Texas*, 139 U. S. 651, 35 L. ed. 300, 11 Sup. Ct. Rep. 675; *Brown v. New Jersey*, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; *Allen v. Georgia*, 166 U. S. 138, 140, 41 L. ed. 949, 950, 17 Sup. Ct. Rep. 525; *Re Converse*, 137 U. S. 624, 632, 34 L. ed. 796, 799, 11 Sup. Ct. Rep. 191; and *Twining v. New Jersey*, 211 U. S. 78, ante, 97, 29 Sup. Ct. Rep. 14, decided at this term of court, where the subject is fully discussed; and previous cases in this court cited.

It is contended that the acts in this case were given a retroactive effect, in violation of the Federal Constitution. Art. 1, § 10. This argument is predicated largely upon the 108] contention *that the conviction in this case was because of the old agreement of the former Waters-Pierce Oil Company, made long before the passage of the present statute, at a time when it was legal, and before the creation of the defendant company. But, in view of the facts found in the state court, to which we have already referred, there was ground for conviction, not because of the making of the old agreement for the division of the territory and the suppression of competition while the old company was in existence, but because the new company was found to have carried out the old agreement and made itself a party thereto, and, by continuing the old arrangement after the passage of the law, had brought itself within its terms. Of a similar contention this court said in *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540:

"It is said that to grant the injunction prayed for in this case is to give the statute a retroactive effect; that the contract, at the time it was entered into, was not prohibited or declared illegal by the statute, as it had not then been passed; and to now enjoin the doing of an act which was legal at the time it was done would be improper. We give to the law no retroactive effect. The agreement in question is a continuing one. The parties to it adopt certain ma-

chinery, and agree to certain methods for the purpose of establishing and maintaining in the future reasonable rates for transportation. Assuming such action to have been legal at the time the agreement was first entered into, the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. The statute prohibits the continuing or entering into such an agreement for the future, and, if the agreement be continued, it then becomes a violation of the act."

It is further insisted that the acts in question are so vague, indefinite, and uncertain as to deprive them of their constitutionality, in that they punish by forfeiture of the right to do business, and the imposition of penalties, under provisions of an act which do not advise a citizen or corporation prosecuted under them, of the nature and character of the acts constituting *a[109 violation of the law. These objections are found in the words of the act of 1899, denouncing contracts and arrangements "reasonably calculated" to fix and regulate the price of commodities, etc. And, in the act of 1903, acts are prohibited which "tend to accomplish the prohibited results. It is insisted that these laws are so indefinite that no one can tell what acts are embraced within their provisions. In support of this contention it is argued that laws of this nature ought to be so explicit that all persons subject to their penalties may know what they can do, and what it is their duty to avoid. And reference is made to decisions which have held that criminal statutes should be so definite as to enable those included in its terms to know in advance whether an act is criminal or not. Among others, *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 917, is cited, in which the opinion was by Mr. Justice Brewer, then judge of the circuit court, in which it was held that the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. To the same effect is *Chicago & N. W. R. Co. v. Dey*, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866, also decided by Judge Brewer at circuit. And also the case of *Louisville & N. R. Co. v. Com.* 99 Ky. 132, 33 L.R.A. 209, 59 Am. St. Rep. 457, 35 S. W. 129, is relied upon, in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for, under such an act, it rests with the jury to say whether a rate is reasonable, and makes guilt depend not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy. But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal

character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited.

Take the act of 1903, which denounces acts which "tend" to bring about the prohibited results. It is not uncommon in criminal law to punish not only a completed act, but also acts which attempt to bring about the prohibited result. In *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249, this court said: "Again, 110]all the authorities *agree that, in order to vitiate a contract or combination, it is not essential that its result should be a complete monopoly; it is sufficient if it really tends to that end, and to deprive the public of the advantages which flow from free competition." This language was quoted with approval in *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 237, 44 L. ed. 146, 20 Sup. Ct. Rep. 96. And in *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436, while the Sherman act directly condemned conspiracies and combinations in restraint of trade or monopolizing or attempting to monopolize the same, this court said (page 332):

"That to vitiate a combination such as the act of Congress condemns it need not be shown that the combination in fact results, or will result, in a total suppression of trade, or in a complete monopoly, but it is only essential to show that, by its necessary operation, it tends to restrain interstate or international trade or commerce, or tends to create a monopoly in such trade or commerce, and to deprive the public of the advantages that flow from free competition."

As to the phrase, "reasonably calculated," what does it include less than acts which, when fairly considered, tend to accomplish the prohibited thing, or which make it highly probable that the given result will be accomplished? Again, speaking of the Sherman act, this court said in *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276.

"The statute gives this proceeding against combinations in restraint of commerce among the states and against attempts to monopolize the same. Intent is almost essential to such a combination and is essential to such an attempt. Where acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability

that it will happen. *Com. v. Peaslee*, 177 Mass. 267, 272, 59 N. E. 55. But, when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law *in some[111] cases, directs itself against that dangerous probability as well as against the completed result."

It is true that the decisions quoted are in civil cases involving contracts and arrangements held invalid when attacked in proceedings in equity, and did not involve penalties such as were imposed in the case now under consideration.

And it is to be remembered that we are dealing with an act of the legislature, sustained in courts of the state, with reference to its validity in view of the prohibitions of the Federal Constitution against deprivation by state action of liberty or property without due process of law. In this case the defendant has had a trial in a court of justice duly established under the laws of the state; the question of its liability has been submitted to a jury. The judgment has been reviewed in an appellate court, and the correctness of the findings of fact and rulings of law in the lower court affirmed. We are not prepared to say that there was a deprivation of due process of law because the statute permitted, and the court charged, that there might be a conviction not only for acts which accomplished the prohibited result, but also for those which tend or are reasonably calculated to bring about the things forbidden.

Again, it is contended that the fines imposed are so excessive as to constitute a taking of the defendant's property without due process of law. It is not contended in this connection that the prohibition of the 8th Amendment to the Federal Constitution against excessive fines operates to control the legislation of the states. The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state. We can only interfere with such legislation and judicial action of the states enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law. *Coffey v. Harlan County*, 204 U. S. 659, 51 L. ed. 666, 27 Sup. Ct. Rep. 305.

The business carried on by the defendant corporation in Texas was very extensive and highly profitable, as the record discloses. The property of the defendant amounted to more *than forty millions of dollars, as tes-[112]tified by its president. Its dividends had been as high as 700 per cent per annum. It was the theory of the state, sustained by the verdict and judgment, that the former course of business was continued, notwith-

standing the judgment of ouster in the former case. Within the bounds of the statute the penalties were left to the discretion of the jury trying the case. While the penalties imposed are large, they are within the terms of the statute. Under the act of 1899 the jury imposed a penalty at the rate of \$1,500 a day; under the act of 1903 at the rate of \$50 per day. Assuming for this purpose that the defendant was guilty of a violation of the laws over a period of years, and in transacting business upon so large a scale, as shown in this case, we are not prepared to say, after confirmation of the verdict and judgment in courts of the state, that there was want of due process of law in the penalties assessed.

Remembering, as we have had frequent occasion to say, that our province in this case is limited to an examination of objections arising under the Federal Constitution, we are unable to find in this record any ground for reversing the judgment of the state court.

Affirmed.

WATERS-PIERCE OIL COMPANY, Plff.
in Err.,
v.

STATE OF TEXAS.

(See S. C. Reporter's ed. 112-118.)

Error to state court — questions reviewable.

1. The assignment of errors in the Federal Supreme Court cannot raise a Federal question reviewable on writ of error to a state court, but such review is confined to the assignments of error made and passed upon in the judgment brought up for review.

[For other cases, see Appeal and Error, 1311-1318, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — decision on non-Federal ground.

2. The Federal Supreme Court will not review a judgment of a state court where the latter has decided the case upon an independent ground not within the Federal objections taken, and that ground is sufficient to maintain the judgment.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

NOTE.—On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Doekery*, 63 L.R.A. 571.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On what adjudications of state courts can be brought up for review in the Supreme Court—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

Error to state court — Federal question.

3. The contention that a state court, in appointing a receiver of a foreign corporation convicted of violating state anti-trust laws, upon the testimony already heard and the conviction already had, deprived the corporation of rights under U. S. Const., 14th Amend., does not present a substantial Federal question which will sustain a writ of error from the Federal Supreme Court to the state court.

[For other cases, see Appeal and Error, 1123-1132, in Digest Sup. Ct. 1908.]

Error to state court — Federal question.

4. The time or manner in which a state court sees fit to approve the bond of a receiver of the property of a corporation convicted of violating the state anti-trust laws presents no substantial Federal question under U. S. Const., 14th Amend., which will sustain a writ of error from the Federal Supreme Court to the state court.

[For other cases, see Appeal and Error, 1123-1132, in Digest Sup. Ct. 1908.]

Error to state court — Federal question — when raised in time.

5. An attempt to assign new errors in a petition for rehearing in a state court which is overruled without an opinion passing on Federal questions cannot avail to import such questions into the record, so as to sustain a writ of error from the Federal Supreme Court to the state court.

[For other cases, see Appeal and Error, 1292-1310, in Digest Sup. Ct. 1908.]

[No. 360.]

Argued October 30, November 2, 3, 1908.
Decided January 18, 1909.

IN ERROR to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a judgment which affirmed an order of the District Court of Travis County, in that state, appointing a receiver of the property and business of a foreign corporation convicted of violating the state anti-trust laws. Dismissed for want of jurisdiction.

See same case below (Tex. Civ. App.) 105 S. W. 851.

The facts are stated in the opinion.

Mr. Moorfield Storey argued the cause, and, with Mr. J. L. Thorndike, filed a brief for plaintiff in error.

preme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On the necessity of color of merit in Federal question to sustain writ of error to state court—see note to *Offield v. New York, N. H. & H. R. Co.* 51 L. ed. U. S. 231.

As to when the Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to *Chicago, I. & L. R. Co. v. McGuire*, 49 L. ed. U. S. 414.

Mr. H. S. Priest also argued the cause and filed a brief for plaintiff in error.

Mr. E. B. Perkins also argued the cause, and, with **Mr. J. D. Johnson**, filed a brief for plaintiff in error.

For their contentions see their briefs as reported in *Waters-Pierce Oil Co. v. Texas*, ante, 417.

Messrs. **G. W. Allen**, **R. L. Batts**, and **Robert Vance Davidson** argued the cause, and, with Messrs. **Jewel P. Lightfoot**, **John W. Brady**, **T. W. Gregory**, and **Allen & Hart**, filed a brief for defendant in error:

There being no substantial Federal question involved in this suit, this court is without jurisdiction to pass upon the merits of the controversy.

St. Louis, G. & Ft. S. R. Co. v. Missouri, 156 U. S. 478, 39 L. ed. 502, 15 Sup. Ct. Rep. 443; *Armstrong v. Athens County*, 16 Pet. 281, 10 L. ed. 965; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79, 35 L. ed. 943, 12 Sup. Ct. Rep. 142; *Terrett v. Taylor*, 9 Cranch, 43, 3 L. ed. 650; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Hammond v. Johnston*, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141; *Crowell v. Randell*, 10 Pet. 368, 9 L. ed. 458; *M'Kinney v. Carroll*, 12 Pet. 66, 9 L. ed. 1002; *Commercial Bank v. Buckingham*, 5 How. 317, 12 L. ed. 169; *Detroit City R. Co. v. Guthard*, 114 U. S. 133, 29 L. ed. 118, 5 Sup. Ct. Rep. 811.

The alleged Federal question not having been called to the attention of the trial court or the appellate court until after final judgment was rendered in the latter court, this court has no jurisdiction over this controversy.

Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; *Lawler v. Walker*, 14 How. 149, 14 L. ed. 364; *Chapin v. Fye*, 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Clarke v. McDade*, 165 U. S. 163, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Texas & P. R. Co. v. Southern P. Co.* 137 U. S. 48, 34 L. ed. 614, 11 Sup. Ct. Rep. 10; *Endowment Benev. Asso. v. Kansas*, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; *Weber v. Rogan*, 188 U. S. 10, 47 L. ed. 363, 23 Sup. Ct. Rep. 263; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Chicago, I. & L. R. Co. v. McGuire*, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; *Missouri, K. & T. R. Co. v.*

Ferris, 179 U. S. 602, 45 L. ed. 337, 21 Sup. Ct. Rep. 231; *Allen v. Southern P. R. Co.* 173 U. S. 479, 43 L. ed. 775, 19 Sup. Ct. Rep. 518; *Hammond v. Johnston*, supra; *Kennard v. Louisiana*, 92 U. S. 480, 23 L. ed. 478; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Simmerman v. Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; *Coons v. Gallaher*, 15 Pet. 18, 10 L. ed. 645; *Occan Ins. Co. v. Polleys*, 13 Pet. 157, 10 L. ed. 105; *Mills v. Brown*, 16 Pet. 525, 10 L. ed. 1055; *Moore v. Mississippi*, 21 Wall. 638, 22 L. ed. 653; *Poydras de la Lande v. Louisiana*, 18 How. 192, 15 L. ed. 350.

The action taken and proceedings had in the state courts constituted due process of law.

Remington Paper Co. v. Watson, 173 U. S. 443, 43 L. ed. 762, 19 Sup. Ct. Rep. 456; *New Orleans Waterworks Co. v. Louisiana and St. Louis, G. & Ft. S. R. Co. v. Missouri*, supra; *Iowa C. R. Co. v. Iowa*, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; *New Orleans Debenture Redemption Co. v. Louisiana*, 180 U. S. 320, 45 L. ed. 550, 21 Sup. Ct. Rep. 378; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* supra; *Rothschild v. Knight*, 184 U. S. 334, 46 L. ed. 573, 22 Sup. Ct. Rep. 391; *Simon v. Craft*, supra; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178; *Cosmopolitan Club v. Virginia*, 208 U. S. 378, 52 L. ed. 536, 28 Sup. Ct. Rep. 394.

The act of April 11, 1907, is not repugnant to any provision of the Constitution of the United States, in that it undertakes to create a lien in favor of the state upon property of corporations that violate the anti-trust laws of Texas by acts committed prior to the passage thereof.

Bangor v. Goding, 35 Me. 73, 56 Am. Dec. 688; *Bolton v. Johns*, 5 Pa. 145, 47 Am. Dec. 404; *Gordon v. South Fork Canal Co.* 1 McAll. 513, Fed. Cas. No. 5,621; *O'Neil v. St. Olaf's School*, 26 Minn. 329, 4 N. W. 47; *Colpetzer v. Trinity Church*, 24 Neb. 113, 37 N. W. 931; *Kellogg v. Howes*, 81 Cal. 170, 6 L.R.A. 588, 22 Pac. 509; *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 641, 22 Pac. 860; *Gurney v. Walsham*, 16 R. I. 698, 19 Atl. 323; *Livingston v. Moore*, 7 Pet. 546, 552, 8 L. ed. 779, 781; *Louisiana v. New Orleans*, 102 U. S. 207, 26 L. ed. 133.

Mr. Justice Day delivered the opinion of the court:

This case was argued and submitted with *Waters-Pierce Oil Company*, plaintiff in error, against the state of Texas, just decided, No. 359. [212 U. S. 86, ante, 417, 29 Sup. Ct.

Rep. 220.] It is brought here to review the action of the court of civil appeals of Texas, affirming an order of the district court of Travis county, appointing a receiver to take charge of the property and business of the Waters-Pierce Oil Company. In view of the statement made in No. 359 it is unnecessary to repeat the facts leading up to the judgment in this case. On the same day that the judgment was rendered in the former case the state of Texas, acting through its attorney general and the county attorney of Travis county, filed in the district court of Travis county an application for the appointment *of a receiver, reciting the judgment rendered in the earlier case, averring that a suit was pending in Missouri for the forfeiture of the charter of the Waters-Pierce Oil Company; that a master had been appointed in that case by the supreme court of the state wherein the action was pending; that he had reported in favor of dissolving the corporation, which recommendation had the force and effect of a judgment forfeiting the charter of said company, and it was alleged that the penalties recovered in that case could not be collected outside of the state of Texas; that the property of the defendant within the state of Texas was inadequate to pay the judgment; that the great bulk of the property situated in the state, subject to the payment of the judgment, consisted of accounts, cars, money on hand, and other property, easily movable, and that, if the same was carried beyond the limits of the state, the judgment could not be collected. It was averred that, under and by virtue of an act of the state of Texas, passed April 11, 1907, the state has a lien upon all said property to secure the payment of the above-mentioned judgment.

A receiver was asked for to take charge of the property and assets of every kind belonging to the defendant and situated in the state of Texas. And the state also asked for a writ of injunction, prohibiting the removal from the state of Texas of any of the property of the defendant. On the same day the court granted the temporary injunction as prayed for, and set the application for a receiver for hearing on June 8, 1907.

On the 7th of June, the defendant's motion for a new trial in the principal case having been overruled, the defendant gave notice of appeal to the court of civil appeals of Texas, and tendered a supersedeas bond in the sum of \$3,275,000, which bond was not accepted. On June 10, 1907, the court reached the conclusion that a receiver should be appointed, and continued the temporary injunction in force, from which action the defendant gave notice of its intention to appeal to the civil court of appeals. At the time of the making of this order the

judge of the court announced his determination to appoint *Robert J. Eckhardt receiver, and postponed the hearing until June 13, 1907, to hear objections to the appointment, and on that date the court made its order appointing Eckhardt receiver fixing the bond in the sum of \$250,000. On June 19, 1907, Eckhardt filed his bond, which was approved, and he qualified as receiver, and, after the appointment of a receiver and the approval of his bond, as aforesaid, a supersedeas bond in the sum of \$100,000, for appeal from the order appointing a receiver, was approved. On June 15, 1907, the motion for new trial being overruled in the main case, the Waters-Pierce Oil Company appealed and gave a bond, which was approved by the clerk.

On the appeal of the present case, involving the receivership, to the civil court of appeals of Texas, an application was made for an injunction restraining a receiver who had been appointed by the circuit court of the United States for the eastern district of Texas, upon which application the court declined to make any order interfering with the Federal receiver, but ordered its receiver to appear in conjunction with the attorneys of the state of Texas in the circuit court of the United States, and there urge and insist upon the right of the state courts to prior jurisdiction. 103 S. W. 836.

The right to the Federal receivership is involved in No. 224 of this term [212 U. S. 118, post, 435, 29 Sup. Ct. Rep. 230], heretofore argued and submitted to this court.

On October 23, 1907, the appeal of the Waters-Pierce Oil Company from the order appointing a receiver came on for hearing in the court of civil appeals. The judgment of the district court was affirmed. 105 S. W. 851. Subsequently the supreme court of Texas refused a writ of error to that judgment. The present proceeding in this court seeks a reversal of the judgment of the court of civil appeals of Texas, affirming the order in the district court, appointing the receiver.

It is well settled in this court that a review of the judgment of a state court is confined to the assignments of error made and passed upon in the judgment of the state court brought here for review. The assignment of errors in this court cannot bring into *the record any new matter[116 for our consideration. *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394, 25 Sup. Ct. Rep. 176.

Looking to the assignments of error in the court of civil appeals, we find that the first one to mention the Federal Constitution is No. 9, in which the constitutionality of the act of the state of Texas, approved April 11, 1907, is challenged, and that act

is alleged to be void because in violation of § 10 of article 2 of the Constitution of the United States, which denies to any state the right to pass *ex post facto* laws.

The tenth assignment assails the same act, because in violation of § 1 of the 14th Amendment of the Federal Constitution. Assignment 12 is likewise based upon objections to the act of April 11, 1907. The amended assignments of error contain additional assignments; numbers 15 and 16, likewise, are also leveled at the act of April 11, 1907.

The act of April 11, 1907, undertakes, in § 1 thereof, to give a lien upon the property of any corporation within the state, or on any corporation created by the laws of the state, or any foreign corporation authorized to do business within the state, which shall violate the anti-trust laws of the state, for fines and penalties, with costs of suit recovered in such cases, and gives the like lien for the recovery of such fines and penalties where any such law had been theretofore violated, or should be violated before the taking effect of the act, and provides for the appointment of a receiver in such cases.

When we examine the opinion of the court of civil appeals we find that it sustained the proceeding for the appointment of a receiver, not only under the act of April 11, 1907, but, as well, by virtue of subdivision 3 of article 1465 of Sayles's Civil Statutes for Texas, passed originally in 1887, which subdivision provides that a receiver may be appointed where a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights.

It is well settled in this court that where a state court decides a case upon an independent ground not within the Federal objections taken, and that ground is sufficient [117] to maintain the *judgment, this court will not review the case. *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Giles v. Teasley*, 193 U. S. 146, 48 L. ed. 655, 24 Sup. Ct. Rep. 359.

The only other assignments of error which mention the Federal Constitution are numbers 13 and 14, which are as follows:

"13. The court erred in appointing the said receiver without any evidence being introduced before it, at the time said appointment was made, to show that defendant did not intend to change its status and methods of doing business so as to conform to the laws of the state of Texas, and without evidence affirmatively showing that defendant could not make use of its property and carry on its business in accordance with

law, and in holding that the court was authorized to so appoint a receiver for defendant's property in the state of Texas, and deprive defendant of the instrumentalities by which it had been convicted of violating the laws of said state, based upon its past conduct and the said judgment of conviction rendered against it on June 1, 1907.

"Wherefore, defendant says that the said action of the court was unauthorized and in violation of § 1 of the 14th Amendment to the Constitution of the United States, and has the effect of depriving defendant of its property without due process of law and in denying to it the equal protection of the laws.

"14. The court erred in disregarding the supersedeas bond filed by the defendant in connection with its appeal from the main judgment recovered against it on June 1, 1907, and in requiring defendant to file the additional bond in the sum of \$100,000 to supersede the order appointing the said receiver and to avoid having to surrender its property to said receiver by reason of said appointment, and this action on the part of the court was without lawful warrant and in violation of § 1 of the 14th Amendment to the Constitution of the United States, in that the effect of such action by the court was to deprive the defendant of its property without due *process of law and to deny to it the [118 equal protection of the law."

We are of opinion that neither of these assignments presents substantial questions of a Federal character. The practice of the state courts in acting upon matters within their jurisdiction is left for the states and their courts administering their laws to determine, and, if the court saw fit to act upon the testimony already heard and the conviction already had of the violation of the anti-trust laws of the state, there is nothing in the Federal Constitution which prevents it from so doing. Nor does the time or manner in which the state court saw fit to approve the receiver's bond present any question under the 14th Amendment. See the cases cited in No. 359, 212 U. S. 86, ante, 417, 29 Sup. Ct. Rep. 220. The attempt to assign new errors in the petition for rehearing, which was overruled without an opinion passing on Federal questions, cannot avail. *McCorquodale v. Texas* [211 U. S. 432, ante, 269, 29 Sup. Ct. Rep. 146], decided at this term of this court, and previous cases therein cited. We are therefore of the opinion that no substantial Federal question is presented in this case, and the writ of error must be dismissed.

The writ of error is dismissed.

BRADLEY W. PALMER and H. Clay
Pierce, Petitioners,
v.

STATE OF TEXAS and Robert J. Eck-
hardt, Receiver of the Waters-Pierce Oil
Company.

(See S. C. Reporter's ed. 118-132.)

**Courts — conflict of jurisdiction — cus-
tody of the res.**

1. Jurisdiction of a state court of the property of a foreign corporation attaches so as to prevent interference on the part of a Federal court when a receiver of the property of such corporation has been appointed, the judicial process served, and the receiver duly qualified, although such receiver has not taken actual possession of the property. [For other cases, see Courts, VI. g, in Digest Sup. Ct. 1908.]

**Courts — conflict of jurisdiction — cus-
tody of the res.**

2. The jurisdiction of a state court over the res, acquired by the appointment and qualification of a receiver of the property of a foreign corporation, is not lost, so as to permit interference on the part of a Federal court, because of an appeal with supersedeas from the order appointing the receiver, where the state courts hold that the effect of the appeal and supersedeas bond is merely to suspend the order appointing the receiver pending the determination of the appeal.

[For other cases, see Courts, VI. g, in Digest Sup. Ct. 1908.]

**Courts — conflict of jurisdiction — re-
ceivership.**

3. The possible danger of prosecutions and interference pending an appeal with supersedeas from an order of a state court appointing a receiver of the property of a foreign corporation whose permit to do business in the state has been forfeited for violating the state anti-trust laws will not justify a Federal court in interfering with the state court's custody of the res, acquired by the appointment and qualification of the receiver.

[For other cases, see Courts, VI. g, in Digest Sup. Ct. 1908.]

**Receivers — for foreign corporation —
interference with interstate business.**

4. The appointment by a state court of a receiver of the property of a foreign corporation whose permit to do business in the state has been adjudged forfeited for violation of the state anti-trust laws is not invalid because the judgment of forfeiture

expressly permits the corporation to continue its interstate business, where the state court rested its order appointing the receiver not solely upon Texas act of April 11, 1907, making special provisions for carrying out judgments under the anti-trust laws, but also upon a statute in force before the permit to do business within the state was granted, empowering the courts to appoint a receiver of the property of a corporation which is insolvent or has forfeited its corporate rights.

[Appointment of receiver for corporation, see Receivers, 9-14, in Digest Sup. Ct. 1908.]

Receivers — costs — who liable.

5. Costs of the receivership should not be assessed against the complainant on reversing the order appointing the receiver, where the receivership has gone on pending the appeal, but such costs should be paid out of the fund realized in court.

[For other cases, see Costs, I. d, in Digest Sup. Ct. 1908.]

[No. 224.]

Argued April 8, 9, 1908. Decided January 18, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which reversed an order of the Circuit Court for the Eastern District of Texas, appointing a receiver of the property of a foreign corporation, and remanded the cause with directions to discharge the receiver and to tax the costs of the receivership against the complainant. Modified by directing the costs to be paid out of the fund realized in court, and, as modified, affirmed.

See same case below, 85 C. C. A. 603, 158 Fed. 705.

The facts are stated in the opinion.

Mr. Moorfield Storey argued the cause, and, with Mr. J. L. Thorndike, filed a brief for petitioners:

The United States court of appeals was wrong in treating the property as in any way affected by the order appointing Eckhardt receiver, while that order was suspended by the appeal.

Shields v. Coleman, 157 U. S. 169, 39 L. ed. 660, 15 Sup. Ct. Rep. 570; People's Cemetery Asso. v. Oakland Cemetery Co. 24 Tex. Civ. App. 668, 60 S. W. 679; Tornanses v. Melsing, 45 C. C. A. 615, 106 Fed. 788; Arnold v. Sabin, 4 Cush. 46.

A supersedeas "stops all sorts of proceedings."

Smith v. Nicholson, 2 Strange, 1186; Sampson v. Brown, 2 East, 439.

Possession of the officer of one court, whether he be a receiver, sheriff, marshal, or sequestrator, is the ground upon which the authority of other courts or any of their officers to meddle with possession of the same property has been excluded. There is no magic about a receiver, and the same

NOTE. — As to the time from which an order appointing a receiver becomes operative—see note to Squire v. Princeton Lighting Co. 15 L.R.A. (N.S.) 657.

As to jurisdiction as affected by possession of the subject-matter—see notes to Adams v. Mercantile Trust Co. 15 C. C. A. 6; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 356; and Tefft v. Sternberg, 5 L.R.A. 223.

On the exclusiveness of jurisdiction acquired by appointment of receiver—see note to Re Schuyler's Steam Tow-Boat Co. 20 L.R.A. 391.

rule is applied to him as to a sheriff or a marshal, and for the same reasons. This appears by all the cases.

Hagan v. Lucas, 10 Pet. 400, 9 L. ed. 470 (sheriff); *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028 (sheriff); *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749 (marshal); *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355 (marshal); *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570 (receiver); *Payne v. Drewe*, 4 East, 545 (sequestrator).

The court of appeals was wrong in directing that the costs of the receivership be taxed against the complainant.

Atlantic Trust Co. v. Chapman, 208 U. S. 360, 52 L. ed. 528, 28 Sup. Ct. Rep. 406.

Mr. E. B. Perkins also argued the cause, and, with Mr. J. D. Johnson, filed a brief for petitioners:

The property was not in the possession, actual or constructive, of the receiver.

Waters-Pierce Oil Co. v. State (Tex.) 106 S. W. 326.

It was manifest error for the United States circuit court of appeals to hold that the property of the Waters-Pierce Oil Company ever passed to the receiver appointed by the state court, or remained within the jurisdiction and control of that court after the supersedeas bonds were given.

People's Cemetery Asso. v. Oakland Cemetery Co. 24 Tex. Civ. App. 668, 60 S. W. 679; *Gruner v. Westin*, 66 Tex. 214, 18 S. W. 512; *Smithwick v. Kelly*, 79 Tex. 576, 15 S. W. 486.

Where a court appoints a receiver in aid of the enforcement of a judgment, and an appeal is taken and supersedeas bond given before the receiver takes possession of the property, thereby permitting the defendant to continue in the possession of the property, the possession of such defendant is not substituted for the custody of the receiver.

Shields v. Coleman, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570.

The decisions of this court in discussing the amount of supersedeas appeal bonds show conclusively that an appeal bond is not taken in lieu of the property in controversy.

Providence Rubber Co. v. Goodyear, 6 Wall. 153, 18 L. ed. 762; *Omaha Hotel Co. v. Kountze*, 107 U. S. 378, 27 L. ed. 609, 2 Sup. Ct. Rep. 911.

The original bill of complaint showed a statement of facts which called for the appointment of a receiver for the purpose of promoting the ends of justice and protecting the rights of all the parties interested in the subject-matter, and showed that there was no other adequate remedy for the ac-

complishment of the desired objects of the proceedings.

Boatmen's Bank v. Fritzlen, 68 C. C. A. 288, 135 Fed. 666.

Messrs. T. W. Gregory, G. W. Allen, and Robert Vance Davidson argued the cause, and, with Messrs. Jewel P. Lightfoot, John W. Brady, Gregory & Batts, Allen & Hart, and D. W. & D. H. Doom, filed a brief for respondents:

The state court acquired jurisdiction over the property in question before the complaint was filed in the Federal court.

Farmers' Loan & T. Co. v. Lake Street Elev. R. Co. 177 U. S. 51, 44 L. ed. 667, 20 Sup. Ct. Rep. 564; *Chittenden v. Brewster*, 2 Wall. 191, 17 L. ed. 839; *Gaylord v. Ft. Wayne, M. & C. R. Co.* 6 Biss. 286, Fed. Cas. No. 5,284; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Biss. 198, Fed. Cas. No. 14,401; *Illinois Steel Co. v. Putnam*, 15 C. C. A. 556, 30 U. S. App. 358, 68 Fed. 515; *Adams v. Mercantile Trust Co.* 15 C. C. A. 1, 30 U. S. App. 204, 66 Fed. 617; *Sharon v. Terry*, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 355; *Riesner v. Gulf, C. & S. F. R. Co.* 89 Tex. 656, 33 L.R.A. 171, 59 Am. St. Rep. 84, 36 S. W. 53; *Texas Trunk R. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776; 16 S. W. 647; *May v. Printup*, 59 Ga. 128; *Waters-Pierce Oil Co. v. State (Tex. Civ. App.)* 103 S. W. 836.

The jurisdiction of the state courts having attached, it became exclusive; and their right to prosecute the suit to final determination and exhaust their jurisdiction could not be arrested, defeated, impaired, or interfered with by a Federal tribunal.

Wabash R. Co. v. Adelbert College, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 183; *Covell v. Heyman*, 111 U. S. 176, 28 L. ed. 390, 4 Sup. Ct. Rep. 355; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Taylor v. Taintor*, 16 Wall. 370, 21 L. ed. 290; *Heidritter v. Elizabeth Oil-Cloth Co.* 112 U. S. 294, 28 L. ed. 729, 5 Sup. Ct. Rep. 135; *People's Bank v. Calhoun (People's Bank v. Winslow)* 102 U. S. 256, 26 L. ed. 101; *Taylor v. Carryl*, 20 How. 583, 15 L. ed. 1028; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Buck v. Colbath*, 3 Wall. 334, 18 L. ed. 257; *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 51, 44 L. ed. 671, 20 Sup. Ct. Rep. 564; *Sharon v. Terry*, 1 L.R.A. 572, 13 Sawy. 387, 36 Fed. 355; *Mutual Reserve Fund Life Asso. v. Phelps*, 190 U. S. 147, 47 L. ed. 987, 23 Sup. Ct. Rep. 707; *Riesner v. Gulf, C. & S. F. R. Co.* 89 Tex. 660, 33 L.R.A. 171, 59 Am. St. Rep. 84, 36 S. W. 53; *Union Trust Co. v. Rockford, R. I. & St. L. R. Co.* 6 Biss. 197, Fed. Cas. No. 14,401; *Waters-Pierce Oil Co. v. State*, supra; *Wait, Insolvent Corp.* § 261; *High, Receivers*, 212 U. S.

§ 52; *State ex rel. Sullivan v. Reynolds*, 209 Mo. 161, 15 L.R.A. (N.S.) 963, 123 Am. St. Rep. 468, 107 S. W. 487.

The giving of the supersedeas bond appealing from the order of the state court appointing its receiver still left the property in the custody of the state courts, though the right of the receiver to the possession thereof was suspended, and the right of the oil company to such possession was, for the time being, restored.

Waters-Pierce Oil Co. v. State, supra; *San Antonio Street R. Co. v. State* (Tex. Civ. App.) 38 S. W. 54; *Hagan v. Lucas*, 10 Pet. 400, 9 L. ed. 470; *Gulf, C. & S. F. R. Co. v. Ft. Worth & N. O. R. Co.* 68 Tex. 103, 2 S. W. 199, 3 S. W. 564; *Churchill v. Martin*, 65 Tex. 368; *Wells v. Littlefield*, 62 Tex. 30; *Deming v. New York Marble Co.* 12 Abb. Pr. 66; *Fowler v. Stonum*, 6 Tex. 72; *O'Brien v. Hilburn*, 22 Tex. 622; *Fleming v. Clark*, 22 Mo. App. 222; *Caldwell v. Gans*, 1 Mont. 578; *Coos Bay R. Co. v. Wieder*, 26 Or. 457, 38 Pac. 338; *Selleck v. Phelps*, 11 Wis. 388; *Pipher v. Fordyce*, 88 Ind. 437; *Bain v. Lyle*, 68 Pa. 66; *Slutter v. Kirkendall*, 100 Pa. 313.

The decision of the court of civil appeals of the third supreme judicial district of the state of Texas, holding that the giving of the supersedeas bond appealing from the order of the state court appointing its receiver left the property in the custody of the state court, is binding on the Federal court.

Waters-Pierce Oil Co. v. State, supra; *Wade v. Travis County*, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *United States v. Morrison*, 4 Pet. 124, 7 L. ed. 804; *Green v. Neal*, 6 Pet. 291, 8 L. ed. 402; *Leffingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Fairfield v. Gallatin County*, 100 U. S. 47, 25 L. ed. 544; *Andrews v. National Foundry & Pipe Works*, 36 L.R.A. 150, 22 C. C. A. 110, 46 U. S. App. 281, 76 Fed. 166; *Sandford v. Poe*, 60 L.R.A. 641, 16 C. C. A. 305, 37 U. S. App. 378, 69 Fed. 546; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. ed. 316, 13 Sup. Ct. Rep. 466; *Moore v. Citizens' Nat. Bank*, 104 U. S. 625, 26 L. ed. 870; *Stutsman County v. Wallace*, 142 U. S. 293, 35 L. ed. 1018, 12 Sup. Ct. Rep. 227; *Suydam v. Williamson*, 24 How. 427, 16 L. ed. 742; *Waters-Pierce Oil Co. v. State* (Tex.) 106 S. W. 326.

The complainant in the bill filed in the Federal court could have secured from the state courts which had acquired jurisdiction over the property all the relief he was entitled to, or that could have legally been granted by the Federal court, and he should have resorted to those tribunals.

Morgan's L. & T. R. & S. S. Co. v. Texas C. R. Co. 137 U. S. 171, 34 L. ed. 625, 11 Sup. Ct. Rep. 61; *Farmers' Loan & T. Co.* 53 L. ed.

v. Lake Street Elev. R. Co. and Wabash R. Co. v. Adelbert College, supra; *East Line & R. River R. Co. v. State*, 75 Tex. 451, 12 S. W. 690.

Mr. Justice Day delivered the opinion of the court:

This case grows out of the proceedings in the state of Texas to forfeit the permit of the *Waters-Pierce Oil Company* to do business in that state, and the subsequent proceedings for the appointment of a receiver of the property of the company in the state court, just decided, cases Nos. 359 and 360, 212 U. S. 86, 112, ante, 417, 431, 29 Sup. Ct. Rep. 220, 227. It is unnecessary, in view of the recital of the facts contained in those cases, to repeat herein what is there said in this connection.

On the 19th day of June, 1907, after the appointment of a receiver in the state case and the acceptance and approval of his bond, an appeal was taken from the district court of Travis county to the court of civil appeals of Texas, and bond given to supersede the receivership. Immediately thereafter, and upon the same day, a bill was filed by Bradley W. Palmer, one of the petitioners herein, against the *Waters-Pierce Oil Company*, in the circuit court of the United States for the eastern district of Texas, praying for the appointment of a receiver for the *Waters-Pierce Company*. Palmer filed the bill as a stockholder in the company. The bill is quite lengthy and recited the proceedings in the district court of Travis county, Texas, stated in cases Nos. 359 and 360, 212 U. S. 86, 112, ante, 417, 431, 29 Sup. Ct. Rep. 220, 227, recites the appeal from the order appointing a receiver, to the court of civil appeals, also the appeal from the judgment terminating the right to do business in Texas, and for the recovery of penalties.

The prayer of the bill is for the appointment of a receiver to take possession of the property belonging to the company in Texas, that the business of the company might be wound up, *and its property [124 sold, that the receiver be authorized to operate and manage the property, etc.

On the same day the *Waters-Pierce Oil Company* waived the service of subpoena, confessed the averments of the bill, and the circuit court appointed Chester B. Dorchester receiver.

On the same day H. C. Pierce intervened, and, repeating the allegations of the original bill, prayed the same relief. On June 20, 1907, Dorchester qualified and gave bond as receiver, and was put in possession of the property.

The cases involved in Nos. 359 and 360, 212 U. S. 86, 112, ante, 417, 431, 29 Sup. Ct.

Rep. 220, 227, having been appealed to the court of civil appeals, Robert J. Eckhardt, the state receiver appointed in the district court of Travis county, applied in the court of civil appeals for an order to obtain possession of the property which had been placed in the hands of the Federal receiver.

The court of civil appeals on June 28, 1907, handed down an opinion (103 S. W. 836) in which it declined to make an order directing the receiver in the Federal court to surrender possession, but did direct its receiver, in conjunction with the law officers of the state of Texas, to appear before the circuit court of the United States for the eastern district of Texas, and to there urge the rights of the state and the prior jurisdiction of its courts over the property in question, and to ask for such orders, decrees, and judgments as might be proper and necessary to protect that jurisdiction.

Thereafter, on July 1, 1907, the state of Texas, through its officers and Eckhardt as receiver, applied to the circuit court of the United States, and prayed it to set aside and annul its order appointing a Federal receiver. On July 15 the circuit court refused to grant the prayer of the state of Texas and the state receiver. The state of Texas and Eckhardt as receiver took an appeal from the order of June 19, 1907, appointing the Federal receiver, and from the order of July 15, 1907, refusing to vacate the order appointing Dorchester receiver. Thereupon the matter came on for hearing in the circuit court of appeals, and that court, holding that the state court had first [125] acquired jurisdiction in the matter, reversed and vacated the order of the circuit court appointing a receiver, and remanded the case to the circuit court, with directions to discharge the receiver, and to tax all the costs of the receivership against the complainant. 158 Fed. 705.

If the state court had acquired jurisdiction over the property by the proceedings for the appointment of its receiver, and had not lost the same by the subsequent proceedings, then, upon well-settled principles, often recognized and enforced in this court, there should be no interference with the action of the state courts while thus exercising its authorized jurisdiction. The Federal and state courts exercise jurisdiction within the same territory, derived from and controlled by separate and distinct authority, and are therefore required, upon every principle of justice and propriety, to respect the jurisdiction once acquired over property by a court of the other sovereignty. If a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over the same, such property is withdrawn

from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty. *Wabash R. Co. v. Adelbert College*, 208 U. S. 38, 52 L. ed. 379, 28 Sup. Ct. Rep. 182, and previous cases in this court, cited therein at page 54.

The circuit court of the United States, in the appointment of a receiver in this case, seems to have proceeded upon the theory that the proceedings in the state court had left the property in such a situation that it was no longer *in custodia legis*, and was liable to seizure by adverse proceedings.

This situation had arisen, in the view of the circuit court, because the Waters-Pierce Oil Company had given a bond securing the amount of penalties awarded against it by the judgment, and had also given a bond in the sum of \$100,000 in order to suspend the powers of the receiver to act pending the appeal; and, in the view of the learned circuit judge, the court of last resort of the state of Texas had established the rule that *an appeal from such order, and the [126] giving of the security required by the court, had the effect of returning the property to the owner, and to make the order appointing the receiver inoperative. "It appears to me," says the learned judge, "that they [the Texas cases] announce the doctrine that the powers of the receiver cease, and that the adverse party takes the security which the law furnishes, and the defendant takes his property, with the right to use, control, and dispose of the same." 158 Fed. 717.

The circuit court of appeals in this case, after reviewing the Texas cases, reached a different conclusion, and held that the rulings of the supreme court of Texas showed that the appeal and the giving of the bond had only the effect of suspending the order appointing the receiver, and that the court had not lost jurisdiction over the property by the bond given to supersede the order made.

If the courts of Texas had acquired jurisdiction over this property, and the subsequent procedure amounted to simply suspending the order appointing the receiver, then we are of opinion that the Federal court had no right to intervene. If it is established that the state court had acquired jurisdiction over this property before the application in the Federal court was made, the court of the state had the right to determine for itself, while continuing to lawfully exercise its prior jurisdiction, how far it would permit any other court to interfere with such possession and jurisdiction. *People's Bank v. Calhoun* (People's

Bank v. Winslow) 102 U. S. 258, 261, 26 L. ed. 101, 102.

As already stated, after the case reached the court of civil appeals of Texas an application was made for relief against the receiver appointed by the United States circuit court, and to obtain possession of the property. That court maintained (103 S. W. 836) that the state court had acquired jurisdiction over the property; that the effect of the appeal was simply to suspend the order appointing the receiver; and that the appellate court still had jurisdiction over the *res* the same as the trial court had; 127] and the court cited the decisions *of the supreme court of Texas which seem to support that view.

The court of civil appeals subsequently affirmed the order appointing the receiver, holding that the proceeding was authorized under the act of April 11, 1907, and the general statutes of Texas, authorizing the appointment of a receiver where a corporation had forfeited its corporate rights. Sayles's Civ. Stat. (Tex.) art. 1465.

Upon application to the supreme court of Texas that court refused to allow a petition in error to be filed, and the case was brought here, being No. 360, 212 U. S. 112, ante, 431, 29 Sup. Ct. Rep. 227, just disposed of, in which we held no Federal question was raised.

The case also came before the supreme court of Texas, and is reported in 106 S. W. 326. In that case application was made by the attorney general in the supreme court of the state for the appointment of a receiver, and the court, in deciding the motion, stated its reason for recalling the mandate issued by the court of civil appeals upon the motion of the Waters-Pierce Oil Company, and also passed upon the application of the attorney general of the state of Texas for an order revoking the order recalling the mandate of the court of civil appeals, or a direction of the supreme court that the state receiver take actual and physical possession of the property and conduct the same under the order of the supreme court until the final disposition of the case.

The grounds stated for the former order, recalling the mandate of the court of civil appeals, were that, as the appellant, the Waters-Pierce Oil Company, had the right to present an application for a writ of error to the supreme court, the clerk of the court of civil appeals had no authority to issue the mandate on the judgment of that court until the time had expired for an application for writ of error to the supreme court, and the mandate was therefore withdrawn to await the action of the supreme court upon the application for writ of error. As be-

fore stated, that application for writ of error has since been *denied. In stating its[128 decision on the motion to withdraw the mandate, the supreme court of Texas said:

"That decision in no wise interferes with any authority that the district court or the receiver could lawfully exercise over the property of the oil company during the pendency of that appeal."

In considering the effect of the appeal, the supreme court of Texas cited the previous cases in Texas, and used the following language (106 S. W. 330):

"This court has no power to direct or authorize Eckhardt to take charge of the property of the defendant company, when the statute expressly provides that the giving of the appeal bond shall suspend the action of the court in that regard. If the appeal did not have the effect to suspend the execution of the order, the judge had authority to limit the appointment, as he did by his order, in which it is thus expressed: 'And now, on this, the 15th day of June, 1907, in open court, it is ordered by the court in the above cause that \$100,000 be and the same is hereby fixed as the amount of bond which the defendant shall be required to give in order to supersede the judgment of the court, placing defendant's property in the hands of a receiver; and it is further ordered that, upon the approval of the court and the filing with the clerk by defendant of a good and sufficient bond, conditioned as required by law for said amount, further proceedings herein be suspended pending appeal. But this order shall not affect or rescind the order heretofore entered prohibiting and enjoining the defendant, its servants, officers, agents, and attorneys, from removing any of its property or assets beyond the limits of the state of Texas; but said injunction shall remain in full force and effect pending the appeal from the order appointing a receiver herein.' We do not, however, intimate a doubt upon the proposition which we have asserted, that the appeal, by the filing of the bonds by the defendant in that court, suspended the operation of the order appointing the receiver until the final decision of the case."

The supreme court of Texas has therefore decided in this case, *as we think it[129 had held in its former decisions, cited in the opinion of Judge Shelby, speaking for the court of appeals in this case, that the effect of the appeal and bond was merely to suspend the order appointing the receiver pending the determination of the appeal.

In this attitude of affairs, had the circuit court of the United States authority to take possession of the property under the

bill filed in that court for the appointment of a receiver?

We think the law of this court is well established to be that jurisdiction over the property was acquired by the state courts when the receiver was appointed, the judicial process served, and the receiver duly qualified, although the state receiver had not taken actual possession of the property. This principle was recognized in *Farmers' Loan & T. Co. v. Lake Street Elev. R. Co.* 177 U. S. 59, 44 L. ed. 670, 20 Sup. Ct. Rep. 564, in which this court said:

"The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and, for the time being, disables other courts of co-ordinate jurisdiction from exercising like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons. Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts, or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. *Peck v. Jenness*, 7 How. 612, 12 L. ed. 841; *Freeman v. Howe*, 24 How. 450, 16 L. ed. 749; *Moran v. Sturges*, 154 U. S. 256, 38 L. ed. 981, 14 Sup. Ct. Rep. 1019; *Central Nat. Bank v. Stevens*, 169 U. S. 432, 42 L. ed. 807, 18 Sup. Ct. Rep. 403; *Harkrader v. Wadley*, 172 U. S. 148, 43 L. ed. 399, 19 Sup. Ct. Rep. 119."

If this rule is not applied, a court of competent jurisdiction, "which, by the law of its own procedure, has acquired jurisdiction of property, may find itself, as in this case, after final judgment, maintaining its right over the property, at the conclusion of the litigation deprived of the subject-matter of the suit. Indeed, this case would be an apt illustration of that situation. The courts of Texas have sustained the right to the receivership, and have held it was only suspended pending the appeal; but, when it comes to enforcing the right to administer the property, if the Federal receivership is maintained, the court of original jurisdiction finds itself stripped of the property, and the same being administered in another court which acquired its dominion over the

property after it had become subject to the state jurisdiction.

It is further contended that this case is controlled by the principles laid down in *Shields v. Coleman*, 157 U. S. 168, 39 L. ed. 660, 15 Sup. Ct. Rep. 570. But in that case, before there was an attempt to appoint a receiver and take possession of the property by the second proceedings, the first receiver had been discharged and the property restored to the owner, who had given a bond for the forthcoming of the property to answer the judgment. In this case the receivership had merely been suspended when the application was made to the Federal court, and the receiver's bond was conditioned to account for the rental value of the property pending the appeal.

A special ground for the appointment of a receiver by the Federal court is said to exist in the danger that the Waters-Pierce Oil Company might be made the subject of prosecutions and its officers interfered with or intimidated pending the appeal, and while the receivership was in abeyance because of the appeal from the order appointing him. When a similar contention was made in the supreme court of Texas in support of the application of the state for the appointment of a receiver in that court, the supreme court of Texas said:

"If, in the use of its property, the Waters-Pierce Oil Company should violate the laws of the state during the pendency of its appeal, it would be liable to prosecution and punishment in the same manner as for acts done before the trial of this case; and if *the safety of the persons in charge of [131 the property is endangered in any manner the courts are open to them to seek their protection where the jurisdiction has been lodged by the Constitution of this state for such purposes. The trial court has no less power now to prevent a violation of the laws of this state by the conducting of the business of the Waters-Pierce Oil Company than it had before the trial." 106 S. W. 331.

It is submitted by the counsel for the petitioners that the effect of the appointment of the receiver in the state court was to violate the right of the Waters-Pierce Oil Company to carry on its business of an interstate character. It is true that the original proceedings which resulted in forfeiting the permit of the Waters-Pierce Oil Company to do business in the state of Texas resulted in a judgment forfeiting the permission theretofore given by the state, except the interstate business of the company.

If the proceedings for the appointment of a receiver had been sustained as merely in aid of the original judgment, and for the purpose of carrying that into effect, there would have been cogency in this argument. It is to be remembered that the state courts of Texas have sustained the proceedings for the appointment of a receiver (No 360, 212 U. S. 112, ante, 431, 29 Sup. Ct. Rep. 227) not only under the act of April 11, 1907, which makes special provision for carrying out judgments under the anti-trust laws of the state and for the appointment of a receiver in such cases, but have maintained as well the right of the courts of Texas to appoint the receiver under the general statutes of the state of Texas (Sayles's Civ. Stat. art. 1465, § 3), giving authority to apply in any court of competent jurisdiction in certain cases, among others, where a corporation has been dissolved, or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights.

The Texas courts have the right to construe their own statutes, and their judgment in such matters is conclusive upon the Federal courts. We have, therefore, a case where the appointment of a receiver has been sustained by the highest court of the state under a general statute giving the [132] right to appoint receivers *in such cases and to take possession of the property of the corporation in the state.

This statute was admittedly in force before the permit of the Waters-Pierce Company to do business within the state of Texas was granted. Under this statute, no less than the special act of April 11, 1907, the courts of the state have held that the receivership can be maintained under the procedure had in this case, and that the appeal merely suspended the receivership. In that view there is no unlawful interference with the rights of the company to transact interstate commerce business.

Upon the whole case, we are of opinion that the courts of Texas had not lost the jurisdiction which they had acquired by the appointment of the receiver, and that the Federal court ought not to have appointed a receiver to take possession of the property. We think the circuit court of appeals was right in reversing the order of the circuit court appointing the receiver. In that court the costs of the receivership were assessed against Palmer, the original complainant. The receivership has gone on pending the proceedings upon appeal, and we are of opinion that justice will be done if the costs of the receivership are paid out of the fund realized in the Federal court, and it is so ordered; otherwise the judgment of the Circuit Court of Appeals is affirmed.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, Plff. in Err.,

v.

CENTRAL STOCK YARDS COMPANY.

(See S. C. Reporter's ed. 132-152.)

Judgment—conclusiveness as between state and Federal courts.

1. A state court cannot, by its decree, compel one of two connecting carriers which maintain live-stock depots at or near Louisville, Kentucky, as points of delivery for stock having that city as their general destination, to transfer and deliver at the point of physical intersection "any and all live stock or other freight coming over its lines in Kentucky," consigned to the other's depot or persons doing business there, and to change the destination to such depot upon request at any of its stations, and particularly at its "break-up yards" in South Louisville, where a Federal court has previously dismissed the bill in a similar suit between the same parties, dealing only with interstate shipments.

[For other cases, see Judgment, 1072-1078, in Digest Sup. Ct. 1908.]

Constitutional law—due process of law—compelling interchange of railway cars.

2. Requiring a railway company to deliver its own cars to another railway company when performing its duty under Ky. Const. § 213, to receive, deliver, and transport freight from and to any point where there is a physical connection between its tracks and those of any other railway company deprives the former company of its property without due process of law, because such provision, which alone is relied upon by the courts as authorizing such requirement, contains no adequate protection for the carrier from loss or undue detention of its cars, and for securing due compensation for their use.

[For other cases, see Constitutional Law, 458-466, in Digest Sup. Ct. 1908.]

Constitutional law—due process of law—compelling carrier to share terminal facilities with rival.

3. The property of a railway company is taken without due process of law by Ky. Const. § 213, under which, as construed by the state courts, such company may be compelled, upon payment simply for the service of carriage, to accept cars offered to it at an arbitrary connecting point near its terminus, by a competing road, for the purpose

NOTE.—As to conclusiveness and effect of judgments as between Federal and state courts—see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478, and *Union & P. Bank v. Memphis*, 49 C. C. A. 468.

On the duties and liabilities of carriers as to furnishing facilities for transportation—see note to *Harp v. Choctaw, O. & G. R. Co.* 61 C. C. A. 414.

of reaching and using the former's terminal facilities.

[For other cases, see *Constitutional Law*, 458-466, in *Digest Sup. Ct.* 1908.]

[No. 51.]

Argued December 10, 11, 1908. Decided January 25, 1909.

IN ERROR to the Court of Appeals of the State of Kentucky to review a decree which affirmed a decree of the Jefferson Circuit Court, in that state, compelling a carrier to interchange cars and share its terminal facilities with a rival carrier. Reversed.

See same case below, 30 Ky. L. Rep. 18, 97 S. W. 778.

The facts are stated in the opinion.

Mr. **Helm Bruce** argued the cause, and, with Messrs. Henry L. Stone, James P. Helm, and Kennedy Helm, filed a brief for plaintiff in error:

The judgment of the Federal court in the case of *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339, is conclusive between those same parties in this action, so far as interstate shipments of stock are concerned.

Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; *Cromwell v. Sac County*, 94 U. S. 353, 24 L. ed. 198; *Smith v. Auld*, 31 Kan. 262, 1 Pac. 625.

The compulsory surrender of cars takes property without due process of law.

Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; *McGehee, Due Process of Law*, p. 291; *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. ed. 489, 17 Sup. Ct. Rep. 130; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 240, 41 L. ed. 979, 986, 17 Sup. Ct. Rep. 581; *State v. Chicago, M. & St. P. R. Co.* 36 Minn. 402, 31 N. W. 365.

What carriers may choose voluntarily to do furnishes no criterion for the measurement of the power of the legislature. Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which to measure the reasonableness of the matter exacted by the legislature.

Taking the use of the Louisville & Nashville Railroad Company's terminals, and requiring it to act as a transfer company, denies due process of law.

Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398; *Wisconsin, M. & P. R. Co. v. Ja-*

cobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; *Martin v. District of Columbia*, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440.

Mr. **Joseph C. Dodd** argued the cause, and, with Mr. John L. Dodd, filed a brief for defendant in error:

The provisions of §§ 213 and 214 of the Constitution of Kentucky, and §§ 818 and 819 of the General Statutes of Kentucky, as construed and interpreted by the court of last resort of that state, do not deny to the plaintiff in error any right or privilege secured to it by the interstate commerce act or Federal Constitution.

Louisville & N. R. Co. v. Central Stock Yards Co. 30 Ky. L. Rep. 39, 97 S. W. 778; *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 697, 43 L. ed. 864, 19 Sup. Ct. Rep. 565; *Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 261, 46 L. ed. 1155, 22 Sup. Ct. Rep. 900; *Pennsylvania R. Co. v. Miller*, 132 U. S. 75, 33 L. ed. 267, 10 Sup. Ct. Rep. 34; *Louisville Water Co. v. Clark*, 143 U. S. 1, 36 L. ed. 55, 12 Sup. Ct. Rep. 346; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 513, 46 L. ed. 304, 22 Sup. Ct. Rep. 95; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 489, 48 L. ed. 272, 24 Sup. Ct. Rep. 132; *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *Chicago, M. & St. P. R. Co. v. Solan*, 169 U. S. 137, 138, 42 L. ed. 692, 18 Sup. Ct. Rep. 289; *Chicago, M. & St. P. R. Co. v. Becker*, 32 Fed. 849; *Iowa v. Chicago, M. & St. P. R. Co.* 4 Inters. Com. Rep. 425, 33 Fed. 395; *Sherlock v. Alling*, 93 U. S. 99, 23 L. ed. 819; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 9 Sup. Ct. Rep. 28; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

The police power of the state cannot be bargained away or contracted against, and when, within such power, a duty of a common carrier is required by constitutional or statutory provision, the question of inconvenience or expense is immaterial.

Debates of Constitutional Convention of Ky. Vol. 4, pp. 5118-5162; *Butchers' & D. Stock Yards Co. v. Louisville & N. R. Co.* 14 C. C. A. 290, 31 U. S. App. 252, 67 Fed. 36; *Covington Stock Yards Co. v. Keith*, 139 U. S. 128, 35 L. ed. 73, 11 Sup. Ct. Rep. 467; *Louisville & N. R. Co. v. Com.* 108 Ky. 628, 57 S. W. 508; *Louisville & N. R. Co. v. Pittsburg & K. Coal Co.* 111 Ky. 960, 55

L.R.A. 601, 98 Am. St. Rep. 447, 64 S. W. 969; Louisville & N. R. Co. v. Williams, 95 Ky. 199, 44 Am. St. Rep. 214, 24 S. W. 1; Burlington, C. R. & N. R. Co. v. Dey, 82 Iowa, 336, 12 L.R.A. 436, 3 Inters. Com. Rep. 584, 31 Am. St. Rep. 477, 48 N. W. 98; Peoria & P. Union R. Co. v. Chicago, R. I. & P. R. Co. 109 Ill. 139, 50 Am. Rep. 605; Jacobson v. Wisconsin, M. & P. R. Co. 71 Minn. 532, 40 L.R.A. 392, 70 Am. St. Rep. 358, 74 N. W. 893; Michigan C. R. Co. v. Smithson, 45 Mich. 221, 7 N. W. 791; McCoy v. Cincinnati, I. St. L. & C. R. Co. 13 Fed. 3; Coe v. Louisville & N. R. Co. 3 Fed. 778; Interstate Stock-Yards Co. v. Indianapolis Union R. Co. 99 Fed. 472; Louisville, E. & St. L. Consol. R. Co. v. Wilson, 132 Ind. 517, 18 L.R.A. 105, 32 N. E. 311; Union P. R. Co. v. Goodridge, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; Inman v. St. Louis Southwestern R. Co. 14 Tex. Civ. App. 39, 37 S. W. 37; Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; State use of School Fund v. Wabash, St. L. & P. R. Co. 83 Mo. 144; Missouri P. R. Co. v. Wichita Wholesale Grocery Co. 55 Kan. 525, 40 Pac. 899; 2 Elliott, Railroads, §§ 1432, 1440; Pennsylvania R. Co. v. Jones, 155 U. S. 333, 39 L. ed. 176, 15 Sup. Ct. Rep. 136; Dana v. New York C. & H. R. R. Co. 50 How. Pr. 428; Little Miami R. Co. v. Washburn, 22 Ohio St. 330; Palmer v. Chicago, B. & Q. R. Co. 56 Conn. 137, 13 Atl. 818; Bosworth v. Chicago, M. & St. P. R. Co. 30 C. C. A. 541, 56 U. S. App. 274, 87 Fed. 72; Michigan C. R. Co. v. Mineral Springs Mfg. Co. 16 Wall. 318, 21 L. ed. 297; Vincent v. Chicago & A. R. Co. 49 Ill. 41; Petersen v. Case, 21 Fed. 885; North v. Merchants' & M. Transp. Co. 146 Mass. 315, 15 N. E. 779; Michigan, S. & N. I. R. Co. v. Day, 20 Ill. 375, 71 Am. Dec. 278; Beers v. Wabash, St. L. & P. R. Co. 34 Fed. 244; Louisville & N. R. Co. v. Odil, 96 Tenn. 61, 54 Am. St. Rep. 820, 33 S. W. 611; Season-good, S. K. Co. v. Tennessee & O. River Transp. Co. 21 Ky. L. Rep. 1144, 49 L.R.A. 270, 54 S. W. 193; McNeill v. Southern R. Co. 202 U. S. 545, 50 L. ed. 1143, 26 Sup. Ct. Rep. 722; Atlantic Coast Line R. Co. v. North Carolina Corp. Commission, 206 U. S. 1, 51 L. ed. 933, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

By the opinion of the court of appeals of Kentucky there was no failure to give full faith and credit to the Federal court decree between the parties hereto, relied upon as *res judicata*.

Central Stock Yards Co. v. Louisville & N. R. Co. 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339, 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113; Smith v. Auld, 31 Kan. 262, 1 Pac. 626; Black, Judgm. 2d ed. § 733; 53 L. ed.

Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Polk v. Wendal, 9 Cranch, 87, 3 L. ed. 665; Nesmith v. Sheldon, 7 How. 812, 12 L. ed. 925; Walker v. State Harbor (Walker v. Marks) 17 Wall. 648, 21 L. ed. 744; Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Green v. Neal, 6 Pet. 291, 8 L. ed. 402; Lessingwell v. Warren, 2 Black, 599, 17 L. ed. 261; Sumner v. Hicks, 2 Black, 532, 17 L. ed. 355; Olcott v. Fond du Lac County, 16 Wall. 678, 21 L. ed. 382; State Railroad Tax Cases, 92 U. S. 575, 23 L. ed. 663; Rowan v. Runnels, 5 How. 134, 12 L. ed. 85; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; Re Duncan, 139 U. S. 449, 35 L. ed. 219, 11 Sup. Ct. Rep. 573; Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 579; Bucher v. Cheshire R. Co. 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; Louisville, N. O. & T. R. Co. v. Mississippi. 133 U. S. 587, 33 L. ed. 784, 2 Inters. Com. Rep. 801, 10 Sup. Ct. Rep. 348; Beauregard v. New Orleans, 18 How. 499, 15 L. ed. 470; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934; Wisconsin, M. & P. R. Co. v. Jacobson, 179 U. S. 287, 45 L. ed. 194, 21 Sup. Ct. Rep. 115; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; Sherlock v. Alling, 93 U. S. 99, 23 L. ed. 819; Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257, 46 L. ed. 1151, 22 Sup. Ct. Rep. 900; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding in equity prosecuted in the courts of Kentucky, similar in the main to one in the United States courts between the same parties, that was decided by the circuit court of appeals in 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113, and by this court in 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339. The latter was brought by the Central Stock Yards Company, a Delaware corporation, against the railroad company, a Kentucky corporation, to compel it to receive live stock tendered to it outside the state of Kentucky for the Central Stock Yards station, and to deliver the same at a point of physical connection between its road and the Southern Railway, for ultimate delivery to or at the Central Stock Yards. The Central Stock Yards station is at the Central Stock Yards, just outside the boundary line of Louisville, Kentucky, on the Southern Railway Company's line, and, by agreement between the two com-

panies, the Central Stock Yards were the live-stock depot for the purpose of handling live stock to and from Louisville on the Southern Railway. The Louisville & Nashville Railroad, by a similar arrangement, had made [139] the Bourbon Stock Yards its *live-stock depot for Louisville, and declined to receive live stock billed to the Central Stock Yards, or to deliver live stock destined to Louisville elsewhere than at the Bourbon Yards. There were physical connections between the Louisville & Nashville and the Southern tracks at a point between the two stock yards which was passed by the greater portion of the live stock carried by the Louisville & Nashville Company, and at another point that would be more convenient for delivery, a little further to the northward. In order to deliver as prayed the Louisville & Nashville would have been compelled either to build chutes or to hand over its cars to the Southern Railway. The right was claimed under the interstate commerce act of February 4, 1887, chap. 104, § 3, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154, and the Constitution of Kentucky, especially § 213. The circuit court of appeals and this court agreed that the right was not conferred by the former act. As to the Constitution of Kentucky, the circuit court of appeals held that if it could be given any such construction as to make it purport to give the plaintiff a right to the relief sought, it would be making a void attempt to regulate interstate commerce. This court, on the general principle that a construction was to be adopted, if possible, that would save the instrument from constitutional objections, followed the suggestion of the circuit court of appeals, read the section as not requiring the railroad to deliver its own cars, and affirmed a decree dismissing the bill.

The material sections of the Constitution of Kentucky are as follows:

"Sec. 213. All railroad, transfer, belt lines, and railway bridge companies, organized under the laws of Kentucky, or operating, maintaining, or controlling any railroad, transfer, belt lines, or bridges, or doing a railway business in this state, shall receive, transfer, deliver, and switch empty or loaded cars, and shall move, transport, receive, load, or unload all the freight in car loads or less quantities, coming to or going from any railroad, transfer, belt line, bridge, or siding thereon, with equal promptness and despatch, and without any discrimination as [140] to *charges, preference, drawback, or rebate in favor of any person, corporation, consignee, or consignor, in any matter as to payment, transportation, handling, or delivery; and shall so receive, deliver, transfer, and transport all freight as above set forth, from and to any point where there is a

physical connection between the tracks of said companies. But this section shall not be construed as requiring any such common carrier to allow the use of its tracks for the trains of another engaged in like business.

"Sec. 214. No railway, transfer, belt line, or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association, or corporation, for the receipt, transfer, delivery, transportation, handling, care, or custody of any freight, or for the conduct of any business as a common carrier."

The present case was begun by the defendant in error earlier than the one just stated, and sought similar relief without regard to the place where the stock was received. A preliminary injunction was issued, and soon led to proceedings for contempt on the charge that it had been disobeyed. The court of first instance held that the injunction applied to an interstate shipment when the owner had sought to bill it to the Southern Railway at Louisville for delivery to the Central Stock Yards and had been refused, and thereafter, at the break-up yards, so called, of the Louisville & Nashville road, by giving notice to change the destination, had attempted to bring about the desired result. This decision was reversed by the court of appeals (*Louisville & N. R. Co. v. Miller*, 112 Ky. 464, 66 S. W. 5), and thereupon the before-mentioned bill in the United States court was brought, to deal with interstate shipments, with a prayer, also, that the railroad be required to recognize changes of destination; while the present proceeding was kept on foot to cover all that it lawfully might. At a later date, the petition, as it is called, in this case, was amended so as to pray that the plaintiff in error might be required, upon tender by the Southern Railway, to receive, at a point of physical connection *with the South-[140] ern Railway, live stock from the Central Stock Yards, and to deliver the same to the consignee at the Bourbon Stock Yards or any depot on its line.

After the decision in the other case, the railroad company asked leave to plead the decree as a bar to so much of the relief in the present action as relates to stock shipped or desired to be shipped from points outside of Kentucky to points within Kentucky. The trial court, being of opinion that the decree would not be a bar, refused leave, but ordered the proposed amendment to be made part of the record for the purpose of appeal. After final hearing a judgment was entered for the plaintiff, the defendant in error, granting all the prayers of the bill. The railroad company was ordered (1) to receive at its stations in Kentucky, and "to

bill, transport, transfer, switch, and deliver in the customary way," at some point of physical connection with the tracks of the Southern Railway, and particularly at one described, all live stock or other freight consigned to the Central Stock Yards or to persons doing business there. (2) It was ordered, further, to transfer, switch, and deliver to the Southern Railway at the said point of connection, "any and all live stock or other freight coming over its lines in Kentucky consigned" to the Central Stock Yards or persons doing business there. (3) It was ordered, further, to receive at the same point and to "transfer, switch, transport, and deliver all live stock" consigned to anyone at the Bourbon Stock Yards, "the shipment of which originates at the Central Stock Yards;" with proviso requiring pay or tender of proper charges for its services, whenever demanded, at the time such live stock or other freight is offered. (4) Finally, the railroad company was required, whenever requested by the consignor, consignee, or owner of the stock, "at any of the stations, and particularly at its break-up yards in South Louisville, Kentucky," to recognize their right to change the destination, and, upon payment of the full Louisville freight rate and proper presentation of the bill of lading, duly indorsed, the railroad was required to change the destination and deliver at a point of connection with the Southern Railway tracks for [142]*delivery by the latter to the Central Stock Yards. This judgment was affirmed by the court of appeals, whereupon this writ of error was brought. The points relied upon are that due credit was denied to the decree by the United States court; that, if the Constitution of Kentucky purports to authorize the requirement in the judgment as to delivery of shipments from outside the state, it attempts to regulate commerce among the states; that, if the same instrument authorizes the requirement in the judgment that the railroad company should give up possession of its cars to the Southern Railway Company, it attempts to deprive the railroad of its property without due process of law; and that the same constitutional objection applies to the attempt to make the railroad do switching work over its terminal property in Louisville between two points in the city when the shipment was neither coming into the city nor going out of the city over the lines of the plaintiff in error's road.

The court of appeals found itself unable to pass over the bridge laid by this court in its construction of the state Constitution, § 213. It held that that section did purport to require the plaintiff in error to deliver its own cars, under the circumstances of the

case, to the extent of the judgment that it affirmed. It declined to follow the decision of this court that, for the purposes of the case before it, the two stock yards stood on the same footing as if they were the stations of two railroads placed side by side. It decided that the state Constitution, as construed by it, did not attempt to regulate commerce among the states, and, no doubt for that reason, disregarded the former decree between the same parties, thinking, we presume, that, as the former bill dealt only with interstate commerce, the decree could have no binding effect as against a judgment which it deemed to affect only matters within the control of the state.

We are surprised that the court of appeals should have decided that the judgment appealed from did not deal with commerce among the states. The portion that we have numbered (2) ordered a delivery to the Southern Railway of all live stock and freight coming over its lines consigned to the Central Stock Yards, and this includes, [143 of course, that coming from other states. The same is to be said of the requirement in (4) as to change of destination. When the live stock reached the point of connection or the break-up yards, the carriage was not at an end, as appears by the very intent of the judgment, and as was decided in *McNeill v. Southern R. Co.* 202 U. S. 543, 559, 50 L. ed. 1142, 1147, 26 Sup. Ct. Rep. 722. Moreover, that decision cited and approved the language of the circuit court of appeals, to which we have referred already, in the case between these parties, to the effect that, if the Kentucky Constitution could be construed as the state court of appeals has construed it, it would be attempting what it could not do. *Ibid.* 562. We think discussion of this part of the case unnecessary, and we should have to hold the provision of the state Constitution void as applied, if we followed the construction given to it by the state court; but we are relieved of that necessity by the fact that those portions of the judgment of which we are speaking are invalid by reason of the previous adjudication of the United States court.

As we have indicated, the decree was pleaded as a bar only "to so much of the claim for relief as relates to stock shipped or transported, or desired to be shipped or transported, from points outside of Kentucky to points within Kentucky." It was not argued that a decision that certain words in a Constitution have a certain meaning, in a suit founded upon them, is conclusive as between the same parties in another suit upon the same words, for the same purpose, except that one is to enforce them with regard to matters outside the control of the state, and the other to enforce them with

regard to matters within its control. Therefore we express no opinion upon the point. It was argued, however, that the requirement that the plaintiff in error should deliver its own cars to another road was void under the 14th Amendment as an unlawful taking of its property. In view of the well-known and necessary practice of connecting roads, we are far from saying that a valid law could not be passed to prevent the cost and loss of time entailed by needless transshipment or break-144]ing bulk, in case *of an unreasonable refusal by a carrier to interchange cars with another for through traffic. We do not pass upon the question. It is enough to observe that such a law perhaps ought to be so limited as to respect the paramount needs of the carrier concerned, and at least could be sustained only with full and adequate regulations for his protection from the loss or undue detention of cars, and for securing due compensation for their use. The Constitution of Kentucky is simply a universal, undiscriminating requirement, with no adequate provisions such as we have described. The want cannot be cured by inserting them in judgments under it. The law itself must save the parties' rights, and not leave them to the discretion of the courts as such. See *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87; *Roller v. Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410; *Connecticut River R. Co. v. Franklin County*, 127 Mass. 50, 53, 34 Am. Rep. 338; *Ash v. Cummings*, 50 N. H. 591; *Moody v. Jacksonville, T. & K. W. R. Co.* 20 Fla. 597; *Ex parte Martin*, 13 Ark. 198, 58 Am. Dec. 321; *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861. It follows that the requirement of the state Constitution cannot stand alone under the 14th Amendment, and that the judgment in this respect also, being based upon it, must fall. We do not mean, however, that the silence of the Constitution might not be remedied by an act of legislature or a regulation by a duly authorized subordinate body if such legislation should be held consistent with the state Constitution by the state court. We should add that the requirement in the first part of the judgment, which we have been discussing, is open to the objections mentioned in the former decision so far as it practically requires the Louisville & Nashville Railroad to deliver cars at Louisville elsewhere than at its own terminus. 192 U. S. 570, 571, 48 L. ed. 569, 570, 24 Sup. Ct. Rep. 339.

There remains for consideration only the third division of the judgment, which requires the plaintiff in error to receive at the connecting point, and to switch, transport, and deliver, all live stock consigned from the Central Stock Yards to anyone at the Bour-

bon Stock Yards. This also is based upon the 145]sections *of the Constitution that have been quoted. If the principle is sound, every road into Louisville, by making a physical connection with the Louisville & Nashville, can get the use of its costly terminals and make it do the switching necessary to that end, upon simply paying for the service of carriage. The duty of a carrier to accept goods tendered at its station does not extend to the acceptance of cars offered to it at an arbitrary point near its terminus by a competing road, for the purpose of reaching and using its terminal station. To require such an acceptance from a railroad is to take its property in a very effective sense, and cannot be justified unless the railroad holds that property subject to greater liabilities than those incident to its calling alone. The court of appeals did not put its decision upon any supposed special liability, but upon the broad ground that the state Constitution requires it, and lawfully may require it, of a common carrier by rail. Therefore the judgment must be reversed.

Judgment reversed.

Mr. Justice McKenna, dissenting:

I am unable to concur in the opinion of the court so far as it applies to the transportation of cattle wholly within Kentucky. The difference between that and interstate transportation is important, for it was conceded at the argument that at least 60 per cent of the business was of domestic cattle.

This is a second review of the controversy between the parties. It was originally started in one of the courts of Kentucky, and there, meeting obstacles arising from the want of jurisdiction over interstate commerce, the latter was made the subject of a suit in a United States circuit court, where the Central Stock Yards Company suffered defeat, its bill being dismissed for want of equity. This judgment was affirmed by the circuit court of appeals (63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113) and subsequently by this court. 192 U. S. 568, 48 L. ed. 568, 24 Sup. Ct. Rep. 339. This is pointed out in the opinion, but it may be well to see what was decided. In the circuit court *of[146] appeals these propositions were decided: (1) Independently of statute, the railway could not be required to deliver to the Southern Railway Company for transportation to the Central Stock Yards Company the live stock, though shipped to and ultimately destined to the stock yards company. The Louisville & Nashville Company, the court said, performed its duty under the common law when it provided a place for disembarkation of the stock at the Bourbon Stock Yards, though that place was fixed by contract with

the latter company. (2) That the refusal of the Louisville & Nashville Company to make such transfer of stock to the Southern Railway Company was not a violation of § 3 of the interstate commerce act. (3) Considering the case more broadly and as involving the right to require one railroad to interchange traffic with another, the position of the Central Stock Yards Company would be untenable, because, as it was held at common law, a railroad is only bound to transport freight at its own terms. (4) If the Constitution of Kentucky could be construed to require such delivery of the live stock, it was invalid in so far as it affected interstate commerce. The case, therefore, left local commerce untouched. It declared no principle that precluded a state, by legislation, constitutional or statutory, to require such transfer of stock if it applied only to commerce within the state. The case came to this court, and here also it was considered only as it affected interstate commerce. It is true it was said that "if the cattle are to remain in the defendant's cars it cannot be required to hand those cars over to another railroad without a contract, and the courts have no authority to dictate a contract to the defendant, or to require it to make one." This expressed only a limit upon the power of the courts, not of a legislature or a constitution, for it was also said, "there is no act of Congress that attempts to give courts a power to require contracts to be made in a case like this." And the cases which were cited sustain the view that the impotency of the courts was not because of a right in the railroads, which were exempt from legislative regulation, but a right only exempt from control by the 147] courts in the *absence of legislation. None of the cases declare otherwise. They interpreted the then-existing legislation, and did not attempt to decide what legislation might be competent. Indeed, Judge Jackson (afterwards a justice of this court) in *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567, 634, strongly intimated that Congress had the power to do what he, exercising the powers of the circuit court, could not do without legislative authority.

I will assume, therefore, the power of the state to require an exchange of cars between railroads, and consider only what are the limitations upon the exercise of the power; not broadly, for the case has been brought into the narrow requirements of provision for compensation and security. Must such provisions be explicit in the law? May not the principle or rule of regulation be prescribed by law, statutory or constitutional, and the conditions of its application be ascertained and enforced by the courts or an

administrative body? To what extent a court may be made an instrumentality in the administration of the laws of a state I may refer to the Virginia Railroad Commission cases. *Prentiss v. Atlantic Coast Line Co.* 211 U. S. 210, ante, 150, 29 Sup. Ct. Rep. 67. See also *Kohl v. United States*, 91 U. S. 367, 23 L. ed. 449.

If the state may so distribute its power of regulation it is certainly not within the province of this court to say that it has not done so, against a contrary view, expressed or assumed, by the courts of the state. We can only deal with the result, that is, the ultimate action of the state, through any of its instrumentalities, as offending the 14th Amendment of the Constitution of the United States. The procedure is for the determination of the state. This principle is conspicuously illustrated in *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, ante, 417, 29 Sup. Ct. Rep. 220, and is also illustrated by the decisions under the Massachusetts and New Hampshire mill acts, *infra*. What, then, is the effect of the judgment under review?

It will be observed that the Constitution puts an obligation upon railroad companies to "receive, transfer, deliver, and switch empty or loaded cars," and to "move, transport, receive, load, or unload all the freight in carloads or less quantities *coming to or[148 going from any railroad . . . with equal promptness and despatch, and without any discrimination as to charges, preference, drawback, or rebate in favor of any person . . . in any matter as to payment, transportation, handling, or delivering," and to "receive . . . and transport all freight, . . . from and to any point where there is a physical connection between the tracks of said companies." [§ 213.] The Constitution, therefore, imposes a duty, it is true, but not a duty to be uncompensated. The special emphasis of the prohibition of favor as to charges makes conspicuous and indisputable the right to make and enforce them if made and enforced without "favor to any person." There could be no discrimination "as to charges," if there were no charges, no drawback or rebate from them; and the right to require security for the return of the cars is left untouched. Nor have the constitutional provisions been limited by the decree under review.

It does not adjudge that the service required of the Louisville & Nashville Railroad should not be compensated. The right of the railroad company to charge for the use of its cars is declared. The court said that the transfer of the cars was a use of them in the interest of the public. "If this," the court further observed, "is, in a sense, the taking of its property for private pur-

poses, appellant must [plaintiff in error], as a common carrier, submit to it, for it is only a temporary and necessary use of its property. Appellant cannot suffer loss by such use of its cars. If it delivers its cars to the Southern Railway to be taken to appellee's [Central] stockyards for the loading or unloading of stock, that company has no right to detain them longer than a reasonable time for that purpose, and must return them. Appellant may charge a reasonable amount for the use of its cars, and if they are not returned, or, if detained an unreasonable time, it may sue the delinquent road for damages, or apply to a court of equity for a mandatory injunction to compel the return of the cars. Indeed, it can suffer no loss which the law may not remedy." [30 Ky. L. Rep. 35, 97 S. W. 789.] And the court pointed out that, by regulations between railroads, cars were interchanged **149***between them at a fixed charge. It is entirely consistent with the opinion that plaintiff in error may charge for the delivery of its cars, either when the cattle are shipped or when their destination is changed, or at the time of delivery to the Southern Railway Company. It is also entirely consistent with the opinion of the court that plaintiff in error can exact such stipulations from the Southern Railway Company as will protect it fully. The practice of connecting roads should be regarded, I think, when considering so simple a servitude as imposed in this case upon property devoted to a public use, and subject, because of such use, to regulation by the state. In this every right of plaintiff in error would be preserved. In this every power of the state would be preserved. I do not stop to make a comparison between such right and such power, but I submit this court should put no limit upon the latter that is not clearly necessary to preserve the other.

Plaintiff in error makes no question of precedent or ultimate payment for the use of its cars, or the absence of provisions for their return. It is contended that in some way (in what way is not pointed out) the state must exercise its right of eminent domain, and, unless the right be exercised through an impartial tribunal, there is not due process of law. It is also contended that there is an attempted transfer of terminals, and the duty of a local transfer company imposed on plaintiff in error, which, in some way, takes its property without due process of law. The question made, then, is of an inviolable right, impregnable in constitutional protection, against a legislative regulation such as in the case at bar; and to what contemplation does this bring us? If the right is impregnable in constitutional protection against

regulation in the interest of *intrastate* commerce, it is also impregnable in such constitutional protection against regulation in the interest of *interstate* commerce. Are we prepared to announce that conclusion? The consequences of it are certainly quite serious.

The act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 893), provided that "the term 'transportation' shall include . . . all [of the articles] instrumentalities *and facil-**150** ities of shipment or carriage;" and further provides that every carrier subject to its provisions shall "provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto." (§ 1.)

The act also provides that such carriers, upon the application of any lateral branch line of railroad or of any shipper, shall construct and operate switch connections and shall furnish cars for the traffic thereover. And the Commission is given power to enforce such duty.

The Commission is also given the power to divide a joint rate and establish joint rates and through routes. The Commission further has the power to fix the compensation to be paid to the owner of property transported for any instrumentality furnished by him.

These are some of the regulations of interstate commerce,—regulations of great reach and consequence; and they are not more specific as to compensation or security for the use or loss of cars than the Constitution of Kentucky. And I submit that the power of a state over its domestic commerce is as great as the power of the nation over interstate commerce.

The exigencies of this case do not require me to distinguish between those sovereign powers of the state denominated the power of eminent domain and the police power. Both may be exercised over private property. By the exercise of the first power property is taken, and compensation for it is a necessary condition; by the exercise of the second power property is subjected to regulation, and a provision for compensation is not necessary. When regulation is transcended and becomes a taking of property may, at times, be a close question; but the power of regulation must not be overlooked or underestimated. It is, as I have said, an exercise of the police power, and that is the most absolute of the sovereign powers of the state. We said in *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289, that it "extends to so dealing with the conditions which exist in a state as to bring out of them the greatest wel-

fare of its people." In *Otis Co. v. Ludlow* 151]Mfg. Co. 201 *U. S. 140, 50 L. ed. 696, 26 Sup. Ct. Rep. 353, this court sustained the Massachusetts mill act, which gave the right of one owner of land on a stream to flow the land of another, against the charge that it was contrary to the 14th Amendment of the Constitution of the United States, as taking property without due process of law, in that it made no adequate provision for the payment of damages caused by an exercise of the rights conferred by the act. The provision for payment was an action for damages. The use of property in that case was as complete and more enduring than in this, and we said of it: "The right of the lower owner only becomes complete when the land is flowed, and as, even then, it is not a right to maintain the water upon the plaintiff's land, but merely a right to maintain the dam subject to paying for the harm actually done, we see nothing to complain of in that regard." See *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441. This court, therefore, has decided that a simple action of damages is sufficient security for compensation for that use of property which this court, and almost every court in the Union, has held to be a taking. *Pumpelly v. Green Bay & M. Canal Co.* 13 Wall. 166, 20 L. ed. 557.

It is true it is held by the supreme judicial court of Massachusetts that the principle upon which the mill act is founded is not the right of eminent domain, but the resulting general good of all, or the public welfare. *Murdock v. Stickney*, 8 Cush. 113. And this court, yielding also to that purpose, has quite recently declared that a state might, in order to meet new conditions, elevate into a public use of property that which, under other conditions, had universally been held to be a private use. *Clark v. Nash*, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174. See also *Offield v. New York, N. H. & H. R. Co.* 203 U. S. 372, 51 L. ed. 231, 27 Sup. Ct. Rep. 72.

Other cases may be adduced for illustration. I think, therefore, that it might easily be contended that the service required of plaintiff in error cannot be considered, in any legal or practical sense, a taking of property. Let us keep steadily in mind what it is that is required, and what the requirement involves of the use of plaintiff in error's cars. It is a use not different from 152]that *they served from the moment of starting, or would serve if the end of the transportation be the Bourbon Stock Yards. 53 L. ed.

If the end of the transportation be made the Central Stock Yards, there is the added element only that a limited and temporary possession of the cars is given to the Southern Railway Company,—a possession, it must be said, not required in the interest of that company, but in the interest of the commerce of which it and the plaintiff in error are but instrumentalities, and as aids to which they were organized and are permitted to exist.

But I do not have to take this position, strongly supported as it may be. It is enough for my purpose that the Constitution of the state provides for compensation for the duty it imposes on the railroads.

I am authorized to say that Mr. Justice Harlan and Mr. Justice Moody concur in this dissent.

ONTARIO LAND COMPANY, Plff. in Err.,
v.
JAY YORDY and Minnie E. Yordy, His Wife.

(See S. C. Reporter's ed. 152-159.)

Constitutional law — due process of law in tax proceedings — notice.

Tax proceedings resulting in a tax sale and deed under which property marked "reserved" on an official plat was described as certain numbered blocks, not designated on the plat, but which would have borne such numbers if the tract reserved had been divided into blocks and lots and numbered in harmony with the numbering of the rest of the tract, do not deprive the owner of his property without due process of law, where he not only has notice from the record, but notice in fact, that such property was listed and assessed for taxes under such description.

[For other cases, see *Constitutional Law*, 725-744, in *Digest Sup. Ct.* 1908.]

[No. 59.]

NOTE.—As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L.R.A. 657; *Chauvin v. Valiton*, 3 L.R.A. 194; and *Ulman v. Baltimore*, 11 L.R.A. 225.

On due process of law in revenue proceedings—see note to *Read v. Dingess*, 8 C. C. A. 398.

Argued January 7, 1909. Decided February 1, 1909.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which reversed a judgment of the Superior Court of Yakima County, in that state, in favor of plaintiff in an action of ejectment and to quiet title, and ordered judgment in favor of defendants. Affirmed.

See same case below, 44 Wash. 239, 87 Pac. 257.

Statement by Mr. Justice Brewer:

153] *On May 16, 1889, plaintiff's grantors, Chester A. Congdon and Clara B. Congdon, his wife, then the owners of the west half (W. $\frac{1}{2}$) of the southeast quarter (S.E. $\frac{1}{4}$) and the east half (E. $\frac{1}{2}$) of the southwest quarter (S. W. $\frac{1}{4}$) of section twenty-four (24), in township thirteen (13) north, range eighteen (18) east, Willamette meridian, excepting 10 acres which belonged to Charles M. Holton, platted their land as "Capital Addition to North Yakima." According to the plat, in the central portion was a body of land marked "reserved" and not divided into lots and blocks. If it had been so divided the ground would have made four blocks, and, to be in harmony with the other numbering, would have been blocks 352, 353, 372, and 373. Nothing was shown on the plat to indicate the meaning of the term "reserved," nor the use to which the tract was to be applied. For the years 1892, 1893, 1894, and 1895 the proper assessor listed and assessed for taxation with other real estate that which he described as blocks 352 and 372 in "Capital Addition to North Yakima." All taxes on the property so listed for these years became delinquent. The county foreclosed the same in proceedings conforming to the statutes of Washington, and under the decree the property was sold and a tax deed executed to the defendant Jay Yordy, who paid all subsequent taxes levied thereon. After the platting by Congdon and wife, and in 1890, they deeded all the land to the plaintiff, describing it not by lots and blocks, but by the government descriptions, and with no allusion to the Capital Addition to North Yakima. In September, 1904, after the tax deed had been executed, delivered, and recorded, the plaintiff platted that portion of Capital Addition marked "reserved" as "Heerman's Addition to North Yakima," and subdivided said reserved tract into four blocks, numbered from 1 to 4, inclusive, each block being subdivided into 16 lots. The defendant Jay Yordy had already taken possession of the tract purchased by him, claiming it under his tax deed. On March 17, 1905, the plaintiff brought this action against the de-

fendants to recover the property, describing it is lots in blocks 1 and 2 of Heerman's Addition. *The plaintiff had actual knowl-[154 edge of the fact that an attempt was being made to levy and collect taxes upon that portion of its property marked "reserved;" it denied the validity of such taxes in interviews with two county treasurers, and stood quietly by during the foreclosure proceedings and tax sale. With full knowledge it permitted the purchaser to make his purchase without any protest, and only thereafter platted the reserved tract as Heerman's Addition to North Yakima. The trial court entered judgment in favor of the plaintiff, but that judgment was reversed by the supreme court of the state, which ordered a judgment in favor of the defendants. 44 Wash. 239, 87 Pac. 257. Thereupon the case was brought here on error.

Mr. Arcadius L. Agatin argued the cause, and, with Mr. William W. Billson, filed a brief for plaintiff in error:

These lands were not described in the tax proceedings.

Ontario Land Co. v. Wilfong, 162 Fed. 999; Ronkendorff v. Taylor, 4 Pet. 349, 359, 362, 7 L. ed. 882, 885, 886; Baldwin v. Winslow, 2 Minn. 213, Gil. 174; Bird v. Benlisa, 142 U. S. 664, 670, 35 L. ed. 1151, 1153, 12 Sup. Ct. Rep. 323; Stout v. Mastin, 139 U. S. 151, 152, 35 L. ed. 121, 122, 11 Sup. Ct. Rep. 519; Tallman v. White, 2 N. Y. 66; Hill v. Mowry, 6 Gray, 551; Zink v. McManus, 121 N. Y. 259, 24 N. E. 467; Miller v. Williams, 135 Cal. 185, 67 Pac. 788; Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53; Curtis v. Brown County, 22 Wis. 167; Knight v. Alexander, 38 Minn. 387, 8 Am. St. Rep. 675, 37 N. W. 796; Keith v. Hayden, 26 Minn. 212, 2 N. W. 495; Williams v. Central Land Co. 32 Minn. 440, 21 N. W. 550; Black, Tax Titles, § 208; 2 Cooley, Taxn. 3d ed. p. 935; Schattler v. Cassinelli, 56 Ark. 172, 19 S. W. 746; Jones v. Pelham, 84 Ala. 208, 4 So. 22; People v. Mahoney, 55 Cal. 286; Greene v. Lunt, 58 Me. 534; Bidwell v. Webb, 10 Minn. 59, Gil. 41, 88 Am. Dec. 56; Jackson v. Sloman, 117 Mich. 126, 75 N. W. 282; Clemens v. Rannells, 34 Mo. 583; Wooters v. Arledge, 54 Tex. 395; Jackson ex dem. Livingston v. De Lancey, 13 Johns. 552, 7 Am. Dec. 403; Mitchell v. Ireland, 54 Tex. 301; Kleber, Void Judicial & Execution Sales, § 354.

The lack of description is not cured by the owner's personal knowledge of the tax, whether accidentally derived, or otherwise.

Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 332, 333, 51 L. ed. 204, 207, 208, 27 Sup. Ct. Rep. 87; Stuart v. Palmer, 212 U. S.

74 N. Y. 195, 30 Am. Rep. 289; Railroad Tax Case, 8 Sawy. 238, 13 Fed. 753; Roller v. Holly, 176 U. S. 398-409, 44 L. ed. 520-524, 20 Sup. Ct. Rep. 410; Ronkendorff v. Taylor, 4 Pet. 349, 362, 7 L. ed. 882, 886.

The tax proceedings, not having described our property, were not, as against it, due process of law.

Ontario Land Co. v. Wilfong, *supra*.

A state may, if it will, provide for a tax not resting upon a basis of appraised valuation, and then no opportunity to be heard can be claimed under the Federal Constitution. But, if the state elects to apportion its taxes upon appraised valuation the Federal guaranty of a right to be heard must then be respected.

Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 709, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663.

The judgment of foreclosure is a judgment strictly *in rem*, and is so ranked by the Washington court.

Williams v. Pittock, 35 Wash. 271, 77 Pac. 385; Carson v. Titlow, 38 Wash. 196, 80 Pac. 299; Spokane Falls & N. R. Co. v. Abitz, 38 Wash. 8, 80 Pac. 192; Allen v. Peterson, 38 Wash. 599, 80 Pac. 849; Rowland v. Eskeland, 40 Wash. 253, 82 Pac. 599.

There can, of course, be no valid judgment *in rem* without either an actual seizure, or some notice-conveying act which the law can treat as a constructive seizure, of the *res*.

Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Leigh v. Green, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; Longyear v. Toolan, 209 U. S. 414, 52 L. ed. 859, 28 Sup. Ct. Rep. 506; Londoner v. Denver, 210 U. S. 373, 52 L. ed. 1103, 28 Sup. Ct. Rep. 708.

In a case of a tax based as this is upon the value of the property assessed it is a condition of its validity under the 14th Amendment that the owner shall have an opportunity to be heard.

Security Trust & S. V. Co. v. Lexington, 203 U. S. 323, 51 L. ed. 204, 27 Sup. Ct. Rep. 87; Central R. Co. v. Wright, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47.

To local assessments the same rule was still earlier applied.

Turpin v. Lemon, 187 U. S. 57, 58, 47 L. ed. 73, 74, 23 Sup. Ct. Rep. 20.

The 14th Amendment is confessedly applicable alike to all departments of state government, and to other forms of gross injustice quite as much as to the absence of notice or opportunity to be heard in a judicial or a tax proceeding.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 234, 41 L. ed. 979, 983, 17 Sup. Ct. Rep. 581.

53 L. ed.

There are always residuary forms of injustice too grossly impinging on fundamental rights to be advisedly tolerated anywhere, which it was the aim of the due process clause to preclude.

Davidson v. New Orleans, 96 U. S. 97, 107, 24 L. ed. 616, 620; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 708, 28 L. ed. 569, 572, 4 Sup. Ct. Rep. 663; Scott v. McNeal, 154 U. S. 34, 45, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108.

A judgment in bar can supervene only upon an opportunity to be heard upon the merits.

Windsor v. McVeigh, 93 U. S. 282, 23 L. ed. 917; Hovey v. Elliott, 167 U. S. 409, 414, 42 L. ed. 215, 220, 17 Sup. Ct. Rep. 841.

Mr. Benjamin S. Grosscup argued the cause and filed a brief for defendants in error:

It is the policy of the state of Washington to sustain tax titles. Errors of a technical character in assessments and foreclosure proceedings are disregarded. So long as substantial justice is done, real estate is not permitted to escape the burden of taxation, and the title to land is not permitted to remain for years under the cloud of a title forfeited by the owner's failure promptly to bear his share of the burden of government.

Spokane Falls & N. R. Co. v. Abitz, 38 Wash. 8, 80 Pac. 192; Carson v. Titlow, 38 Wash. 196, 80 Pac. 299; Rowland v. Eskeland, 40 Wash. 253, 82 Pac. 599; Shipley v. Gaffner, 48 Wash. 169, 93 Pac. 211.

A tax law is within the fundamental requirement of due process if the owner, at some stage, is given opportunity to be heard; and a requirement that he shall give security to pay or deposit the just amount of tax as a condition to the prosecution of a suit is not a denial of a Federal right.

McMullen v. Anderson, 95 U. S. 37, 24 L. ed. 335.

The courts of Washington exercise broad revisory power over the acts of taxing officers.

Templeton v. Pierce County, 25 Wash. 377, 65 Pac. 553.

This court will not look beyond the Federal question unless such Federal question has been decided erroneously by the state court.

McLaughlin v. Fowler, 154 U. S. 663, Appx. and 26 L. ed. 176, 14 Sup. Ct. Rep. 1192.

The state court having correctly decided the legal question, and examined into the question of fact as to whether the property involved was taxed, this court will not review that finding.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *King v. Portland*, 184 U. S. 67-70, 46 L. ed. 431-436, 22 Sup. Ct. Rep. 290.

This court has repeatedly said that, in matters of taxation, the Federal courts will follow the rulings of the state court on all questions involving the tax laws.

Bardon v. Land & River Improv. Co. 157 U. S. 327, 330, 39 L. ed. 719, 720, 15 Sup. Ct. Rep. 650; *Ballard v. Hunter*, 204 U. S. 241, 262, 51 L. ed. 461, 474, 27 Sup. Ct. Rep. 261; *Lewis v. Monson*, 151 U. S. 545, 549, 38 L. ed. 265, 266, 14 Sup. Ct. Rep. 424.

Before proceedings for the collection of taxes sanctioned by the supreme court of a state are stricken down in this court, it must clearly appear that some one of the fundamental guaranties of right contained in the Federal Constitution has been invaded.

Bellingham Bay & B. C. R. Co. v. New Whatcom, 172 U. S. 314, 320, 43 L. ed. 460, 462, 19 Sup. Ct. Rep. 205.

Mr. Justice Brewer delivered the opinion of the court:

The contention of plaintiff in error in the state courts, as shown by the record, and also stated in the certificate of the chief justice of the supreme court of the state, is that sustaining the tax proceedings divests it of its property without due process of law, in contravention to the 14th Amendment to the Constitution of the United States. At the time of those proceedings, while the land in controversy was within the limits of the Capital Addition to North Yakima, it had not been divided into lots and blocks, but was simply marked on the official plat "reserved." In other words, according to the record there was no such property as that described, and nothing to identify any property. There being no legal description, no official identification, no one could, by an examination of the records, know what property was the subject of the proceedings. Hence, they were void, and no one was bound to take notice of them. But land may be identified, although not technically *or officially described, and the identification may be sufficient to sustain a contract or conveyance. The owner of property is bound to take notice of the time and place provided for tax proceedings. He knows that his property is subject to taxation. The plaintiff was the owner of the entire Capital Addition to North Yakima. It was charged with notice of the fact of the platting and the condition shown by the plat. Examining the tax proceedings, it would find that four blocks not named on the plat, but within that addition, were

listed and assessed for taxation. It would also know that if the tract reserved had been divided into blocks and lots and numbered in harmony with that of the balance of the addition, blocks 352, 353, 372, and 373 would occupy the place of the tract marked "reserved." It therefore had notice by the record that the authorities were listing and assessing for taxation certain blocks and lots which occupied the place marked upon the official plat as "reserved." It also had notice that that tract marked "reserved" was not otherwise listed or assessed for taxation, and that, if its entire property was listed and assessed, the words "blocks numbered 352," etc., were used by the authorities for describing the "reserved" tract. Could it ignore these facts because the description in the tax proceedings was not officially or technically correct or sufficient? But the case does not rest on this presumption. It appears from the testimony of the county treasurers that the plaintiff knew that the authorities were attempting to assess and tax this "reserved" tract under the description of blocks 352, etc., so that it had not merely notice from the record, but notice in fact, that the tract marked "reserved" was being assessed for taxation under the description of blocks 352, etc., and in no other way. The general rule in reference to description in conveyances is thus stated by Jones on Real Property, § 323:

"The first requisite of an adequate description is that the land shall be identified with reasonable certainty; but the degree of certainty required is always qualified by the application of the rule that that is certain which can be made certain. A *deed[158 will not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain from the description, aided by extrinsic evidence, what property it was intended to convey. The office of a description is not to identify the land, but to furnish the means of identification. The description will be liberally construed to afford the basis of a valid grant. It is only when it remains a matter of conjecture what property was intended to be conveyed, after resorting to such extrinsic evidence as is admissible, that the deed will be held void for uncertainty in the description of parcels."

The statutes of Washington provide that:

"Any judgment for the deed to real estate sold for delinquent taxes, rendered after the passage of this act, except as otherwise provided in this section, shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judg-

ment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered, and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or assessments have been paid, or the real estate was not liable to the tax or assessment." 1 Ballinger's Anno. Code & Statutes (Wash.) § 1767.

In Washington, proceedings for the collection of taxes upon real property are *in rem*. Spokane Falls & N. R. Co. v. Abitz, 38 Wash. 8, 80 Pac. 192; Allen v. Peterson, 38 Wash. 599, 80 Pac. 849; Rowland v. Eskeland, 40 Wash. 253, 82 Pac. 599; Shipley v. Gaffner, 48 Wash. 169-171, 93 Pac. 211.

In this last case it was said by the court:

"We have repeatedly held that these tax foreclosure proceedings are *in rem*, and not against the person of the owner, and that owners are bound to take notice of the property they own, and pay the taxes thereon, and defend against foreclosure for delinquent taxes, even though the property is assessed to unknown persons or to other persons." See also Carson v. Titlow, 38 Wash. 196, 198, 80 Pac. 299.

159] *We are of opinion that the Federal question in this case was rightly decided, and the judgment of the Supreme Court of Washington is affirmed.

WATERS-PIERCE OIL COMPANY, Plff.
in Err.,
v.
ALBERT B. DESELMS.

(See S. C. Reporter's ed. 159-182.)

Oil inspection — hydrometer test.

1. The plain purpose of the oil inspection provisions of Okla. Sess. Laws 1899, p. 186, § 2, is to permit the use of illuminating fluids which, when tested by the Baume hydrometer, indicate at least 46 degrees specific gravity, and to exclude all oils of a lighter character, although the language of the statute, that all illuminating fluids

shall be branded "rejected" which "have not a specific gravity of not less than 46 degrees Baume," is somewhat confusing from the use of the two negatives, and from the fact that the Baume scale is to be read inversely.

Constitutional law — police power — illuminating fluids.

2. The exclusion from the territory by Okla. Laws 1899, p. 186, § 2, of illuminating fluids which have a specific gravity above 46 degrees Baume, is within the police power of the territory, although some oils may thus be excluded which are as safe for use as those which comply with the statutory standard.

[For other cases, see Constitutional Law, 895-902, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

3. The possible unconstitutionality of the provisions of Okla. Laws 1899, p. 186, § 4, making it a criminal offense to sell products of petroleum which do not conform to the statutory standard, does not affect the validity of the other sections of that statute which provide for inspection and branding. [For other cases, see Statutes, I. d. 4, in Digest Sup. Ct. 1908.]

Evidence — judicial notice.

4. A court may judicially notice the existence in the community of a general custom to use coal oil in kindling fires.

[For other cases, see Evidence, 106-109, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — submitting question to jury.

5. Submitting to the jury the question of the existence of a custom or usage to use coal oil in kindling fires is not prejudicial error, where the custom in the community is so universal as to justify the court in taking judicial notice of its existence.

[For other cases, see Appeal and Error, 5157-5162, in Digest Sup. Ct. 1908.]

Trial — question for jury — cause of accident.

6. The question whether a fire was caused by the inflammable nature of a mixture of coal oil and gasoline sold as coal oil is for the jury, where the evidence of the conditions after the fire, while tending to show that such mixture had been used to saturate kindling wood in a stove preparatory to starting a fire, conformably to a local custom to use coal oil for that purpose, tends to rebut any implication that, after the fire had been lighted, the mixture was then poured upon it, and permits the jury

NOTE.—On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

On judicial notice—see note to Olive v. State, 4 L.R.A. 33.

As to admissibility of usage and custom on question of negligence—see note to Standard Oil Co. v. Swan, 10 L.R.A. 366.

On the liability of manufacturers and sellers of injurious substances or defective machinery and appliances for injuries to persons other than immediate vendees—see

note to Standard Oil Co. v. Murray, 57 C. C. A. 5.

On the liability of a manufacturer to person injured by article dangerous to life, in the absence of any privity of contract—see case note to Watson v. Augusta Brewing Co. 1 L.R.A. (N.S.) 1178.

On the liability of manufacturer or packer to ultimate consumer, with whom he is not in privity, for personal injury from defects in commodity—see case note to Tomlinson v. Armour & Co. 10 L.R.A. (N.S.) 923.

to infer that the fire was the result of an explosion caused by applying a light to the saturated kindling wood.

[For other cases, see Trial, 141-152, in Digest Sup. Ct. 1908.]

Negligence — sale of explosive — contract relation with purchaser.

7. The absence of any contractual relation between an oil company and a private consumer does not relieve the company from liability for injury sustained by the latter in using, in the customary manner, a fluid which both he and his innocent vendor supposed was coal oil, but which the oil company, knowing that it contained gasoline, sold to such vendor as coal oil in violation of statute, and with the expectation that it would be retailed to the public for domestic use as such.

[For other cases, see Negligence, I. b, in Digest Sup. Ct. 1908.]

Proximate cause — sale of explosive.

8. The sale by an oil company to a retail dealer as coal oil, in violation of statute, of an explosive mixture of coal oil and gasoline, with the expectation that it would be retailed to the public for domestic use as coal oil, is the proximate cause of an accident resulting from its use by a private consumer in the ordinary manner, both the consumer and retailer being entirely ignorant of its real character.

[For other cases, see Proximate Cause, in Digest Sup. Ct. 1908.]

Trial — instructions as to negligence — ambiguity.

9. Modification of a requested instruction as to damages in an action by a father for the negligent killing of his minor children, by adding that "the amount of damages cannot be fixed by the evidence, but must be the result of your own judgment," cannot be regarded as open to the objection that the jurors were thereby informed that they possessed the power capriciously to fix the amount of the damages, when read in connection with prior instructions to the effect that the measure of damages was the net value to the father of the services of his children during their minority,—especially where the trial court is not asked to remove the supposed ambiguity.

[For other cases, see Trial, VII. in Digest Sup. Ct. 1908.]

[No. 62.]

Argued January 8, 1909. Decided February 1, 1909.

IN ERROR to the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of Logan County, in that territory, in favor of plaintiff in an action to recover damages for the negligent killing of his minor children. Affirmed.

See same case below, 18 Okla. 107, 89 Pac. 212.

The facts are stated in the opinion.

Mr. John W. Shartel argued the cause, and, with Messrs. J. D. Johnson, James R. Keaton, and Frank Wells, filed a brief for plaintiff in error:

The plaintiff's case is not made by showing the negligent admixture and his purchase of a portion of that mixture. He also takes the burden of proving it to have been the efficient cause of the fire,—that the accident would not have happened if the oil had not had the gasoline in it, and that the accident is the result of its super-inflammability.

Haff v. Minneapolis & St. L. R. Co. 14 Fed. 558; Willoughby v. Chicago & N. W. R. Co. 37 Iowa, 432; Kelsey v. Jewett, 28 Hun, 51; Central R. Co. v. Freeman, 75 Ga. 331; Harrigan v. Chicago & I. R. Co. 53 Ill. App. 344; Atchison, T. & S. F. R. Co. v. Aderhold, 58 Kan. 293, 49 Pac. 83; Mobile & O. R. Co. v. Wilson, 22 C. C. A. 101, 46 U. S. App. 214, 76 Fed. 127; Chesapeake & O. R. Co. v. Heath, 103 Va. 64, 48 S. E. 508; Chesapeake & O. R. Co. v. Sparrow, 98 Va. 630, 37 S. E. 302; Bailey, Personal Injuries Relating to Master & Servant, § 1672; Bailey, Master's Liability for Injuries to Servant, p. 503; Sorenson v. Nenasha Paper & Pulp Co. 56 Wis. 338, 14 N. W. 446; Lehman v. Brooklyn, 29 Barb. 234; Norfolk & W. R. Co. v. Cromer, 99 Va. 763, 40 S. E. 54; Southern R. Co. v. Hall, 102 Va. 135, 45 S. E. 867; Norfolk & W. R. Co. v. Poole, 100 Va. 148, 40 S. E. 627; Northington v. Norfolk R. & Light Co. 102 Va. 446, 46 S. E. 475; Yaggle v. Allen, 24 App. Div. 594, 48 N. Y. Supp. 827; Grant v. Pennsylvania & N. Y. Canal & R. Co. 133 N. Y. 657, 31 N. E. 220; Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66; Pueblo Light, H. & P. Co. v. McGinley, 5 Colo. App. 238, 38 Pac. 425; McBroom v. Putney, 28 Ind. 353; Conner v. Missouri P. R. Co. 181 Mo. 397, 81 S. W. 149; Oglesby v. Missouri P. R. Co. 177 Mo. 272, 76 S. W. 623; Warner v. St. Louis & M. River R. Co. 178 Mo. 125, 77 S. W. 67; Bowers v. Bristol Gas & Electric Co. 100 Va. 533, 42 S. E. 296; Dame v. Laconia Car Co. Works, 71 N. H. 407, 52 Atl. 864; Decatur Car Wheel & Mfg. Co. v. Mehaffey, 128 Ala. 242, 29 So. 646; Waters-Pierce Oil Co. v. VanElderen, 70 C. C. A. 255, 137 Fed. 557; Patton v. Texas P. R. Co. 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275; Trapnell v. Red Oak Junction, 76 Iowa, 746, 39 N. W. 884.

If the negligence of the deceased either caused the accident or contributed thereto, there can be no recovery.

1 Thomp. Neg. § 330; Lake Erie & W. R. Co. v. Pike, 31 Ill. App. 90; Grant v. Fitchburg, 160 Mass. 16, 39 Am. St. Rep. 449, 35 N. E. 84.

The nature of petroleum oils of all kinds,
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including that of kerosene, is well known to be such, as a matter of common knowledge, that it is very dangerous to use them where they may come in contact with fire, and that, when they come in contact with fire, an explosion is very liable to occur.

Cleveland, C. C. & St. L. R. Co. v. Ballentine, 28 C. C. A. 572, 56 U. S. App. 266, 84 Fed. 935; Riggs v. Standard Oil Co. 130 Fed. 202.

The oil, without its superadded gasoline, might easily explain every circumstance connected with the case,—the broken stove, the sudden conflagration, with no avenue of escape, the choking gases,—are all common and well-known results of kerosene accidents, and the oil without the gasoline just as rationally explains the phenomena as the oil with it.

Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 543; Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638; Davidson v. Nichols, 11 Allen, 514; Goodlander Mill Co. v. Standard Oil Co. 27 L.R.A. 583, 11 C. C. A. 253, 24 U. S. App. 7, 63 Fed. 400; Cleveland, C. C. & St. L. R. Co. v. Ballentine, supra; Standard Oil Co. v. Murray, 57 C. C. A. 1, 119 Fed. 575.

If the statute is read downward on the Baume scale it would exclude the Pennsylvania oils from the market, which are admitted to be just as good burning oils and just as safe as anything produced in the West; and if, on the other hand, this statute is read upward, it would have the effect to exclude everything from the market of Oklahoma except Pennsylvania oils, and compel the people of the territory to buy in the market and pay the freight on the same quality and the same attributes of oils, except weight, which has no relation to either the quality or the safety of the oil. This testimony is uncontradicted, and the law is void.

Priewe v. Wisconsin State Land & Improv. Co. 93 Wis. 534, 33 L.R.A. 645, 67 N. W. 918; State v. Santee, 111 Iowa, 1, 53 L.R.A. 763, 82 Am. St. Rep. 222, 82 N. W. 445; Re Jacobs, 98 N. Y. 98, 50 Am. Rep. 636; State v. Smith, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545; State v. Julow, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781; Janesville v. Carpenter, 77 Wis. 288, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; St. Louis v. Door, 145 Mo. 466, 42 L.R.A. 686, 41 S. W. 1094, 46 S. W. 976; Mugler v. Kansas, 123 U. S. 623-667, 31 L. ed. 205-212, 8 Sup. Ct. Rep. 273; Corrigan v. Gage, 68 Mo. 541; Haynes v. Cape May, 50 N. J. L. 55, 13 Atl. 231; Kimmish v. Ball, 129 U. S. 217, 32 L. ed. 695, 2 Inters. Com. Rep. 407, 9 Sup. Ct. Rep. 277; Schoolenberger v. Pennsylvania, 171 U. S. 1, 43 L. ed. 49, 18 Sup. Ct. Rep. 757; Smyth v. 53 L. ed.

Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. ed. 567, 15 Sup. Ct. Rep. 484; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29.

Besides, the courts will take judicial notice of the facts which conclusively show that the gravity test of the act in question is not a valid police regulation.

Sutherland, Stat. Constr. §§ 301-306.

The act provides a punishment for corporations, but not for individuals doing the same thing, and engaged in the same business, and is violative of the provision of the Constitution guaranteeing equal protection of the laws.

Re Grice, 79 Fed. 627; Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; Eden v. People, 161 Ill. 296, 32 L.R.A. 659, 52 Am. St. Rep. 365, 43 N. E. 1108; State v. Santee, supra; Connolly v. Union Sewer Pipe Co. 184 U. S. 559, 46 L. ed. 689, 22 Sup. Ct. Rep. 431.

The plaintiff had no right to go to the jury on the question as to the usual and ordinary purposes for which coal oil is ordinarily used, not to have submitted to the jury a supposed custom, because those are matters of pleading and evidence, and the evidence is entirely silent on the subject, as well as being unsupported by any allegation in the petition.

Mobile Fruit & Trading Co. v. Judy, 91 Ill. App. 82; Lindley v. First Nat. Bank, 76 Iowa, 629, 2 L.R.A. 709, 14 Am. St. Rep. 254, 41 N. W. 381; Hayden v. Grillo, 42 Mo. App. 1; Gano v. Palo Pinto County, 71 Tex. 99, 8 S. W. 634; Hendricks v. Middlebrooks Co. 118 Ga. 131, 44 S. E. 835.

If the custom had arisen into the dignity of a law of the land, it was the court's duty to so instruct the jury as a matter of law, and not leave the subject to them to deal with.

Buyck v. Schwing, 100 Ala. 355, 14 So. 48; Robertson v. Wilder, 69 Ga. 340; Wilson v. Bauman, 80 Ill. 493; Canby v. Frick, 8 Md. 163.

Custom or usage must be proved. The jury's knowledge of it cannot be availed of.

Senac v. Fitchard, 4 La. 160; Tyson v. Laidlaw, 18 La. 380.

It was not a custom dignified with a force the equivalent of a law of the land. It required pleading and proof, and could not be submitted to the jury in the absence of appropriate allegations, supported by proof.

Packard v. Van Schoick, 58 Ill. 79; Randall v. Kehler, 60 Me. 37, 11 Am. Rep. 169; Murray v. Hatch, 6 Mass. 465; Livingston

v. Maryland Ins. Co. 7 Cranch, 506, 3 L. ed. 421.

The damages recovered are excessive.

Pennsylvania Co. v. Lilly, 73 Ind. 252; *Vicksburg v. McLain*, 67 Miss. 4, 6 So. 774; *Wells v. New York C. & H. R. R. Co.* 78 App. Div. 1, 78 N. Y. Supp. 991; *Fleming v. Lobel (N. J. L.)* 59 Atl. 27; *Little Rock & Ft. S. R. Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44; *Myers v. San Francisco*, 42 Cal. 215; *North Chicago Street R. Co. v. Wrixon*, 51 Ill. App. 307; *Parsons v. Missouri P. R. Co.* 94 Mo. 286, 6 S. W. 464; *Riley v. Salt Lake Rapid Transit Co.* 10 Utah, 428, 37 Pac. 681; *Hively v. Webster County*, 117 Iowa, 672, 91 N. W. 1041; *Rowe v. New York & N. J. Teleph. Co.* 66 N. J. L. 19, 48 Atl. 523; *Graham v. Consolidated Traction Co.* 64 N. J. L. 10, 44 Atl. 964; *Louisville & N. R. Co. v. Creighton*, 106 Ky. 42, 50 S. W. 227; *West Chicago Street R. Co. v. Mabie*, 77 Ill. App. 176; *Fox v. Oakland Consol. Street R. Co.* 118 Cal. 55, 62 Am. St. Rep. 216, 50 Pac. 25; *Graham v. Consolidated Traction Co.* 62 N. J. L. 90, 40 Atl. 773; *McDonald v. Champion Iron & Steel Co.* 140 Mich. 401, 103 N. W. 829; *Hooghkirk v. Delaware & H. Canal Co.* 63 How. Pr. 328; *Ahern v. Steele*, 48 Hun, 517, 1 N. Y. Supp. 259; *United States Brewing Co. v. Stoltenberg*, 211 Ill. 531, 71 N. E. 1081; *Cicero & P. Street R. Co. v. Boyd*, 95 Ill. App. 510; *Taylor, B. & H. R. Co. v. Warner (Tex. Civ. App.)* 31 S. W. 66; *Connaughton v. Sun Printing & Pub. Assn.* 73 App. Div. 316, 76 N. Y. Supp. 755.

Mr. A. H. Huston argued the cause and filed a brief for defendant in error:

The negligence complained of need not be the only cause, or the most proximate cause; and negligence, to be the proximate cause of an injury, must be such that a person of ordinary caution and prudence would have foreseen that some injury would likely result therefrom; not that the specific injury would result. And the question of proximate cause, whenever there is any doubt, must always be submitted to the jury.

Bishop, Non-Contract Law, §§ 450-455; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74; *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; *Scott v. Hunter*, 46 Pa. 192, 84 Am. Dec. 542; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469-474, 24 L. ed. 256-258; *Kansas City v. Gilbert*, 65 Kan. 469, 70 Pac. 350; *Atchison, T. & S. F. R. Co. v. Parry*, 67 Kan. 515, 73 Pac. 105; *Hayes v. Michigan C. R. Co.* 111 U. S. 228, 28 L. ed. 410, 4 Sup. Ct. Rep. 369.

Where there is no intervening efficient cause, the original wrong must be consid-

ered as reaching to the effect and proximate to it.

Hayes v. Williams, 17 Colo. 465, 30 Pac. 352; *The G. R. Booth*, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9; *The Ontario*, 37 Fed. 220; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L.R.A. 582, 5 C. C. A. 347, 12 U. S. App. 381, 55 Fed. 949.

The plaintiff in error has heretofore rested its claim for a reversal principally upon the proposition that, since there was no eyewitness to the origin of the explosion and fire, such origin must rest wholly in conjecture, and therefore the case must fail for want of proof. This is, no doubt, the rule when an injury occurs that cannot be accounted for, but it does not apply where there is room for balancing the probabilities, and drawing reasonable inferences which do account for the injury.

Schoepper v. Hancock Chemical Co. 113 Mich. 582, 71 N. W. 1081; *Coffeyville Min. & Gas Co. v. Carter*, 65 Kan. 565, 70 Pac. 635; *Seybolt v. New York, L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75; *Lutton v. Vernon*, 62 Conn. 1, 23 Atl. 1020, 27 Atl. 589; *McBride v. Northern P. R. Co.* 19 Or. 64, 23 Pac. 814; *Northern P. R. Co. v. Freeman*, 27 C. C. A. 457, 48 U. S. App. 757, 83 Fed. 82; *Toledo, P. & W. R. Co. v. Chisholm*, 27 C. C. A. 663, 49 U. S. App. 700, 83 Fed. 652; *Stowell v. Standard Oil Co.* 139 Mich. 18, 102 N. W. 227.

The determination of the question as to whether the injury resulted from a mere accident wherein no one was at fault, or was caused by the negligence of the party injured, or whether it is attributable to the dangerous mixture, is a matter for the jury.

Pitman v. El Reno, 2 Okla. 414, 37 Pac. 851; *Ruch v. Gas Electric Co.* 65 N. J. L. 399, 47 Atl. 504; *New York & G. L. R. Co. v. New Jersey Electric R. Co.* 60 N. J. L. 52, 38 L.R.A. 516, 37 Atl. 627; *Pennsylvania R. Co. v. Middleton*, 57 N. J. L. 154, 51 Am. St. Rep. 597, 31 Atl. 616; *Mahnken v. Monmouth County*, 62 N. J. L. 404, 41 Atl. 921; *Schoepper v. Hancock Chemical Co. and Toledo, P. & W. R. Co. v. Chisholm*, supra; *Texas & P. R. Co. v. Gentry*, 163 U. S. 353, 41 L. ed. 186, 16 Sup. Ct. Rep. 1104; *Burns v. Chicago, M. & St. P. R. Co.* 69 Iowa, 450, 58 Am. Rep. 227, 30 N. W. 25.

It cannot be said, as a proposition of law, that the use of coal oil to kindle fires is contributory negligence.

Ives v. Welden, 114 Iowa, 476, 54 L.R.A. 854, 89 Am. St. Rep. 379, 87 N. W. 408; *Riggs v. Standard Oil Co.* 130 Fed. 204; *Ellis v. Republic Oil Co.* 133 Iowa, 11, 110 N. W. 20.

A person who places on the market for general use a dangerous explosive which he represents and sells as a safe illuminant is

liable for any damages caused by such substances, either in the hands of his immediate vendee or a remote purchaser. And the rule that a seller of an article of commerce not in itself dangerous is not responsible for consequences to the purchaser of his vendee, resulting from defects in the articles sold, does not apply in this case.

Elkins v. McKean, 79 Pa. 493; *Judson v. Giant Powder Co.* 107 Cal. 549, 29 L.R.A. 718, 48 Am. St. Rep. 146, 40 Pac. 1020; *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64; *Rose v. Stephens & C. Transp. Co.* 11 Fed. 438; *Stowell v. Standard Oil Co.* supra; *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A.(N.S.) 588, 111 N. W. 745; *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455.

The burden of proving contributory negligence rests on the defendant, and it will not save the defendant unless it has been established by a preponderance of the evidence.

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291, 23 L. ed. 898; *Hough v. Texas & P. R. Co.* 100 U. S. 213, 25 L. ed. 612; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Washington & G. R. Co. v. Harmon* (*Washington & G. R. Co. v. Tobriner*) 147 U. S. 571, 37 L. ed. 284, 13 Sup. Ct. Rep. 557; *Kansas City, L. & S. R. Co. v. Phillibert*, 25 Kan. 583; *Missouri P. R. Co. v. McCally*, 41 Kan. 639, 21 Pac. 574.

The law presumes that a person injured is free from fault, in the absence of eye-witnesses or evidence to the contrary.

Dallemand v. Saalfeldt, 175 Ill. 310, 48 L.R.A. 753, 67 Am. St. Rep. 214, 51 N. E. 645; *Salyers v. Monroe*, 104 Iowa, 74, 73 N. W. 606; *Atchison, T. & S. F. R. Co. v. Aderhold*, 58 Kan. 208, 49 Pac. 83; *Mynning v. Detroit, L. & N. R. Co.* 64 Mich. 93, 8 Am. St. Rep. 804, 31 N. W. 147; *Texas & P. R. Co. v. Gentry*, supra; *Chicago, B. & Q. R. Co. v. Gunderson*, 174 Ill. 495, 51 N. E. 708.

It is a well-settled rule of law, supported by numerous modern decisions, that the negligence of the parent cannot be imputed to the child.

Wymore v. Mahaska County, 78 Iowa, 396, 6 L.R.A. 545, 16 Am. St. Rep. 449, 43 N. W. 264; *Bradshaw v. Frazier*, 113 Iowa, 579, 55 L.R.A. 258, 86 Am. St. Rep. 394, 85 N. W. 752; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399, 98 Am. Dec. 175; *Huff v. Ames*, 16 Neb. 139, 49 Am. Rep. 716, 19 N. W. 623; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64, 46 Am. Rep. 265; *Erie City Pass. R. Co. v. Schuster*, 113 Pa. 412, 57 Am. Rep. 471, 6 Atl. 269; *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67; *Daley v. Norwich & W. R. Co.* 26 Conn. 591, 68 Am. 53 L. ed.

Dec. 413; *Boland v. Missouri R. Co.* 36 Mo. 491.

The clear intent of the legislature was to exclude the lighter and more dangerous illuminants, and to admit the heavier and safer ones; and the obscurity in the meaning of the act which the plaintiff in error contends for in his brief arises from confusing actual specific gravity with the inverse scale of the Baume hydrometer. It may be that the inspectors have misapplied the rule for ascertaining the specific gravity of these oils, and they may have failed to take into consideration the fact that the Baume scale is inverse, and thereby have rejected fluids of sufficient specific gravity; but this does not militate against the law. This was a rightful subject to legislation, and the legislature had full authority to enact it as a police regulation for the protection of the people.

Patterson v. Kentucky, 97 U. S. 501, 24 L. ed. 1115; *Shellabarger v. Jackson County*, 50 Kan. 141, 32 Pac. 132; 1 Kent, Com. p. 461; *Sutherland*, Stat. Constr. § 260.

Where a part of a statute is unconstitutional, but the remainder is valid, the parts will be separated if possible, and that which is constitutional will be sustained. The constitutional and the unconstitutional may have been contained in the same section, yet all perfectly distinct and separable, so that the former may stand although the latter fall.

Presser v. Illinois, 116 U. S. 252, 29 L. ed. 615, 6 Sup. Ct. Rep. 580; *People ex rel. Angerstein v. Kenney*, 96 N. Y. 295; *Black*, Const. Law, § 35; *Cooley*, Const. Lim. 7th ed. p. 246.

Out of an abundance of caution the plaintiff offered to prove that the use of coal oil to kindle a fire was a general usage in this country, but the court excluded it upon the ground that matters of common knowledge and experience were not necessary to be proved at all. This rule was doubtless correct.

Milwaukee & St. P. R. Co. v. Kellogg, 94 U. S. 469, 24 L. ed. 256; *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *Sanford v. Gates*, 38 Kan. 405, 16 Pac. 807.

It is not a matter of what the defendant expected or intended that the mixture should be used for, but what an ordinarily cautious and prudent person might have foreseen. It is not necessary that the precise injury could even have been foreseen; all that is necessary is that the injury would naturally or probably result from the negligent act of sending this dangerous substance out upon the public.

Atchison, T. & S. F. R. Co. v. Parry, 67 Kan. 519, 73 Pac. 105.

The instruction as to damages, taken as a whole, is not subject to any complaint.

Union P. R. Co. v. Dunden, 37 Kan. 5, 14 Pac. 501; *Illinois C. R. Co. v. Spence*, 93 Tenn. 173, 42 Am. St. Rep. 907, 23 S. W. 211; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 18 L. ed. 591.

The question of damages is one of fact, to be settled by the trial court, whose ruling thereon should not be reviewed by this court on writ of error.

Wabash R. Co. v. McDaniels, 107 U. S. 454, 27 L. ed. 605, 2 Sup. Ct. Rep. 932; *New York, L. E. & W. R. Co. v. Winter*, 143 U. S. 60, 36 L. ed. 71, 12 Sup. Ct. Rep. 356; *Hughey v. Sullivan*, 80 Fed. 76; *Homestake Min. Co. v. Fullerton*, 16 C. C. A. 545, 36 U. S. App. 32, 69 Fed. 931; *Smith v. Sun Printing & Pub. Asso.* 5 C. C. A. 91, 14 U. S. App. 173, 55 Fed. 248; *Gale v. New York C. & H. R. R. Co.* 76 N. Y. 594; *Chicago Hansom Cab Co. v. Havelick*, 131 Ill. 179, 22 N. E. 797; *Joliet Street R. Co. v. Call*, 143 Ill. 177, 32 N. E. 389; *West Chicago R. Co. v. Bode*, 150 Ill. 396, 37 N. E. 879; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 500, 44 N. W. 502; *Kumli v. Southern P. Co.* 21 Or. 505, 28 Pac. 637; *Dowd v. Westinghouse Air Brake Co.* 132 Mo. 579, 34 S. W. 493; *Meeks v. St. Paul*, 64 Minn. 220, 66 N. W. 966; *Nelson v. West Duluth*, 55 Minn. 497, 57 N. W. 149; *Nelson v. Oregon R. & Nav. Co.* 13 Or. 141, 9 Pac. 321; *Lancaster v. Providence & S. S. Co.* 26 Fed. 233; *Brushaber v. Stegemann*, 22 Mich. 266; *Watt v. Amos*, 14 Okla. 178, 79 Pac. 109; *Abbott v. Keller*, 14 Okla. 281, 78 Pac. 377.

Mr. John Devereux also argued the cause for defendant in error.

Mr. Justice White delivered the opinion of the court:

Deselms sued the Waters-Pierce Oil Company to recover damages for the death of his wife and two young children, resulting from an alleged explosion of a highly inflammable and *explosive substance, consisting of a mixture of coal oil and gasoline. The mixture, it was alleged, had been bought by Deselms as coal oil from dealers who supposed it be such, although their vendor, the oil company, knew the dangerous character of the article and yet had sold it as coal oil. The oil company answered by a general denial, and specially pleaded that, if the accident in fact occurred, it was caused by the negligence of Mrs. Deselms. Before trial Deselms dismissed the claim based upon the death of his wife. There was judgment on a verdict against the oil company for \$14,500, which was af-

firmed by the supreme court of the territory. 18 Okla. 107, 89 Pac. 212.

On this writ the errors assigned, speaking in a general sense, complain of the action of the court below in affirming the trial court in giving, over exceptions of the oil company, certain instructions asked by Deselms, and in refusing to give various instructions asked by the oil company. For the purpose of clearness, however, we arrange the assignments under three headings: First, errors relating to the action of the trial court in giving and in refusing certain instructions; second, error in refusing, at the close of all the evidence, a request of the oil company for a peremptory instruction in its favor on the ground that the proof as to negligence was not sufficient to justify submitting the case to the jury, and because, even if there was such proof, on the facts shown there was no legal right to recover; third, error in refusing a request concerning the method to be applied in fixing damages in the event the jury found for the plaintiff.

To dispose of these assignments it is necessary to take into view the law of the territory relating to the inspection of coal oil, gasoline, etc., and the facts which the evidence tended to establish. Before coming, therefore, to directly consider the errors relied on, we refer to these subjects.

In 1895 there was enacted in the territory of Oklahoma a statute for the inspection "of coal oil, gasoline, or any other product of petroleum used as illuminating or burning fluids, by *whatever name [167 known." The statute specially provided, however, that, when once duly inspected in the territory, the fluids subject to inspection might be shipped to any portion of the territory without additional inspection. See Laws 1895, § 1, p. 174.

This act was amended in 1899. Session Laws 1899, p. 186. Section 2 of the act amended § 8 of the prior act to read as follows:

"All illuminating fluids that flash under the conditions as prescribed in § 1 at a less temperature than 120 degrees Fahrenheit, and have not a specific gravity of not less than 46 degrees Baume, that is, all oils which fail to stand both tests, shall be branded by the inspector 'Rejected,' and all such oils that do not flash at a less temperature than 120 degrees Fahrenheit, and which have a specific gravity of not less than 46 degrees Baume, as determined above, shall be branded 'Approved Standard Oil.' "

By § 3 the flash test was not to be applied to gasoline or other inflammable fluids, but they were to be tested "to determine the weight or specific gravity in the same manner as required by § 1 of this act to oils."

It was further provided in the section that "all gasolene to be used in vapor stoves and gasolene lamps shall have a specific gravity of not less than 70 degrees Baume and (at) a temperature of 60 degrees Fahrenheit." It was made the duty of the inspector to brand all packages, boxes, or barrels of gasolene or other fluid having no fire test with the words "Highly Inflammable," and the specific gravity found by him. Where the gasolene was found to have a specific gravity of not less than 70 degrees Baume, at a temperature of 60 degrees Fahrenheit, the inspector was required to mark the same "Approved Standard Gasolene." By § 4 the sale by any person of oil or gasolene as approved standard oil or approved standard gasolene, when in fact the same was not of that grade, as found by the inspector of oils, was declared to be a misdemeanor, punishable by fine and imprisonment. Any company or corporation furnishing oils or gasolene for sale in the territory of lower grades than that specified in the act was, moreover, made amenable to a fine.

The oil company had a wholesale depot at Guthrie, Oklahoma, for the sale of oil, gasolene, etc. At this depot there was a storage tank for coal oil, which in January, 1903, contained about 6,600 gallons of that fluid, which presumably had been inspected and tested according to law. Into this tank an employee of the company by mistake ran about 300 gallons of gasolene. When the mistake was discovered the agent of the oil company at Guthrie wrote to the manager at Dennison, Texas, informing him of the mistake. The manager replied, saying, "I cannot believe that this amount of gasolene will materially affect the burning quality of the P. W. oil. At any rate, we will have to watch the matter, and take chances on selling all the P. W. oil in P. W. oil storage tank, trusting that the same will give good results." On receipt of these instructions the agent at Guthrie, without any renewed inspection of the oil in the tank containing the mixture of gasolene and coal oil, sold the same to merchants in his territory as coal oil. On January 28, 1903, three barrels of the mixture were so sold to Powers & Deselms, retail grocers at Orlando, Oklahoma. One of the barrels was sold by the firm to another merchant, and the two remaining barrels were taken to the store of the firm, and their contents placed in an empty tank used for that purpose. The barrels thus sold to Powers & Deselms bore no inspection brand, nor were the barrels inspected after they came into the possession of the firm. On the invoice, however, given to Powers & Deselms by the oil company, a charge for inspection fees 53 L. ed.

was made, and Powers & Deselms had no knowledge of the real character of the material supplied, as above stated. A few days after the sale to Powers & Deselms,—on a Sunday morning,—the plaintiff, Deselms, who was a clerk for the firm, bought one gallon of the mixture, supposing it to be coal oil, and took the same to his home in a 2-gallon can. On the afternoon of the same day Deselms left Orlando for a brief absence. His wife and two children—one a boy of four, and the other a girl of two[169 years—were left at home. The children were bright and active and were in perfect health. It had been arranged that Mrs. Emory, a sister of Deselms, would remain at night with the family.

The dwelling was a one-story wooden structure, weatherboarded on the outside and lathed on the inside, the laths being covered with canvas, and the canvas then being papered over. The house had a frontage of 12 feet, ran lengthwise east and west about 24 feet, and was divided into two rooms. The east room was used as a kitchen, the cooking stove being near the east wall. The west room was the general living and sleeping room. In it was a heating stove composed of a cylindrical firebox and a cylindrical plate or body with a door in the side. This stove stood on the east side of the room and it and the kitchen stove were connected with a brick flue in the partition wall between the two rooms.

The first use made of the gallon of oil bought by Deselms was on Tuesday evening, when Mrs. Emory filled a new lamp from the contents of the can, and then lit the lamp. Almost immediately a flame shot out of the chimney. Mrs. Emory extinguished the light, trimmed the wick, and lit the lamp again, and, upon flame again issuing out of the chimney, thinking that the lamp was defective, she extinguished the light and made no further attempt to use the lamp. The oil can was then placed in the kitchen, near the southwest corner of the room. During the evening a wood fire which had been burning in the heating stove burned out. The next morning, after lighting the kitchen fire, Mrs. Emory started to kindle a fire in the heating stove. She shook down the ashes, examined the contents of the ash pan and found that the stove was cold. She ceased her preparations to start a fire, however, on being asked to assist in dressing the children, Mrs. Deselms saying that she would make a fire in the stove later. There was no fire in the stove when Mrs. Emory left the house at about 8 o'clock on that (Wednesday) morning, and she was the last person to see alive Mrs. Deselms and the two children.

*We take from the opinion of the su-[170

preme court of Oklahoma a summary of the evidence relative to the subsequent destruction of the house by fire and the death of the wife and her two children:

"The plaintiff's house was discovered to be on fire about 10 o'clock in the forenoon, and, upon the arrival of the first person on the scene, it was so completely ablaze that it was impossible, on account of smoke and gases, to force an entrance into the building. About 9 o'clock in the morning it had blown up cold from the northwest, and there was a high wind blowing from that direction at the time the fire occurred. Mr. Bradshaw was the first person to arrive at the building, and he broke in the back or kitchen door and tried to get into the other room, but was choked down by the dense smoke and gas, and came out. He tried a second time to enter the house, and was again choked and smothered by the smoke and gas, and had to retreat. He then ran around the house and tried to get in otherwise. About this time others came, and they broke in the north wall and found the plaintiff's son lying face downward on the bed near the northwest corner of the house, badly burned and life extinct, probably from suffocation. As the smoke cleared somewhat from the room they could see the body of the plaintiff's wife lying on the floor and what remained of the little girl on a couch. By pushing the building partly over, the charred bodies were taken out before the fire had completely burned out.

"After the fire, and after the remains of the building had fallen in and been pushed aside and the fire partly extinguished, the heating stove was found inclined to the northwest, the floor being partly burned out beneath it; the top was off the stove and the upper hinge to the door broken, the door hanging by the lower hinge. There was paper, kindling, and wood in the stove, just a little charred. The plaintiff's wife was lying with her feet near the stove, her head away from it in a westerly direction in front of the stove door. Near her body was found the top or conical part of the oil can, 171] the body of the can being *found 4 to 7 feet away in a southwesterly direction. These were the conditions existing at the time the fire was subdued sufficiently to admit of examination by those present."

The morning after the fire about a dozen pint bottles were filled from the mixture remaining in the tank at the store of Powers & Deselms. After being corked and sealed with plaster of Paris the bottles were placed on shelves in a drug store at Orlando, the shelves being located from 15 to 18 feet from a stove standing in the middle of the room, the temperature of the room being about 75 degrees. In about twenty minutes one of

the bottles exploded, and the remainder were taken into the cellar. Subsequently the fluid in two bottles was tested and analyzed by George L. Holter, an expert chemist, who was then and for thirteen years had been professor of chemistry and metallurgy in the Agricultural College at Stillwater, Oklahoma. Testifying as to the analysis he had made, Professor Holter said he found by the use of a closed-cup tester that the material would flash at 60, which would indicate a flashing point of not more than 80 degrees in the open-cup test required by the statute. The witness made a "fractional distillation" of the fluid to ascertain if it had any light material in it to account for the low-flash test, and produced a distillate of practically 5 per cent of the original quantity, which, judging from the general appearances, smell, and flash point, the witness said, was "what we generally term naphtha or gasoline." The flash point of this distillate was 37 degrees, while the flash point of the residue of the material from which the distillate had been taken was 95 degrees, which, allowing for a full 25 degrees of difference between the closed and open cup test methods, would bring the flash point at about 120 degrees, according to the statutory method. The witness swore that the mixture of coal oil and gasoline at the ratio of 95 and 5 per cent would be dangerous to use as coal oil. He, moreover, testified that ordinarily an explosion of three fourths of a gallon of a mixture of coal oil and gasoline, such as had been examined, would generate a volume of gas fifteen hundred to eighteen hundred times *that of [172 the liquid. Further, the witness declared that while it would not be dangerous to use coal oil having a flash test of 120 degrees to start a fire, it would be dangerous to use the analyzed mixture for that purpose.

In the light of the foregoing we come to consider the assignments of error.

1. *The error alleged to have been committed by the trial court in giving to the jury, at the request of Deselms, four instructions, numbered 4, 5, 6, and 7, and the refusal to give two instructions, numbered 5 and 11, requested by the oil company.*

Instruction numbered 4 called the attention of the jury to the character and quality of the oils and gasolenes which the statute of the territory permitted to be sold, referred to the tests prescribed for ascertaining their quality, and pointed out that it was a criminal offense to sell products of petroleum which did not conform to the statutory standard. It is said that this instruction was based mainly upon the provisions of § 2 of the act of 1899, heretofore quoted, which section, it is insisted, is void, and therefore afforded no proper basis for

consideration by the jury in determining whether the oil company had been negligent in putting the fluid in question upon the market. This rests upon the contention that the text of the statute is in effect meaningless, and that besides, even if it could be enforced according to its letter, the statute would lead to such an absurd result as would operate to destroy the very purposes which it was designed to accomplish. We think the contentions are without merit. As we have seen, the requirement of the statute as to specific gravity is that the oil shall "have not a specific gravity of not less than 46 degrees Baume." While the two negatives may apparently render the clause on its face confusing, if the superfluous negative be omitted all difficulty on this subject is removed, and the sentence would therefore provide that the oil must have a specific gravity of not less than 46 degrees Baume. This provision obviously exacts that the gravity of the oil shall be ascertained by the use of a Baume hydrometer, and it is the method of reading the scale of that instrument *upon which is based the argument that, even with the superfluous negative omitted, the provision of the statute leads to an absurd result and gives sanction to the admission of dangerous while excluding safe oils. In ascertaining the specific gravity by the Baume scale the heavier the oil tested the lower will be the number indicated on the scale, and consequently the higher the number on the scale, the lighter or more volatile will be the oil tested. This results because the Baume scale is to be inversely read. Now, as the statute, omitting the superfluous negative, reads that the oil shall have a specific gravity of not less than 46 degrees Baume, the contention is that the statute excludes all oils lower than 46 degrees and permits all oils above 46 degrees to be sold as not dangerous. But we think when the context of the statute is considered, and its provisions as to gasoline and the other light and highly inflammable fluids are taken into view, it becomes quite clear that, while the words of the statute are somewhat confusedly expressed, arising from the fact the Baume scale is inversely read, that the plain purpose of the statute was to permit the use of oils which, when tested by the Baume hydrometer, indicated at least 46 degrees specific gravity, and to exclude all oils of a lighter character; that is, all oils which, when tested by the hydrometer, indicated a degree of gravity on the scale higher than 46. In other words, we think that when the provision of the statute is taken into view in connection with the inverse scale of the Baume hydrometer, the requirement that the oil shall have a specif-

ic gravity of not less than 46 degrees Baume in effect was intended to exact that the coal oil permitted to be sold as not dangerous should be of no less gravity than 46, and therefore when tested should indicate not more than 46 degrees on the Baume scale.

Relying upon testimony which was offered, tending to show that, from some localities, oils which are perfectly safe are obtained, although they have a specific gravity somewhat above 46 Baume, it is insisted that the law in question was not a legitimate exercise of the police power, since, by selecting 46 degrees Baume as the standard, oils are excluded which would *be as safe[174 for use as oil complying with the standard fixed by the statute. But we think the court below was clearly right in deciding that, as the subject was within the police power of the state, it was not within the province of the judiciary to disregard the statute and treat it as void upon the theory that the legislature had acted unwisely in fixing the standard which the statute prescribed.

It is further contended that § 4 of the act of 1899 was void because of the alleged unequal punishment therein provided for persons and corporations performing the same act. But whether or not the section is subject to the criticism made against it, it is clearly separable from the rest of the act, as held by the court below, and in no wise affected the unlawful use within the territory of oil which did not conform to the standard fixed by the statute.

The other instructions, Nos. 5, 6, and 7, which the assignment of errors assails, in various forms of statement submitted to the jury the following subjects: *a*, The liability of the oil company, predicated upon the fact that the mixture in question was dangerous to be used for the usual and ordinary purposes for which coal oil is generally used; *b*, that it was knowingly sold by the oil company, to be resold as coal oil; *c*, that the making use of coal oil to kindle or start fires was a general and universal custom or usage, and hence the oil company had reason to believe that the mixture so sold by it would be used for such a purpose; and, *d*, that the accident happened while the fluid was being used with ordinary care and caution, in the belief that it was coal oil, and for a purpose for which coal oil is usually intended and used.

In this connection it is to be observed that at the trial Deselms, the plaintiff, offered evidence tending to show that there was a general custom to make use of coal oil for kindling fires; but, on the objection of the oil company, the offered testimony was excluded, the court declaring it was of opinion that whether coal oil was generally used for the purpose claimed, the subject

was one of common knowledge and experience in the community, *and it was not necessary to offer proof in relation thereto; and, as shown by the instructions complained of, the determination of the existence of the custom or usage was subsequently left to the jury. In affirming the action of the trial court on this branch of the case the supreme court of the territory held that the trial court had not erred in excluding the testimony as to the custom or usage in question, and that no prejudicial error had been occasioned by submitting the determination of the question to the jury, since the custom in the community was so universal that the court would have been authorized to have instructed the jury accordingly. In judicially noticing the existence of a usage or custom among persons generally within the territory to use coal oil in kindling fires, we cannot say the court below erred, and, upon the hypothesis indulged, no error was committed in overruling the exceptions to the instructions. See *Ellis v. Republic Oil Co.* 133 Iowa, 11, 110 N. W. 20.

We deem it unnecessary to particularly refer to the assignments of error relating to the refusal of the trial court to give to the jury certain instructions submitted on the part of the oil company, as the proposed instructions but embodied the converse of the propositions contained in instructions Nos. 5, 6, and 7, just disposed of. One of the instructions, however, was framed upon the theory that the case was controlled by the act of 1895, providing for the inspection of oils, etc., because of the alleged void character of the act of 1899,—a contention which we have also previously adversely disposed of in considering that subject.

2. *The error alleged to have been committed by the appellate court in holding that the trial court rightly refused, at the close of the evidence, to give a peremptory instruction for the oil company.*

The errors assigned on this subject, as we have seen, are twofold; that is, the inadequacy of the facts to show that the accident was caused by the inflammable nature of the mixture, and the absence of a legal [176]right to recover, even if the proof *justified submitting the question of fact to the jury. Concerning the first, the contention is that, as the plaintiff was bound to make out his case by a preponderance of evidence, and as there were no facts in evidence from which an inference could properly be drawn that the accident might not have resulted if there had been no admixture of gasoline with the coal oil, or which authorized the inference that the loss was not caused solely by the negligence of the wife of the plaintiff, the peremptory instruction should have been given.

It is, of course, to be conceded that the burden of proof was primarily upon the plaintiff to establish the negligence charged, and it was not enough to show an accident and an injury. *Patton v. Texas & P. R. Co.* 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275. We are, however, of the opinion that the court below was clearly right in deciding that the trial court had committed no error in ruling that the evidence was sufficient to require the submission of the case to the jury on the question of the cause of the accident. The highly inflammable character of the mixture was well illustrated by the testimony of Mrs. Emory, a sister of the plaintiff, that, on filling a new lamp with the mixture, and lighting it, flame shot out of the lamp chimney. Undoubtedly the evidence directly pointed to the fact that the can which contained the fluid had been taken from the east room, where it usually was kept, to the room in which stood the heating stove. Clearly, also, the proof as to the unburned and charred or stained condition of the kindling wood in the heating stove, when connected with the removal of the can, tended to show that some of the fluid from the can had been applied to the kindling before it was ignited and preparatory to starting a fire. But the situation of the can after the fire and the place where the top of the can was found, clearly tended to rebut the implication that the fire had been lighted and fluid from the can then poured upon it. In view of the finding of the jury as to the custom to use coal oil for kindling fires, and the knowledge which the oil company must be presumed to have had, that the fluid sold by it as coal oil would be used for this purpose, the mere inference *that the oil [177] from the can had been applied to the kindling before it was lighted afforded no ground for taking the case from the jury. Moreover, in view of the proof as to the condition of the kindling wood, of the situation of the can, of the condition of the stove after the fire, of the position of the bodies of the wife and the two children, and of the dense and large volume of gases which filled the premises at the outbreak of the fire, we think there was adequate proof from which the jury could have inferred that the accident was the result of an explosion caused by applying a light to the kindling wood in the stove after it had been saturated with fluid taken from the can,—an accident therefore resulting solely from the wrong of the oil company in selling as coal oil a highly dangerous and inflammable mixture, unsafe to be used for the purpose for which, under the instruction of the court and the findings of the jury, coal oil was ordinarily used. It is unnecessary to further elaborate the

subject because of the very full and accurate review of the tendencies of the proof in relation to the matter, made by the court below in its opinion.

The contention that, although there was sufficient evidence to go to the jury as to the fact of negligence on the part of the oil company, nevertheless there was nothing in the tendencies of the proof to support the conclusion that the oil company was legally responsible for the accident, rests on the proposition that, as Deselms bought the oil, not from the oil company, but from the firm of Powers & Deselms, and therefore was only a remote vendee, there was no legal liability on the part of the oil company. This is based upon the propositions that there was between the plaintiff, Deselms, and the oil company, no contractual relation, and besides, in any event, the act of the oil company in selling the dangerous mixture to Powers & Deselms was not the proximate cause of the accident. As we have seen, however, there was evidence tending to prove, and under the instructions given to the jury their verdict must be taken as establishing, the following facts: 1, that the oil company knowingly sold to Powers & Deselms a highly inflammable mixture of coal oil and *gasolene, in violation of the territorial statute, and that the oil company knew, or had reason to assume, that the mixture so sold would be retailed by its vendees (Powers & Deselms) to the public generally for domestic use as coal oil; 2, that Powers & Deselms purchased the mixture in question supposing it to be coal oil, and that the plaintiff, Deselms, bought the mixture from the firm in like ignorance of its real character; 3, that there was a general custom in the community to use coal oil for kindling fires,—a use which would not have subjected persons so using it and exercising ordinary care to the appalling danger which would arise from the making use of the inflammable and dangerous mixture composed of gasolene and coal oil,—a custom of which the oil company had knowledge or of the existence of which it is presumably charged with knowing. From these facts it is apparent that the responsibility of the oil company rested not on contract, but in tort, and therefore the contention as to want of contractual relation is wholly irrelevant.

In *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 621, relied upon by the oil company, it is true an attorney at law was held not to be liable to a third party for the negligent performance of a contract to examine the title to certain real estate, because of the absence of a contractual relation. But the distinction between the principle which was there controlling and the

one which is here applicable was pointed out in the opinion of the court in that case, where it was said (p. 204):

"Pharmacists or apothecaries who compound or sell medicines, if they carelessly label a poison as a harmless medicine, and send it so labeled into the market, are liable to all persons who, without fault on their part, are injured by using it as such medicine, in consequence of the false label; the rule being that the liability in such a case arises, not out of any contract or direct privity between the wrongdoer and the person injured, but out of the duty which the law imposes on him to avoid acts in their nature dangerous to the lives of others. He is liable, therefore, though the poisonous drug with the label may have passed through many intermediate sales before it reached the *hands of the person injured. [179 *Thomas v. Winchester*, 6 N. Y. 397, 410, 57 Am. Dec. 455."

And the same principle was applied to a sale of dangerous oil in *Wellington v. Downer Kerosene Oil Co.* 104 Mass. 64, where it was said: "It is well settled that a man who delivers an article which he knows to be dangerous or noxious, to another person, without notice of its nature and qualities, is liable for any injury which may reasonably be contemplated as likely to result, and which does in fact result, therefrom, to that person or any other who is not himself in fault." And the like doctrine has been expounded in many cases. See, especially, *Elkins v. McKean*, 79 Pa. 493, and *Weiser v. Holzman*, 33 Wash. 87, 99 Am. St. Rep. 932, 73 Pac. 797, where the doctrine is clearly and forcibly stated and the many authorities sustaining the same are cited. In view of the tendencies of the proof as to the entire absence of knowledge by Powers & Deselms, when purchasing from the oil company, and the ignorance of Deselms when he bought from the firm, of the character of the fluid, it is certain that, in the case before us, the act of the oil company, in any view, was the proximate cause of the accident, as no other independent and efficient cause or wrong can be legally said to have occasioned the same. *The G. R. Booth*, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9.

But, because we confine ourselves to the particular facts of the case before us, we must not be understood as holding, in view of the dangerous character of the fluid and the putting of the same upon the market by the oil company, with the expectation that it would be retailed to the public, and the violation of the statutory regulations and prohibition concerning the sale of such article, that under the general principles of law sustained by the authorities already

cited, a recovery against the oil company might not have been justified, even if the proof had established that Powers & Deselms had been informed by the oil company of the dangerous character of the mixture. See, further, *Clement v. Crosby & Co.* 148 Mich. 293, 10 L.R.A.(N.S.) 588, 111 N. W. 745, and *Stowell v. Standard Oil Co.* 139 Mich. 18, 102 N. W. 227, and authorities cited in both cases.

180] *3. *It remains only to consider error alleged to have resulted from the affirmance of the refusal of the trial court to give a particular instruction asked by the oil company concerning the subject of damages.*

In its general charge the court in substance instructed the jury that the measure of damages was the net value to the father of the services of his children during their minority. Thus the court said:

"Damages are intended to be compensatory, and must be fair, reasonable, and just. The father is entitled to the services of his son until he arrives at the age of twenty-one years, and of the daughter until she arrives at the age of eighteen; he is also charged with the expense of their support, maintenance, education, and social training, and you must fix the amount which, in your judgment, will compensate him for any pecuniary loss he may have sustained."

And, later, the jury were cautioned that their verdict "must be based upon the evidence which the court has permitted to go to you."

On behalf of the oil company the trial judge was asked to give an instruction numbered 14, as follows:

"In determining the amount of your verdict for the plaintiff, if you find for such plaintiff, you should not take into consideration the pain suffered by the deceased or the wounded feelings of the father or other surviving relatives, but your verdict must be limited to such amount, if any, as you believe the plaintiff has suffered financially by reason of the death of his children. In other words, the recovery, if any, is to be a pecuniary compensation for a pecuniary loss, and such finding of loss must be based upon the evidence introduced in the case."

The court gave this instruction, with the addition at the end thereof of the following sentence: "The amount of damages cannot be fixed by the evidence, but must be the result of your own judgments."

We shall consider the exception in the light of the objections urged in the brief of counsel. In discussing the subject of 181] excessive *damages counsel for the oil company thus treat of the modification in instruction No. 14:

"We submit, in the first instance, that it was error on the part of the court to tell

the jury that the question of damages cannot be fixed by the evidence, but must be the result of your own judgment. While it is true that the amount of damages cannot be named or ascertained from specific evidence disclosing the amount of loss on the part of plaintiff, yet they must bear a relation to the evidence, and the vice of this instruction is that it cuts loose the minds of the jury from all regard to the evidence, and it is needless to say that they went the instance they were turned loose. The authorities cited later will fully cover this point in this instruction."

The authorities referred to are decisions of state courts of last resort dealing with the subject of excessive damages when allowed by juries for the negligent causing of the deaths of minors. They more particularly concern the duty of a court to grant or refuse a new trial where the damages are excessive, and where the action of the trial court in refusing a new trial was open to review in the appellate court. As it is clear that this court does not possess such a power (*Lincoln v. Power*, 151 U. S. 436, 38 L. ed. 224, 14 Sup. Ct. Rep. 387; *Ward v. Joslin*, 186 U. S. 142, 153, 46 L. ed. 1093, 1100, 22 Sup. Ct. Rep. 807), we need not further notice the authorities relied upon.

That the correctness of the general instruction as to what were the elements of damage sustained by the father was not assailed by the oil company sufficiently appears from the argument of counsel above excerpted, which also evidences the fact that no question was intended to be made as to the nonproduction at the trial of witnesses to give evidence in respect to the net value of the prospective services of the children. Manifestly, the rule deemed by the court and counsel to be applicable, to quote language contained in the opinion in *Brunswick v. White*, 70 Tex. 504, 8 S. W. 85, was that "when, from the age and undeveloped state of the child, any estimate of value of the services until majority would be matter of opinion, in which no particular or especial knowledge in way of expert testimony *could be procured better than [182 the judgment and common sense of the ordinary juror called to the duty of determining such value, then, upon such testimony, the sound discretion of the jury can be relied on to determine the value, without any witness naming a sum." And see *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 535, 42 N. E. 971, and *Birkett v. Knickerbocker Ice Co.* 110 N. Y. 504, 18 N. E. 108.

The complaint that error was committed in the modification made of requested instruction No. 14, as stated by counsel, amounts, therefore, but to the assertion that

thereby the jury were informed that they possessed power to capriciously fix the amount of damages. We are unable, however, to so interpret the language, especially when read in connection with the prior instructions of the court. The jury were not told that the "question" of damages could not be fixed by the evidence, but that the "amount" thereof had not been fixed. When they were further instructed that the amount of damages must be "the result of your own judgments," we think, in reason, the jury could only have understood that it was left to their sound sense and deliberate judgment to determine the amount of damage, from a consideration of the various elements entering into the damage, and the factors in evidence, *viz.*, the age, health, condition in life of the children, etc. If counsel were of opinion that the modification as expressed was susceptible of being misunderstood by the jury, the court should have been asked to remove the supposed ambiguity.

Finding none of the assignments of error relied upon and which we have power to review to be well founded, it results that the judgment of the Supreme Court of the Territory of Oklahoma must be and it is affirmed.

183]*WILLIAM GORDON CRAWFORD,
Petitioner,
v.

UNITED STATES.

(See S. C. Reporter's ed. 183-208.)

Indictment — conspiracy to defraud United States — sufficiency.

1. An indictment for a conspiracy to defraud the United States, in violation of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, which charges a corrupt agreement by which an officer of the United States is, in substance, to have a secret interest in a public contract as to the fulfilling of which by the contractor that officer is to be the judge, is sufficient without averring that the interest was given him or the money paid to him to influence his official conduct upon the very contract in question, or alleging which of the various ways of defrauding the government was in the minds of the conspirators, or that they all were.

[For other cases, see Indictment and Information, 69-81, in Digest Sup. Ct. 1908.]

NOTE.—On qualifications of jurors—see note to Clinton v. Englebrecht, 20 L. ed. U. S. 659.

On a party's books of account as evidence in his own favor—see note to Smith v. Smith, 52 L.R.A. 546.

As to what is provable by books of account—see note to Hall v. Chambersburg Woolen Co. 52 L.R.A. 689, 53 L. ed.

Appeal — objections and exceptions — qualification of juror in criminal case.

2. An objection to a juror in a criminal case because he is a "salaried officer of the government," which is one of the exemptions mentioned in D. C. Code, § 217, reaches the question whether the relation of the juror to the government, as appears from his testimony on his *voir dire*, disqualifies him from acting as a juror on the trial of an indictment for a conspiracy to defraud the United States.

[For other cases, see Appeal and Error, VI. a, in Digest Sup. Ct. 1908.]

Jury — qualifications — government employee.

3. The qualifications prescribed for jurors in the District of Columbia by D. C. Code, § 215, do not furnish the only test of the juror's competency, but leave in force the common-law rule under which an employee of the government cannot sit as a juror on the trial of a criminal proceeding instituted by the government.

[For other cases, see Jury, II. b, in Digest Sup. Ct. 1908.]

Evidence — correspondence — explanatory letter.

4. A letter written by counsel for the accused, with the latter's consent, and by his direction, in reply to a letter charging him with having abstracted certain correspondence from the files of a corporation, should be admitted in evidence in a criminal case to explain the letter of accusation, already admitted in evidence without objection, for the purpose of showing a suppression or spoliation of evidence.

[For other cases, see Evidence, IV. g, in Digest Sup. Ct. 1908.]

Trial — striking out evidence.

5. A letter from a witness, charging the accused with having abstracted certain correspondence from the files of a corporation, admitted without objection in a criminal case, for the purpose of showing a suppression or spoliation of evidence, should be struck out on motion upon the withdrawal by the prosecution of its offer in evidence of the accused's answer to such letter.

[For other cases, see Trial, IV. c, in Digest Sup. Ct. 1908.]

Evidence — intent.

6. The accused should be permitted to testify as to his intent in abstracting certain correspondence from the files of a corporation, where the prosecution claims that he did so for the purpose of suppressing or destroying evidence against him.

[For other cases, see Evidence, XI. e, in Digest Sup. Ct. 1908.]

Appeal — reversible error — excluding evidence.

7. The exclusion of material evidence offered on behalf of the accused in a criminal case is reversible error unless the absence of harm is clearly shown from the record.

[For other cases, see Appeal and Error, 5051-5065, in Digest Sup. Ct. 1908.]

Appeal — error in excluding evidence.

8. The refusal to permit one accused of conspiring to defraud the United States to testify as to his intent in abstracting cer-

tain correspondence from the files of a corporation, which the government claims was for the purpose of suppressing or destroying evidence against him, is reversible error where the conviction rests largely upon the testimony of a felon and self-confessed accomplice, although there may have been other testimony at the trial from which inferences as to such intent might have been drawn.

[For other cases, see Appeal and Error, 5051-5065, in Digest Sup. Ct. 1908.]

Evidence — account books — competency — weight.

9. The possibility of forgery goes to the weight, but not to the competency, of a private account book kept by one accused of conspiring to defraud the United States, which contains entries relating to financial transactions between him and his alleged accomplice in connection with a contract between a corporation and the United States, where he offers such book in evidence to corroborate his testimony on the issue whether he received money back from such alleged accomplice for which he did not account to the corporation, but concealed from it, and testifies that such book is in the same condition as when he received it back from the president of the corporation, with the latter's check marks, indicating approval of the items.

[For other cases, see Evidence, IV. o, in Digest Sup. Ct. 1908.]

[No. 92.]

Argued October 13, 14, 1908. Decided February 1, 1909.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment which affirmed a conviction in the Supreme Court of the District for conspiring to defraud the United States. Reversed.

See same case below, 30 App. D. C. 1.

Statement by Mr. Justice Peckham:

On the 3d of April, 1905, in the supreme court of the District of Columbia, the defendant was indicted, together with George E. Lorenz and August W. Machen, for a conspiracy to defraud the United States, by means stated in the indictment, and in relation to a contract between the Postal Device & Lock Company, a corporation of the state of New Jersey, and the Postoffice Department of the United States, by which the company was to furnish certain satchels to the Department for the use of the letter carriers in the free-delivery system of the government.

185] *The indictment was founded upon § 5440 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3676), which reads as follows:

"If two or more persons conspire either to commit any offense against the United

States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not more than ten thousand dollars, or to imprisonment for not more than two years, or to both fine and imprisonment, in the discretion of the court."

Nearly two years before the finding of this indictment (*viz.*, in July, 1903), the defendant had been indicted in the same court by two different indictments, relating to the same general subject-matter as the one found in April, 1905,—one indictment charging him with conspiring (together with Lorenz and Machen) against the United States, by agreeing to present false bills of account to the Postoffice Department, in relation to the contract mentioned, for supplying the Department with satchels for letter carriers, in alleged violation of § 5438 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3674). The other indictment was against the defendant individually for presenting false claims to a clerk in the Postoffice Department under this same contract, and in violation of the same section of the Revised Statutes. Upon motion the three indictments were consolidated for the purpose of trial of the defendant and were tried together, a severance in the conspiracy indictments having been granted upon the defendant's motion for his separate trial. The two indictments found in 1903 have been so disposed of in the court below that no question arises in regard to either.

Upon the trial the defendant was convicted, as hereinafter more particularly stated, and he then appealed from the judgment entered upon the verdict of conviction to the court of appeals of the District, where it was affirmed by a divided court, Mr. Chief Justice Shepard dissenting. 30 App. D. C. 1.

*Upon application of the defendant [186 this court granted a writ of certiorari, and the case is now here by virtue of that writ.

Mr. A. S. Worthington argued the cause and filed a brief for petitioner:

That part of U. S. Rev. Stat. § 5440, U. S. Comp. Stat. 1901, p. 3676, which refers to conspiracies to "defraud the United States," cannot be strained to apply to a case where an official, without wrongful intention, is found in a position where his personal interest is in conflict with his duty to the government. If the phrase "to defraud the United States" can be given such a broad application, then those words are of such indefinite signification that it is impossible for anyone to know, in advance of judicial determination, to what they may extend.

United States v. Wiltberger, 5 Wheat. 76, 5 L. ed. 37; United States v. Brewer, 139 U. S. 278, 35 L. ed. 190, 11 Sup. Ct. Rep. 538; Todd v. United States, 158 U. S. 278, 282, 39 L. ed. 982, 983, 15 Sup. Ct. Rep. 889; Czarra v. Medical Supervisors, 25 App. D. C. 443; 8 Bishop, Crim. Law, §§ 198-214; Neal v. Clark (Neal v. Scruggs) 95 U. S. 704, 24 L. ed. 586; United States v. Britton, 108 U. S. 199, 27 L. ed. 698, 2 Sup. Ct. Rep. 531; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; Smith v. Townsend, 148 U. S. 490, 37 L. ed. 533, 13 Sup. Ct. Rep. 634.

It is ground for challenge for cause by a party to a suit that the juror is in the employ of the other party.

3 Bl. Com. 363; 1 Chitty, Crim. Law, 541, 542; 1 Bishop, New Crim. Proc. § 902; Block v. State, 100 Ind. 357; Central R. Co. v. Mitchell, 63 Ga. 173; Hubbard v. Rutledge, 57 Miss. 6; Louisville, N. O. & T. R. Co. v. Mask, 64 Miss. 738, 2 So. 360; Pearce v. Quincy Min. Co. 149 Mich. 112, 112 N. W. 739.

Attorney General Bonaparte and Mr. Holmes Conrad argued the cause, and, with Solicitor General Hoyt, filed a brief for respondent:

When an officer of the government, charged with the duty of advising and recommending the purchasing of public supplies, enters into an agreement with one who proposes to become, and does thereafter become, the vendor of the supplies as to which such officer has advised the purchase and has approved the bid of such vendor, under which agreement such officer is to receive a certain proportion of the purchase money paid by the government for such supplies so furnished, and there is actually paid to and received by such officer a portion of the money so paid by the government to the vendor for such supplies so furnished, such facts so charged, without more, constitute a fraud on the government, and the official action of such officer is influenced by such agreement.

Wardell v. Union P. R. Co., 103 U. S. 658, 26 L. ed. 511.

A conspiracy is sufficiently described as a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.

Pettibone v. United States, 148 U. S. 203, 37 L. ed. 422, 13 Sup. Ct. Rep. 542.

States have a right to punish the violation of statutes enacted as part of their public policy, notwithstanding they may have suffered no pecuniary damage therefrom.

53 L. ed.

Hyde v. Shine, 199 U. S. 81, 50 L. ed. 96, 25 Sup. Ct. Rep. 760.

The facts charged in the indictment constitute a conspiracy to defraud the United States.

Tyner v. United States, 23 App. D. C. 362; United States v. Curley, 122 Fed. 738, 64 C. C. A. 369, 130 Fed. 10.

Unless a person in the service of the government holds his place by virtue of an appointment of the President or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States.

United States v. Smith, 124 U. S. 532, 31 L. ed. 536, 8 Sup. Ct. Rep. 595.

A person employed by the United States to sell stamps at a small yearly salary is not a salaried officer of the United States, so as to exempt him from jury duty.

United States v. Barber, 21 D. C. 456.

Are the common-law qualifications of a juror in force in the District of Columbia?

United States v. Lee, 4 Mackey, 496, 54 Am. Rep. 293.

The case is rarely found in which direct and positive evidence of criminal combination exists. To hold that nothing short of such proof is sufficient to establish conspiracy would be to give immunity to one of the most dangerous crimes which infest society.

Com. v. McClean, 2 Pars. Sel. Eq. Cas. 369; 2 Wharton, Crim. Law, § 1398, note.

Whether questions are fit and proper to be asked is in the discretion of the court, and its rulings are not reviewable on writ of error.

Rea v. Missouri, 17 Wall. 532, 21 L. ed. 707; Storm v. United States, 94 U. S. 76, 24 L. ed. 42; Johnston v. Jones, 1 Black, 209, 17 L. ed. 117.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The defendant was convicted on the first count of the indictment found in April, 1905, (which contained six counts), and was acquitted on the fifth and sixth counts. The court having, previous to the trial, sustained a demurrer to the second, third, and fourth counts, there is nothing left under this indictment except the conviction of defendant on the first count, and the question to be considered at the outset is as to the sufficiency of that count. The grounds of the demurrer were that the indictment did not set forth any offense under § 5440 of the Revised Statutes of the United States, nor did it set forth any offense under any statute, or at common law; that, as to the first count, it did not appear how the govern-

ment could have been defrauded by the alleged scheme of conspiracy, and that it is not alleged in the indictment that any payment to Machen under the agreement set forth in the count was intended to influence Machen's official action, and it is not alleged that the government was to pay more than it would have had to pay if the alleged agreement between the defendants had not been entered into, and it is not alleged that the contract was not honestly awarded. These questions may be considered, notwithstanding the defendant, when his demurrer was overruled, pleaded over and went to trial on the plea of not guilty. See Code of District of Columbia, § 1533, page 300. [31 Stat. at L. 1418, chap. 854.]

189] *Without going into any very great detail, it is necessary to state what, in substance, is alleged in the first count. It is therein averred that Machen (one of the alleged conspirators) was the General Superintendent of the Division of Free Delivery of the Postoffice Department of the United States, and that the Department used satchels for letter carriers, which were supplied by contract, at a certain price named therein for each satchel, and in such numbers as the Department might, from time to time, require. It was the duty of the General Superintendent to keep the Department advised from time to time of the approaching expiration of existing contracts for furnishing supplies, and of the necessity for advertising for bids for contracts for the furnishing of supplies, including satchels for letter carriers, and also to advise as to the matter and form of such proposed contracts, and it was his duty to use his best and honest judgment as to the number of satchels that, from time to time, might be required for the use of the carriers under any contract that might be made. It was his duty to examine the bills for such of the satchels as had been delivered, and approve them if correct, upon which payment would be made, in due course, by the Postoffice Department. The defendant and Lorenz knew fully the duties pertaining to the office of General Superintendent prior to the making of the contract mentioned.

On the 6th of May, 1902, on the advice of the General Superintendent, the Department advertised for the presentation to the Department of bids up to June 6, 1902, for the supplying of satchels for letter carriers for four years from July 1, 1902.

On June 3, 1902, the defendant and Machen and one Lorenz, intending to defraud the United States, unlawfully and fraudulently conspired, "knowingly, wrongfully, and corruptly to defraud the United States in a dishonest manner, and through and by means of a dishonest scheme and arrange-

ment," which is then stated. The defendant was to procure the lock company, of which he was an officer, and which was a New Jersey *corporation desiring to engage[190 in furnishing supplies to the Postoffice Department to put in a bid for furnishing satchels for the Department. He was also to procure the lock company, before the offer of the bid of the company to the Department, to make a contract with Lorenz that, if the bid of the lock company was accepted by the Department, then, whenever the lock company furnished any satchels to the Department under such contract, and received from the Department payment therefor, the lock company would pay to Lorenz all of such amount exceeding the cost of manufacturing and delivering the same and 25 cents for each satchel. Pursuant to such agreement the lock company did enter into such a contract with Lorenz.

On June 3, 1902, the defendant and the General Superintendent and Lorenz, as part of their dishonest scheme, agreed that the money which was to be paid to Lorenz by the lock company should thereafter be divided between the defendant, the General Superintendent, and Lorenz, in certain proportions unknown to the grand jury.

On the 25th of June, 1902, the United States, through the Postmaster General, made a contract with the lock company, by which the former agreed to purchase from the lock company, at certain fixed prices, so many satchels as might be needed by the Department for four years from July 1, 1902.

On October 3, 1902, the defendant, in order to effect and carry out the conspiracy, presented a bill against the United States for \$15,800, for 5,000 satchels theretofore sold and delivered to the Department, in accordance with the contract of June 25, 1902, with the lock company, and on October 13, 1902, in pursuance of the conspiracy, the General Superintendent approved the bill as such superintendent, the defendant receiving and accepting a warrant payable to the order of the lock company from the Department, in payment of such bill for the amount thereof.

On the 21st of October, 1902, the defendant, in pursuance of the conspiracy, drew a check of the lock company *upon Spencer Trask & Company, of New York, for \$5,441.36, payable to the order of Lorenz, which he sent to Lorenz.

On October 28, 1902, Lorenz, having received the check and obtained the money on it, sent to Machen, the General Superintendent, the sum of \$900, by means of a draft procured by Lorenz, and sent by him to the Superintendent.

From this statement it appears that the count discloses the duties of the General Superintendent and the duty that he owed to the government in relation to a contract of the nature above mentioned. It was part of his duty to give an honest and unprejudiced judgment, whether the contract was, from time to time, being fairly and fully complied with, both as to the number of satchels furnished, their material and workmanship, as well as with regard to all other matters pertaining to the contract. It cannot be supposed that such duty could be fully, impartially, and honestly discharged by an officer who, by reason of his private and alleged corrupt agreement with the agent of the contractor whose work he was supervising, would obtain more pay by exceeding in his requisitions the number of satchels really necessary for the Department. It could scarcely be believed that he would give an unbiased and honest judgment upon the question whether the contract had been fulfilled as to material or workmanship or other detail when, if the satchels were received, he would at once, though secretly, receive a certain portion of the sum paid by the Department to the contractor for furnishing such satchels. This is not an indictment for the violation of a statute against bribery. It is for a conspiracy to defraud the United States; and when it is seen that the conspiracy consists in such a corrupt agreement as is alleged in the indictment, by which an officer of the United States is, in substance, to have a secret interest in a contract as to the fulfilling of which by the contractor that officer is to be the judge, it becomes unnecessary to aver that the interest was given him, or the money paid to him, to influence his official conduct upon the very contract in question. The agreement is alleged to have [192] been an unlawful *and fraudulent one, wrongfully and corruptly to defraud the United States. Its almost necessary result, if carried out, would be to defraud the United States. The fraud might be perpetrated by getting the contract at a higher price than otherwise would have been obtained, or, if already obtained, then the United States might be defrauded by the General Superintendent accepting improper satchels, not made of the materials or in the manner specified in the contract, or by his requiring the delivery of more satchels than were sufficient for the wants of the Department. It is not necessary in such a case as this (of an alleged unlawful and corrupt contract) to allege in the indictment which of the various ways the government might be defrauded was in the minds of the conspirators, or that they all were. *Dealy v. United States*, 152 U. S. 539, 543, 38 L. ed.

545, 546, 14 Sup. Ct. Rep. 680. Such a corrupt agreement, if carried out, would naturally, if not necessarily, result in defrauding the United States by causing it to pay more for satchels than was necessary, or for more satchels, or possibly inferior ones, than it otherwise would, but for the corrupt agreement set forth. The indictment was sufficient. *United States v. Hirsch*, 100 U. S. 33, 25 L. ed. 539; *Hyde v. Shine*, 199 U. S. 62, 82, 50 L. ed. 90, 96, 25 Sup. Ct. Rep. 760; *United States v. Keitel*, 211 U. S. 370, ante, 230, 29 Sup. Ct. Rep. 123.

Various questions arose upon the trial of the case, to some of which we will now refer.

In the course of empaneling the jury one John C. Haley was called as a juror and sworn upon his *voir dire*, and testified that he was a druggist; that he did not know the defendant; that he had formed no opinion about the case; that his drug store was a subpostal station, and that he was the clerk in charge; that he was technically a clerk of the city postoffice, and that he was paid an annual compensation of \$300, which included all clerk hire and rental of the premises; that he was paid for the entire service of taking charge of the substation, and whatever rent may be necessary; that it is one of the things in connection with the drug business that can hardly be avoided; that a drug store, to keep up its prestige, must sell *postage stamps, and might [193] as well get paid for it as to do it for nothing. The counsel for the defendant then challenged Haley for cause, the objection stated being that he was a "salaried officer of the government;" but the court overruled the challenge, to which ruling the defendant duly objected. During the organization of the jury the defendant exhausted the peremptory challenges allowed him by law, and Haley sat as a member of the jury that tried the case.

The question is, Was Haley disqualified to sit as a juror, and did the court err in holding that he was not? Section 215 of the Code of Laws for the District of Columbia, page 49 [31 Stat. at L. 1223, chap. 854], provides as follows:

"Sec. 215. Qualifications.—No person shall be competent to act as a juror unless he be a citizen of the United States, a resident of the District of Columbia, over twenty-one and under sixty-five years of age, able to read and write and to understand the English language, and a good and lawful man, who has never been convicted of a felony or a misdemeanor involving moral turpitude."

Section 217 provides that "all executive and judicial officers, salaried officers of the government of the United States and of

the District of Columbia . . . shall be exempt from jury duty, and their names shall not be placed on the jury lists." Counsel for the government contend that the objection by defendant's counsel to the juror Haley was founded, as shown by the record, on the ground that the juror was a "salaried officer of the government;" that the juror was not such an officer, and that, if he were, that fact is only ground for a claim on his part for exemption (which he did not make), and not a ground for disqualification. Even though the juror was not a salaried officer of the government, under *United States v. Smith*, 124 U. S. 525, 31 L. ed. 534, 8 Sup. Ct. Rep. 595, which was founded upon a statute concerning a very different subject, and as to which different reasons might apply, and even though such an officer was only exempt under § 217, and not disqualified under § 215, yet we are of opinion that the objection actually made reaches beyond the mere question [194]*whether technically the juror was or was not a salaried officer of the government, and that it reaches the question of the qualification of a juror by reason of his relations to the government as a post-office clerk or employee in a subpostal station, and whether such relations did not by law disqualify him from acting as a juror in an action to which the government was a party. The objection to the juror was evidently by reason of his relations to the government, however described.

In criminal cases courts are not inclined to be as exacting with reference to the specific character of the objection made as in civil cases. They will, in the exercise of a sound discretion, sometimes notice error in the trial of a criminal case, although the question was not properly raised at the trial by objection and exception. *Wiborg v. United States*, 163 U. S. 632, 659, 41 L. ed. 289, 299, 16 Sup. Ct. Rep. 1127, 1197.

Under this rule the general character of the objection to the juror was fairly before the court, and therefore we think it proper to notice the alleged error in the reception of this juror and to decide it with respect to the general qualification of the juror under the law, without being tied down to the question of whether he was a salaried officer and so exempt, but not, as is contended, thereby disqualified to serve as a juror.

The question as to the qualifications of a juror in this District is not, in all cases, a mere local one. If the objection is not based alone upon the wording of the section of the Code above cited, but also upon the common law, it becomes an important question which might arise anywhere in the whole country. There may be

statutes in the different states as to qualifications of jurors which, in their construction, would not prevent the application of the common law in regard thereto, and so the question of qualification being the same in the Federal as in the state courts (*Rev. Stat. § 800*, U. S. Comp. Stat. 1901, p. 623) may be a general one. It is of special importance in this District, where there are so many thousands of clerks and employees of the government, to know whether they are qualified jurors *to sit on the trial of [195] cases to which the government is a party. If they be so qualified it might not be cause for much astonishment to see in this District a majority of a jury composed of such jurors.

Taking the contention of the government to be sound, the fact that a proposed juror is a salaried officer of the government can only be ground for his own claim of exemption, which, if not made by him, leaves him a competent juror. A jury composed of government employees where the government was a party to the case on trial would not in the least conduce to respect for, or belief in, the fairness of the system of trial by jury. To maintain that system in the respect and affection of the citizens of this country it is requisite that the jurors chosen should not only in fact be fair and impartial, but that they should not occupy such relation to either side as to lead, on that account, to any doubt on that subject. We do not think that § 215 of the Code of the District includes the whole subject of the qualifications of jurors in that District. If that section, together with § 217, were alone to be considered, it might be that the juror was qualified. But by the common law, a further qualification exists. If that law remains in force in this regard in this District a different decision is called for from that made in this case. The common law in force in Maryland, February 27, 1801, remains in force here, except as the same may be inconsistent with or replaced by some provision of the Code for the District. Code, chap. 1, § 1, p. 5. It has not been contended that the common law upon the subject of jurors was not in force in Maryland at the above-named date, or that it did not remain in force here, at least up to the time of the passage of the Code. Jurors must at least have the qualifications mentioned in § 215, but that section does not, in our opinion, so far alter the common law upon the subject as to exclude its rule that one is not a competent juror in a case if he is master, servant, steward, counselor, or attorney of either party. In such case a juror may be challenged for principal cause as an absolute disqualification of the juror. 3 *Cooley's Bl. Com.* 4th *ed. p. 363; Block [196

v. State, 100 Ind. 357, 362. In the Indiana case, Judge Niblack, speaking for the supreme court of that state, held in substance in accordance with the above rule of the common law, and that the Indiana statute upon the qualifications of jurors did not strike out the rule of the common law on the subject, when not inconsistent with the statute. This rule applies as well to criminal as to civil cases. Mr. Chief Justice Shepard, in his dissenting opinion in this case, cites many cases to the effect that a clerk or employee of a private party or of a corporation is not qualified to sit as a juror in such a case, over the objection of the opposite side. Although the cases cited were civil cases and rest mainly on the common law, they are not lessened in weight on that account. On the contrary, they apply with added weight to criminal cases. Modern methods of doing business and modern complications resulting therefrom have not wrought any change in human nature itself, and therefore have not lessened or altered the general tendency among men, recognized by the common law, to look somewhat more favorably, though perhaps frequently unconsciously, upon the side of the person or corporation that employs them, rather than upon the other side. Bias or prejudice is such an elusive condition of the mind that it is most difficult, if not impossible, to always recognize its existence, and it might exist in the mind of one (on account of his relations with one of the parties) who was quite positive that he had no bias, and said that he was perfectly able to decide the question wholly uninfluenced by anything but the evidence. The law therefore most wisely says that, with regard to some of the relations which may exist between the juror and one of the parties, bias is implied, and evidence of its actual existence need not be given.

The position of the juror in this case is a good instance of the wisdom of the rule. His position was that of an employee who received a salary from the United States, and his employment was valuable, to him, not so much for the salary as for the prospect such employment held out for an increase in his business *from the people who might at first come to his store for the purchase of stamps, etc. It need not be assumed that any cessation of that employment would actually follow a verdict against the government. It is enough that it might possibly be the case; and the juror ought not to be permitted to occupy a position of that nature to the possible injury of a defendant on trial, even though he should swear he would not be influenced by his relations to one of the parties to the suit in

giving a verdict. It was error to overrule the defendant's challenge to the juror.

Upon the trial of the case the government called as a witness John Aspinwall, who was the president of the Fabrikoid Company, of Newburg, New York, and it appeared from his testimony that some time in 1902, and prior to the making of the contract between the lock company and the Postoffice Department, the defendant had some correspondence with the Fabrikoid Company with reference to the availability and the cost of the material manufactured by that company for use in the manufacture of satchels to be used by the Postoffice Department for letter carriers.

After the finding of the two indictments against the defendant, and some time in the latter part of 1903, the defendant visited the place of business in Newburg, New York, of the Fabrikoid Company, and requested the privilege of looking over the correspondence between himself and that company. For the purpose of proving what the government asserted was a suppression or spoliation of evidence, the witness testified that the defendant was permitted to look over the files in the company's letter books and examine his letters to the company, and copies of its letters to him, the witness not being present when the defendant made such examination. Subsequently the witness discovered that a copy of a letter that the company had written to the defendant, and dated April 21, 1902, had been removed from the copy book, and the index covering that letter had been erased. The letter book was then produced by the witness from which the copy letter had been removed, and *it was exhibited to the jury[198 by counsel for the government. Counsel for the defendant thereupon admitted that the defendant took the copy letter from the letter book and made the erasure of the reference to the page, and the witness identified the letter then produced as the original which had been taken from the letter book of the witness. The witness also identified a letter dated April 18, 1902, as a letter which he testified he had received from the defendant, and which counsel for defendant admitted defendant had taken at the same time he had taken the copy letter from the copy book. Counsel for the government then read in evidence to the jury the letter from defendant of April 18, and also the letter from the witness, dated April 21, replying thereto, which had been removed from the letter book of witness's company. The court of appeals has held that both letters were in fact harmless, and that their contents would tend to negative the existence of any sinister intent of defendant in taking them. But evidence as to the intent of defendant

in taking them was certainly proper, as is hereafter stated.

The witness Aspinwall further testified that when he discovered the loss of the letters he wrote to the defendant the letter dated December 7, 1903. Counsel for the defendant then admitted that he had the original of that letter, but stated that the witness might read it from his copy book. The letter was then read, in which the witness charged the defendant, in substance, with having surreptitiously removed from the files of the company a copy of the letter from the company to the defendant, and with having erased the page from the index. The letter of December 7 was then offered in evidence without objection.

As soon as the letter was admitted in evidence the counsel for the government immediately offered the letter written by counsel for defendant in answer to it, but was stopped by the court with an inquiry as to its relevancy, which he answered by stating that he did not see its relevancy. The court observed he would hear from whoever 199] offered the letter as to its *relevancy, when counsel for government said he did not desire to offer the letter, and that he had only offered it at the suggestion of counsel for defendant, who then moved to strike out the letter just received in evidence (that of December 7) on the ground that it was inadmissible unless coupled with the answer that might have been made to it. The court held that the letter from defendant's counsel could not be considered by the jury, but that the letter written by the witness Aspinwall to defendant was relevant as tending to prove that the defendant was charged by that witness with abstracting the letter from the files. The motion to strike out was denied, and the counsel for the government then said that he did not offer the answer to the letter, which was accordingly not received in evidence. To obviate an objection that the defendant had no right to offer evidence while the case was with the government, the defendant subsequently, when the case was with him, offered in evidence the letter written by his counsel, which, on objection, was ruled out.

It is plain that the letter from the witness Aspinwall to the defendant, making the charge that defendant took the letters, as above stated, was put in evidence by the government for the purpose of endeavoring to show that the defendant had surreptitiously taken evidence which might possibly be used against him upon his trial. The response of defendant to such letter should have been admitted as explanatory of the letter of accusation. Without the letter of explanation the other letter should not have been received. The court of appeals

held that it was difficult to understand the theory upon which the letter from Aspinwall to defendant was admissible, but, as it was admitted, without objection, there was no error, and the subsequent motion to strike out the letter was addressed to the discretion of the trial court. It seems clear from the record that the letter of the witness to defendant was not objected to, under a belief by defendant's counsel, formed possibly upon some prior arrangement or understanding between counsel, that the answer to it would also, at once, be offered in evidence. *Under these circumstances, and [200 in the absence of the offered explanation, the letter of witness, making a charge of abstracting letters, should have been struck out on the motion made by defendant immediately upon the withdrawal of the offer in evidence of the answer to the letter. It was all one transaction, and the reception of the first letter without objection was at once followed up by the government's offer of the answer, and when the offer was withdrawn it is too strict an enforcement of a general rule to hold that the motion to strike out was addressed to the discretion of the court. But the motion was not denied on any such ground. The record shows it was denied because the court held the letter proper to be put in evidence. The theory stated by the court was a mistaken one. It was wholly immaterial what charge was made by witness in the letter, separate from the action of defendant in regard to the charge. Defendant was not on trial for abstracting the letter, and the statements therein were alone no evidence against defendant. If the letter were admitted, then the answer to it should also have been admitted. The court seemed to agree that if the answer had been made by the defendant personally, instead of by his counsel, it might have been admissible, but that, as defendant did not himself write the answer, it could not be admitted. The court stated, when the offer was first made by defendant's counsel to put the answer to the letter in evidence, that it was not proper to offer any of his evidence at that time, while the case was with the government, but the answer was subsequently offered in evidence by defendant's counsel, when the case was with him, and, under objection, was again rejected. So the defendant had the accusing letter put in evidence against him and was not permitted to have his answer, through his counsel, admitted in reply.

Again, at the close of all the evidence, when counsel for the defendant once more moved to strike out the letter of witness Aspinwall, the court denied the motion on the ground that the evidence was of a nature to throw light on the minds of the jury

upon the moral make-up of the individual, 201]and thus enable *the jury to come to a conclusion as to what his sworn word is worth. This reason was repeated in his charge, when the court said that while such evidence did not tend to indicate that the defendant was guilty, it was admitted to enable the jury to take into consideration what was the degree of moral sense that the defendant witness had.

When the letter was first offered and received in evidence on the part of the government the defendant had not been placed on the witness stand, and after he had been on the stand this evidence was retained, while the defendant was not permitted to show what his written answer to the charge of spoliation was, because the answer was written by his counsel (although by his direction and under his authority), and not by himself, personally. An explanation of the reason for his taking the letters might be quite material to enable the jury to come to a decision as to the moral make-up of defendant, but he was not allowed to fully give it. The court of appeals also held that the answer to that letter, concededly written by defendant's counsel, was plainly inadmissible, but that, even if its exclusion had been error, it was cured by the fact that the defendant, when on the stand, testified to the same explanation of his action. *i. e.*, that he understood that Aspinwall had consented that he take such of the files as he desired.

We do not think that the letter written by counsel for the defendant was inadmissible. The defendant had in substance testified that it was written by his counsel, with his consent and by his direction. In other words, that counsel was acting simply as the agent and under the direction of his principal, the defendant in the case. It was not necessary that such letter should be written by the defendant personally, in his own handwriting. The importance of the matter lies in the fact that defendant, as soon as the accusation was made, had, through his counsel, acting under his direction, explained the charge made of secretly taking evidence which was in the hands of a third party, and which he feared might be used against him. The defendant did on 202]the trial testify to the same *explanation as contained in the letter of his counsel, *i. e.*, that Aspinwall in substance consented to the taking of the letters, but it is doubtful if such evidence cured the error of excluding the letter, written at once after the accusation was made and long before the trial, in which letter he admitted and explained the taking, showing it was from no desire to suppress evidence, but, on the contrary, to preserve it.

We are of opinion, also, that the court
53 L. ed.

erred in its refusal to allow defendant to testify in regard to his intention in taking the letters from the files. His counsel asked him the question when he was on the stand, after he had admitted their taking, whether he took them with the intent to suppress or destroy them, or with intent that they might be preserved and presented to the jury when his trial should come on. Counsel offered to show the fact by the witness and let the witness say which it was. This was objected to by counsel for the government and the objection sustained.

The witness was further asked whether, when he took the evidence, he had the intention to destroy it. This, upon objection, was ruled out, as was the question, What did you do with these letters after you had taken them? Defendant's counsel then stated: "We offer to prove that the witness then brought them to his counsel in Washington, Mr. Worthington." The offer was, on objection, overruled.

The whole bearing of the evidence on the part of the government in regard to the letters could only have been for the purpose of contending that the defendant took the letters without leave, and intended to suppress the evidence contained in them. It was proper to prove the intent of the witness when he took these letters, whether he took them with the intent of destroying or suppressing them as evidence against himself, or whether he took them for the purpose of preservation and of delivering them to his counsel, to be used on his trial. It was error to reject the evidence, for it was material and proper to go to the jury. The court of appeals so held, and said: "The intent of the defendant in obtaining possession of *the letters was material, and, [203 being material, the defendant should have been permitted to testify as to his intent and motive." The court, however, Mr. Chief Justice Shepard dissenting, held that the record showed that this error, in excluding material evidence, did not harm the defendant, and should, therefore, be disregarded by the appellate court.

There is a presumption of harm arising from the existence of an error committed by a trial court against the party complaining, in excluding material evidence on a trial, especially before a jury. It is only in cases where the absence of harm is clearly shown from the record that the commission of such an error against a party seeking to review it is not cause for the reversal of the judgment. *Deery v. Cray*, 5 Wall. 795, 807, 18 L. ed. 653, 657; *Smith v. Shoemaker*, 17 Wall. 630, 21 L. ed. 717.

The defendant was peculiarly situated in this case, and great care was necessary to prevent injustice to him. The record shows

that one of the alleged conspirators, Machen, had, just prior to defendant's trial herein, pleaded guilty under this same indictment, and had been sentenced to imprisonment, to commence upon the expiration of a term of imprisonment he was then serving. He was not called as a witness. While this action of Machen was not the slightest evidence of the guilt of defendant, and was not matter to be referred to or considered by the jury, it left defendant without the aid of Machen in the trial of the case. In addition to that, Lorenz was called as a witness for the government upon the trial of this defendant, and testified that he was a defendant in the two conspiracy indictments in regard to which this defendant was then on trial, and that he was then serving in the Moundsville penitentiary a sentence from the supreme court of the District. Both of these men might have been guilty of a conspiracy to defraud the United States, and the defendant be innocent thereof. But a felon, being also a confessed accomplice, was thus produced by the government as a witness for the purpose of proving its case against defendant, the witness having, as it would appear, in popular language, 204] turned "state's evidence," *at least so far as to incriminate himself together with defendant. Without his evidence it would have been difficult, if not impossible, to convict the defendant. No reflection is intended or intimated with regard to this action on the part of the government. It was wholly within the discretion of its law officers, and their decision ought not to be reviewed by the court. But the evidence of a witness, situated as was Lorenz, is not to be taken as that of an ordinary witness of good character in a case, whose testimony is generally and prima facie supposed to be correct. On the contrary, the evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution, and ought not to be passed upon by the jury under the same rules governing other and apparently credible witnesses. In many jurisdictions such a man is an incompetent witness unless he has been pardoned. The facts surrounding this case make it particularly important that the rule in regard to material errors should be most rigidly adhered to. If it be not clear that no harm could have resulted from the commission of this material error, the judgment should be reversed. A careful perusal of the testimony regarded by the court below as sufficient to show that no harm resulted to the defendant on account of this error has failed to convince us that such is the fact. In the opinion of the court of appeals it is said there was no testimony given as to the intent with which

defendant took the letters. This was, of course, because such evidence was excluded. The letters were, in fact, subsequently produced by defendant's counsel in court. It is further said, in the opinion, that the defendant was "permitted to testify as to his reason for erasing the index number in the letter book, and that he did so 'with the idea of putting that,' i. e., the letter from the company, 'back, and making the file perfect.' It is therefore clear that the defendant was permitted to offer testimony, fully meeting the government's contention that he had taken the letters without the consent of their custodian; further, that, on the subject of his intent in taking them, he was permitted to offer testimony *from [205 which the only possible inference was that he desired them in order that he might show everything with reference to his transactions with the Fabrikoid Company; and that as to one letter, at least, he was permitted to testify that he took it with the intention of putting it back. To have permitted him to testify, as he offered, in addition to the foregoing, that he took them with the intention of showing them to his counsel, would have added little, if anything, to his explanation; indeed, as already stated, such testimony was not directly responsive to that offered by the government, viz., that he had taken the letters surreptitiously. This latter allegation he was permitted to negative fully and explicitly. It is impossible to conclude that the refusal of the learned trial justice to permit him to testify more fully as to what he intended to do with the letters was prejudicial to his defense." [30 App. D. C. 19.]

There may have been testimony some time during the trial, inferences might possibly have been drawn as to the motive or intent with which those letters were taken, but, instead of testimony from which such inferences might have been drawn, the defendant was entitled to state directly on oath to the jury what that intention was, and what were the motives which induced him to take the letters.

It is hardly possible to imagine a case where greater care was necessary in regard to the exclusion of proper and admissible evidence than in the case before us. As we have said, it was entirely possible that the jury might believe that both Lorenz and Machen were guilty, as alleged, in the indictment for conspiracy, and that the defendant was, nevertheless, perfectly innocent. No material and proper evidence upon that issue should have been excluded, and the error committed was not, in our opinion, clearly shown to have been harmless.

During the trial, while the case was with the defense, counsel offered in evidence a

certain book, which contained entries relating to the financial transactions between defendant and Lorenz, in connection with the contract, dated June 25, 1902, between the lock company and the Postoffice Department. 206]*As part of its case, the government had been permitted to introduce evidence tending to show that Lorenz had paid to defendant some part of the money which Lorenz had received from the lock company, and evidence was given which the government claimed tended to show that the receipt of these moneys by defendant was concealed from his company.

Spencer Trask had been called by the government as a witness for the purpose of showing his ignorance of any such payments, and he was asked whether the defendant had ever told him that, under this contract with the government, he was to receive a part of the money back from Lorenz, and the witness answered, "Certainly not; absolutely not." It appeared that the witness Trask was a banker in the city of New York, and that he held a controlling interest in the lock company, of which Mr. Chance, his private secretary, was president. He also testified that he did not care to and did not, as a matter of fact, spend time in the examination of the details of the business of the lock company; that he confided it to Mr. Chance and the defendant, and that the president, Mr. Chance, by direction of witness, had the general conduct of the company under his control.

The question whether the defendant had received money back from Lorenz, of which he gave no account to and concealed from the lock company, was strongly contested upon the trial, and evidence given on the part of the government which it claimed tended to prove the concealment. The defendant, on the contrary, contended that these moneys, which he did not deny that he had received, were paid to him by Lorenz for services which defendant had performed for him, and which moneys were known by Mr. Chance to have been paid, and that he had, as president of the company, approved of such payments. It was further contended that Mr. Chance had seen the book in which the defendant had entered the fact and the dates of such receipts of money from Lorenz, and that the book had been given to Mr. Chance for the purpose of examination by him in his capacity as president; that Mr. 207]Chance *had taken the book and had looked through it, and checked in lead pencil marks, in evidence of his approval, the various items, among which were the items showing the receipt of the moneys from Lo-

renz by defendant. The witness testified that such book, then offered in evidence by his counsel, was in the same condition when offered in evidence as it was when it was received back by him from Mr. Chance after his examination and approval of its entries.

The receipt of the book in evidence was objected to by counsel for the government, and excluded by the court. "What is there," inquired the court, "to show that this book has not been altered since he made the entries" (meaning the defendant)? And again the court said: "I am very seriously in doubt as to whether you are entitled to have the book in evidence on the ground claimed for it, that is, that it was submitted to Chance; and, on account of the condition of the book, I will resolve that doubt against you." We do not see there was anything in the condition of the book (which was produced on the argument before us) that would prevent its being received in evidence.

We think the court erred in the exclusion of the book. It was not offered as an ordinary account book, showing accounts between different parties, but it was offered as a written corroboration of the evidence of the defendant when he testified that the receipt of the moneys by him from Lorenz was known by the company, and was not concealed from it by him, but, on the contrary, was put into a book which the president of the company saw, and which he checked as approved. It is true that the integrity of the items in the book depends upon the evidence of the defendant. He might have made all of them after this question arose. He might have so made the entries as to the receipt of the moneys from Lorenz. He might have forged the check marks alleged to have been made by Mr. Chance, but he testified that such was not the case; that the book was in the condition it was when he received it from Mr. Chance. We think it was competent to allow it to be shown *to the jury, and for the jury to[208 decide as to its worth and weight. The book was a part of the transaction testified to by the defendant.

Various other questions were urged on the argument before us, but, as those already discussed require a reversal of the judgment, we do not think it necessary to notice them.

The judgment is reversed.

Mr. Justice Moody did not take any part in the decision of this case.

JOHN D. SPRECKELS, Adolph B. Spreckels, and C. August Spreckels, Partners, Doing Business under the Firm Name of J. D. Spreckels' Bros., and A. G. Serrao, D. Lycurgus, S. C. Guercera, W. C. Borden, W. K. Akana, Wing Sing, Kwong Wa Kee, C. Aho, Peter Miguel, Tang Sing, and Mrs. John Utterstron, Plffs. in Err.,

v.

CHARLES A. BROWN.

(See S. C. Reporter's ed. 208-215.)

Appeal—finality of judgment below.

1. A judgment of the supreme court of Hawaii on a writ of error, overruling exceptions to a verdict and judgment in ejectment, and affirming the judgment, is final for the purpose of a review in the Supreme Court of the United States.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

Appeal—jurisdictional amount—dismissal.

2. A writ of error to review a judgment of the supreme court of Hawaii in an action of ejectment will not be dismissed on the ground that the value of the land in dispute is less than \$5,000, where the contrary sufficiently appears by affidavits in the record and in the Federal Supreme Court.

[For other cases, see Appeal and Error, 359-371, in Digest Sup. Ct. 1908.]

Appeal—jurisdictional amount—estoppel by tax returns.

3. The owners of real property are not estopped by their tax returns under oath, valuing such property at less than \$5,000, from asserting that such property has that value, in order to sustain the jurisdiction of the Federal Supreme Court of a writ of error to review a judgment of the Hawaiian supreme court in an action of ejectment.

[For other cases, see Appeal and Error, 488, 489, in Digest Sup. Ct. 1908.]

Deeds—release and quitclaim by dissee to stranger.

4. A deed by a dissee which purports, for a substantial consideration, to "remit, release, and forever quitclaim" to a stranger all the former's "right, title, and interest in and to" the premises, is sufficient in Hawaii to pass all the estate which the grantor could convey by a deed of bargain and sale, there being no question but that a dissee can convey a title.

[For other cases, see Deeds, III. d, in Digest Sup. Ct. 1908.]

Appeal—error in instruction—boundaries.

5. An instruction that a grant from the King of Hawaii of the upland above a street down to what was then its upper side, "and also the sea beach in front of the same down to low-water mark," includes the strip between the front lines of the upland, as described by metes and bounds, and high-water mark, cannot be deemed erroneous by the Federal Supreme Court without having the evidence before it, where the supreme court of Hawaii, in upholding the instruction, said that the area between the part described and high-water mark was not very extensive, was of little value, and was closely connected with the upper part in use.

[For other cases, see Appeal and Error, 5071-5126, in Digest Sup. Ct. 1908.]

Boundaries—when monuments control.

6. Monuments in a royal grant prevail over a description by courses, distances, and area where a discrepancy exists.

[For other cases, see Boundaries, 123-153, in Digest Sup. Ct. 1908.]

Boundaries—low-water mark.

7. A conveyance of the upland "with the right of extension to low-water mark" carries the title to land between the upland, as described, and low-water mark.

[For other cases, see Boundaries, IV. b, in Digest Sup. Ct. 1908.]

Appeal—error in instructions—accretions.

8. Error in the instructions of the trial court with regard to the apportionment of accretions does not require the Federal Supreme Court, without the evidence before it, to reverse a judgment for plaintiff in ejectment on a writ of error to the supreme court of Hawaii, where that court, though believing that the instructions were wrong, was of the opinion that, so far as appeared, the verdict was right, and declined to set it aside or require a remittitur as a condition of not doing so.

[For other cases, see Appeal and Error, 5071-5126, in Digest Sup. Ct. 1908.]

Appeal—harmless error—instructions.

9. A verdict in favor of plaintiff in ejectment will not be disturbed for any error in instructing the jury to find against the defendants on the defense of adverse possession unless satisfied, by a preponderance of evidence, that they have "clearly" proved such defense.

[For other cases, see Appeal and Error, 5071-5126, in Digest Sup. Ct. 1908.]

NOTE.—As to what judgments or decrees are final for purposes of review—see notes to Brush Electric Co. v. Electric Improv. Co. 2 C. C. A. 379; Central Trust Co. v. Madden, 17 C. C. A. 238; Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co. 28 C. C. A. 482; Gibbons v. Ogden, 5 L. ed. U. S. 302; and Schlosser v. Hemphill, 49 L. ed. U. S. 1001.

As to the construction and effect of quitclaim deeds—see note to United States v. California & O. Land Co. 37 L. ed. U. S. 354.

On the effect of a deed to carry title to the water's edge where street or highway

intervenes—see case note to Johnson v. Grenell, 13 L.R.A. (N.S.) 551.

On the effect of bounding a grant on river or tide water—see notes to Hanlon v. Hobson, 42 L.R.A. 502, and United States v. Pacheco, 17 L. ed. U. S. 865.

As to when monuments control courses and distances—see note to Newsom v. Pryor, 5 L. ed. U. S. 383.

As to admissibility of testimony of jurors to impeach verdict—see notes to Bartlett v. Patton, 5 L.R.A. 523; Murphy v. Murphy, 9 L.R.A. 820; and Hauk v. Allen, 11 L.R.A. 706.

New trial — improper influence of jury — waiver.

10. A new trial need not be granted on the ground that the jury was improperly influenced by newspaper reports that the trial judge, in the absence of the jury, stated, on a motion to direct a verdict, that he was inclined in favor of the plaintiff, though still having some doubt, and that he might set aside a verdict for defendants, where counsel for defendants, in open court, stated that they would take their chances of the effect of such reports upon the jury, at a time when there were several ways in which the jurors could have been prevented from seeing the papers, and stopped the court from even giving the jury instructions not to read the papers.

[For other cases, see New Trial, III. in Digest Sup. Ct. 1908.]

Appeal — harmless error.

11. The error, if any, in admitting affidavits of the jurors, on a motion for a new trial, to show that they were not influenced by newspaper reports, is immaterial, where the order overruling the motion is right on other grounds.

[For other cases, see Appeal and Error, 4479-4492, in Digest Sup. Ct. 1908.]

[No. 61.]

Submitted December 11, 1908. Decided February 1, 1909.

IN ERROR to the Supreme Court of the Territory of Hawaii to review a judgment which affirmed a judgment of the Circuit Court of the First Judicial Circuit, in that territory, in favor of plaintiff in an action of ejectment. Affirmed.

See same case below, 18 Haw. 91.

The facts are stated in the opinion.

Messrs. Mason F. Prosser and Robbins B. Anderson submitted the cause for plaintiffs in error:

A release to a person not in possession of the whole or some part of the premises conveys no title.

2 Bl. Com. chap. 20, p. 324; 3 Washb. Real Prop. 6th ed. §§ 2238, 2239; Runyan v. Smith, 18 Fed. 581; Bennett v. Irwin, 3 Johns. 366; Porter v. Perkins, 5 Mass. 236, 4 Am. Dec. 52; Warren v. Childs, 11 Mass. 222; Mayo v. Libby, 12 Mass. 343; Miller v. Emans, 19 N. Y. 387; Baker v. Woodward, 12 Or. 11, 6 Pac. 173; 4 Greenleaf's Cruise, Real Prop. *78.

The words "sea beach" have a fixed legal meaning,—namely, the shore between high and low water mark.

Scratton v. Brown, 4 Barn. & C. 495; Cutts v. Hussey, 15 Me. 241; 3 Am. & Eng. Enc. Law, 2d ed. p. 901; Gould, Waters, pp. 61, 64; Littlefield v. Littlefield, 28 Me. 184; Doane v. Willcutt, 5 Gray, 335, 66 Am. Dec. 369; Niles v. Patch, 13 Gray, 257; Hodge v. Boothby, 48 Me. 70; East Hampton 53 L. ed.

v. Kirk, 6 Hun, 259; Coburn v. San Mateo County, 75 Fed. 531.

Courses plus distances plus area plus the map should govern the more or less ambiguous and general clause "along the edge of the sea."

White v. Luning, 93 U. S. 524, 23 L. ed. 939; Davis v. Rainsford, 17 Mass. 210; Higginbotham v. Stoddard, 72 N. Y. 99.

Any expression by the judge of his opinion on a material fact, in the hearing of the jury, is error, and entitles the party prejudiced thereby to a new trial under the Hawaiian statute.

Lyman v. Hilo Tribune Pub. Co. 13 Haw. 455; McMinn v. Whelan, 27 Cal. 320; Neill v. Rogers Bros. Produce Co. 38 W. Va. 228, 18 S. E. 564; 1 Thomp. Trials, §§ 218, 219; 21 Enc. Pl. & Pr. p. 994; McDowell v. Crawford, 11 Gratt. 377.

It is immaterial that the prejudicial remarks are not embodied in the instructions, since they have substantially the same effect upon the jury as if they were so given.

Lyman v. Hilo Tribune Pub. Co. and Neill v. Rogers Bros. Produce Co. supra; State v. Philpot, 97 Iowa, 365, 66 N. W. 730, 21 Enc. Pl. & Pr. p. 995; 1 Thomp. Trials, § 219.

It is obvious from the nature of the error that the court cannot cure it by instructing the jury that they are the sole judges of the facts, and must disregard his remarks.

Neill v. Rogers Bros. Produce Co. supra; State v. Harkin, 7 Nev. 383; Lyman v. Hilo Tribune Pub. Co. supra; 1 Blashfield, Instructions to Juries, § 49.

The reading of the publication in the jury room was undoubtedly such misconduct as would vitiate the verdict and require a new trial.

Mattox v. United States, 146 U. S. 140, 150, 36 L. ed. 917, 921, 13 Sup. Ct. Rep. 50; Morse v. Montana Ore-Purchasing Co. 105 Fed. 346; People v. Stokes, 103 Cal. 196, 42 Am. St. Rep. 102, 37 Pac. 207; 17 Am. & Eng. Enc. Law, p. 1248.

Any affidavits as to the effect of such reading on the minds of the jurors are clearly inadmissible.

Mattox v. United States, 146 U. S. 140, 147-149, 36 L. ed. 917, 920, 921, 13 Sup. Ct. Rep. 50; United States v. Ogden, 105 Fed. 373; Morse v. Montana Ore-Purchasing Co. 105 Fed. 345; People v. Stokes, supra; Woodward v. Leavitt, 107 Mass. 460, 9 Am. Rep. 49; Wright v. Mississippi & I. Teleg. Co. 20 Iowa, 210; Hix v. Drury, 5 Pick. 302.

Mr. Charles A. Brown in propria persona submitted the cause for defendant in error:

It is not the law that a deed in the form of a release cannot be construed as a bargain and sale deed.

Moelle v. Sherwood, 148 U. S. 21, 37 L. ed. 351, 13 Sup. Ct. Rep. 426; *Pray v. Pierce*, 7 Mass. 381, 5 Am. Dec. 59; *Russell v. Coffin*, 8 Pick. 143; *McAnaw v. Tiffin*, 143 Mo. 667, 45 S. W. 656; *Mayo v. Libby*, 12 Mass. 339; 9 Am. & Eng. Enc. Law, p. 104.

Such a deed has been repeatedly upheld as a bargain and sale deed in Hawaii.

Mossman v. Hawaiian Government, 10 Haw. 421; *Ninia v. Wilder*, 12 Haw. 118; *Andrews v. Wahinenui*, 16 Haw. 260.

But, if these contentions are unsound, the supreme court having held in this case that such a deed is good as a bargain and sale deed, it is the law of the case, and controlling in this court.

Brine v. Hartford F. Ins. Co. 96 U. S. 627, 24 L. ed. 858; *East Central Eureka Min. Co. v. Central Eureka Min. Co.* 204 U. S. 266, 51 L. ed. 476, 27 Sup. Ct. Rep. 258; *Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 27 Sup. Ct. Rep. 281; *Gatewood v. North Carolina*, 203 U. S. 531, 51 L. ed. 305, 27 Sup. Ct. Rep. 167; *Francis v. Francis*, 203 U. S. 233, 51 L. ed. 165, 27 Sup. Ct. Rep. 129; *Paine v. Willson*, 70 C. C. A. 44, 146 Fed. 488.

It matters not whether the trial judge made a mistake in leaving to the jury certain questions on which they should have been instructed to find for plaintiff below. Such an error would not entitle defendants below to complain, as they could in no possible way be prejudiced thereby.

Morrison v. Dickey, 122 Ga. 353, 69 L.R.A. 90, 50 S. E. 175.

This court will not consider a question that depends upon the weight of evidence.

Young v. Amy, 171 U. S. 179, 43 L. ed. 127, 18 Sup. Ct. Rep. 802; *Harrison v. Perea*, 168 U. S. 311, 42 L. ed. 478, 18 Sup. Ct. Rep. 129.

Counsel for defendants below is wholly at fault for the article read by the jury. He took his chances (those were his words) in agreeing that the jury might read the article, and he cannot now complain.

State v. Kent (State v. Pancoast) 5 N. D. 516, 35 L.R.A. 518, 67 N. W. 1052; *Consolidated Ice-Mach. Co. v. Trenton Hygeian Ice Co.* 57 Fed. 898; *Martin v. Mitchell*, 28 Ga. 382; *Valiente v. Bryan*, 66 How. Pr. 302; *Wynn v. City & Suburban R. Co.* 91 Ga. 344, 17 S. E. 649; *Moore v. New York Elev. R. Co.* 15 Daly, 506, 8 N. Y. Supp. 331; *Townsend v. Kelley (Me.)* 5 Atl. 70; *State v. Bowden*, 71 Me. 89.

Mr. Justice Holmes delivered the opinion of the court:

This is an action of ejectment brought by the defendant in error, Brown. He had a verdict and judgment, subject to exceptions. These were taken to the supreme court of

Hawaii by writ of error, the supreme court overruled the exceptions and affirmed the judgment below, and the case then was brought to this court. A motion to dismiss was made, on the grounds that the supreme court had no authority to enter final judgment, that it does not appear that the property in question is worth \$5,000, and that the plaintiffs in error are estopped to say that it has that value by their tax returns, under oath, valuing it at a less amount. This motion can be disposed of in a few words. For the first ground, *Meheula v. Pioneer Mill Co.* 17 Haw. 91, is relied upon. See also *Cotton v. Hawaii*, 211 U. S. 162, ante, 131, 29 Sup. Ct. Rep. 85; *Hutchins v. Bierce*, 211 U. S. 429, ante, 267, 29 Sup. Ct. Rep. 122. But those cases deal with proceedings upon a bill of exceptions alone. Here there was a writ of error, which, as the supreme court of Hawaii pointed out in the decision cited, brings up the judgment. As to the value of the land in dispute, *it[210 sufficiently appears by affidavits in the record and in this court, in which also there is an attempt to explain the low valuation in the tax returns. *Red River Cattle Co. v. Needham*, 137 U. S. 632, 635, 636, 34 L. ed. 799-801, 11 Sup. Ct. Rep. 208. The tax returns, in any event, are not conclusive. *Willcox v. Consolidated Gas Co.* (Jan. 4, 1909) [212 U. S. 19, ante, 382, 29 Sup. Ct. Rep. 192]. Therefore the motion to dismiss is overruled.

The suit is for two parcels of land, mostly accretions, on the ocean side of Front street, Hilo, in Hawaii. The plaintiffs in error are admitted to own the upland on the other side of the street. For the first question raised upon the merits it is enough to say that, subject to other questions to be discussed, these parcels formerly belonged to Benjamin Pitman, together with the upland; that after conveyance by him of the latter, they passed to his wife by devise, and that she, while disseised, executed a deed purporting to "remit, release, and forever quitclaim" to the defendant in error, Brown, a stranger, "all (her) right, title, and interest in and to" the premises. The plaintiffs in error contend, and asked rulings to that effect, that a deed in that form by a disseisee to a stranger is void. We should be very slow to import into Hawaii a purely historical and uselessly technical reminiscence when the courts of the territory say that their usage has neglected it. Here, as there, the words quoted carry, even to professional minds, the notion of conveyance, as fully as the words "give and grant." They suggest a possible infirmity of title, or an unwillingness of the grantee to take risks, but they are not limited in popular understanding to a release to a party al-

ready in. They hardly ever suggest that idea. Especially where, as here, the conveyance is upon a substantial consideration (\$5,000), it ought to be upheld, as it would be upheld in a jurisdiction which has furnished its share of precedents to Hawaii.

In Massachusetts the principle that a deed of quitclaim and release is sufficient to pass all the estate that the grantor could convey by a deed of bargain and sale early was established by judicial decision. *Pray v. Pierce*, 7 Mass. 381, 5 Am. Dec. 59; *Russell v. Coffin*, 8 Pick. 143, 153; *Freeman v. 211*] *M'Gaw*, 15 Pick. 82, 86, 87. *See *Moelle v. Sherwood*, 148 U. S. 21, 28, 37 L. ed. 350, 353, 13 Sup. Ct. Rep. 426. And this principle was embodied in the first revision of the statutes, the section having been inserted by the commissioners "to remove all doubts as to a mode of conveyance which long has prevailed throughout the commonwealth; and to which there is no objection, but what is merely technical and formal." Rev. Stat. chap. 59, § 5, and Commissioners' Notes. Rev. Laws, chap. 127, § 2. (It appears, in his handwriting, that this note was written by Judge Jackson, who was especially learned in real property law.) The principle is carried so far that a release of the grantor's right, title, and interest is held sufficient to bar an entail and remainders expectant thereon (*Allen v. Ashley School Fund*, 102 Mass. 262, 265; *Coombs v. Anderson*, 138 Mass. 376, 378), under a statute allowing it to be done by a deed in common form (Gen. Stat. chap. 89, § 4, Pub. Stat. chap. 120, § 5, Rev. Laws, chap. 127, § 24), although the obvious and established construction of the words "my right, title, and interest" confines them to the estate actually owned at the time (*Allen v. Holton*, 20 Pick. 458). The right of a disseisee to convey is a different question from the one we have been discussing, but that is not disputed, and in Hawaii seems to be established by law.

It will be remembered that the land in controversy consists of two parcels on the ocean side of Front street. One, called the Bates land, lies between the lines of King street and Waianuenue street extended, these streets being at right angles with Front street; and one called the Kalaeloa land, lies on the further side of King street. The court instructed the jury that the plaintiff had made out a complete paper title to these two lots. This ruling is challenged on several grounds. The Bates land is supposed to have come to Pitman through mesne conveyances from a grant from King Kamehameha III. to Elizabeth G. I. Bates. This conveyed the upland above Front street down to what then was its upper side, "and also the sea beach in front of the same down

to low-water mark." As the case *comes[212 to us, the facts appear but imperfectly, but it would seem that if the words "the sea beach" be taken in a very strict sense, there would have been a strip not conveyed, between the front lines of the upland as described by metes and bounds and the beach,—that is, high-water mark; in which case the accretions now in question would not belong to the plaintiff. This is the first ground of challenge. But it would be impossible, on this record, for us to say that the ruling was wrong, and we see no reason whatever to doubt that it was right. The natural interpretation is that the King conveyed the upland and all in front of it to low-water mark. The matter was discussed very fully by the supreme court. It said that the area between the part described and high-water mark was not very extensive, was of little value, and was closely connected with the upper part in use. We gather that if the evidence were before us we should be confirmed in our opinion that, on this point, the ruling was right.

The other land is claimed under a land commission award and royal patent to Kalaeloa. The latter, as translated from Hawaiian, bounded the land "beginning at the west corner of this, adjoining the edge of the street (King street), along the edge of the sea," with a description by courses and distances and area. There was also a diagram inclosing the upland in heavy lines, and extending the sides by dotted lines across a space marked "Beach" to the edge of the sea. It is said that the measurements go only to the street, although the defendant in error affirms that the area would include the beach. We see no reason why the monuments should not prevail, as usual, if there is a discrepancy as alleged.

Kalaeloa conveyed to Pitman. The deed is not in the record, but it was assigned as error that the court instructed the jury that the words "with the right of extension to low-water mark" covered the lot in question. If anything is open on this assignment, we are of opinion that the ruling was right. We may add at this point that it is not argued here that the conveyances by Pitman, under which the plaintiffs in error *claim, carried the land[213 on the ocean side of Front street. That remained in Pitman and passed by his devise to his wife.

The plaintiffs in error contend that the trial court erred in its instructions to the jury with regard to the apportionment of accretions. The evidence is not before us, and they rely simply on a statement in the opinion of the supreme court. As that court said, they did not claim the portion concerned, and were trying to set aside the

verdict on the weakness of the plaintiff's title alone. The supreme court was of opinion that the instructions were wrong, but that, so far as appeared, the verdict was right, and declined to set it aside or to require a remittitur as a condition of not doing so. It does not appear that there was error in this course.

The plaintiffs in error set up the defense of adverse possession. They admit that the burden was upon them to prove it, but assign as error that the jury was instructed to find against them unless satisfied by a preponderance of evidence that they had "clearly" proved it. The slight over-emphasis in the word "clearly," if it was such, is not a sufficient ground for disturbing the verdict. See *Ward v. Cochran*, 150 U. S. 597, 606, 37 L. ed. 1195, 1197, 14 Sup. Ct. Rep. 230.

The final assignments of error are for the refusal to grant a new trial. It seems that after a long trial the plaintiff (defendant in error) moved the court to direct a verdict. In the absence of the jury the judge stated that he was inclined in favor of the plaintiff, but did not want to grant the motion, as there was still some doubt in his mind. He added that should the jury render a verdict for the defendants, and should a motion be made to set it aside, he might do so. He made these remarks, supposing that no reporter was present, but they were printed in the evening paper, with a heading, "Favors the Plaintiff." This was called to the attention of the judge, and he was proceeding to instruct the jury not to read the papers of that evening or the next morning, when the counsel for the defendants said: "Your honor, I presume, refers to the article in the Evening Bulletin. We do not 214]ask for such an order. *Let the jurors read the papers, we will take our chances." In the morning, in consequence of an imputation, there was some inquiry into the responsibility for the article, proof that the plaintiff had nothing to do with it, and mutual apologies. The judge instructed the jury that whatever remarks were made by the court were made without having heard counsel, and were not intended to influence the jury, and pointed out that the jury were the judges of the facts. In short, every effort was made by all concerned to have the jury disregard the whole matter. The morning paper, however, reprinted a part of the article, with a heading "Judge De Bolt Leans to Plaintiff," etc., and states that, in reply to the reporter, the judge said that he did make such an intimation of his views, that he did it to save time in arguing the motion, but was not aware that any member of the press was present. One ground of the motion for a new trial was that these papers

were read by several of the jurors before the case was submitted to them, and afterwards were read aloud in the jury room.

It appears to us that the motion could not have been granted on the facts as we have stated them, following the statement of the trial judge. In the first place, the remarks, although they indicated a present leaning, disclosed a present doubt, and by no means promised that a verdict for the defendants would be set aside. They meant little or nothing more than that, by refusing to direct a verdict, the judge did not preclude another application by the plaintiff if he should not prevail. The morning papers added nothing substantial to the article of the evening before. The evening article purported to report the words,—the morning one, to give a verification of their having been spoken. But there was no reasonable doubt of the truth of the first report, and the truth was assumed in what was said to the jury on the matter. The waiver by the counsel of the defendants, although there are some slight differences in the reports of it, was understood to be, and is found to have been, in general terms, and to have applied to any other papers as well as the Evening Bulletin. It would be most unjust to *interpret it otherwise now.[215 The defendants said they would take their chances at a time when there were several ways in which the jury could have been prevented from seeing the papers or seeing them further. They stopped the court from even giving the jury instructions. It is too late now to complain.

It is objected that the judge erred in admitting affidavits of the jurymen that they were not influenced by the reading of the article. *Mattox v. United States*, 146 U. S. 140, 36 L. ed. 917, 13 Sup. Ct. Rep. 50. This error is immaterial, as the order overruling the new trial was right on other grounds.

Judgment affirmed.

STANDARD OIL COMPANY, Petitioner,
v.

EDWARD ANDERSON.

(See S. C. Reporter's ed. 215-227.)

Master and servant — which of two persons is master of third.

A winchman in the general employ of a shipper remains the latter's employee for the purpose of fixing the responsibility for injuries inflicted through his negligence upon a longshoreman employed by a master

NOTE.—As to which of two or more persons is the master of another, who is conceded to be a servant of one of them—see note to *Hardy v. Shedden Co.* 37 L.R.A. 33.

stevedore whose contract with the shipper to load a vessel requires him to pay the latter an agreed compensation for the hoisting, and who has no control over the movements of the winchman except that the latter's hours of labor necessarily conform to those of the longshoremen, and that, in timing the raising and lowering, he obeys the signals of a gangman representing the master stevedore.

[For other cases, see Master and Servant, I. a, in Digest Sup. Ct. 1908.]

[No. 58.]

Argued January 7, 1909. Decided February 1, 1909.

ON WRIT of Certiorari to the United State Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of New York in favor of plaintiff in an action to recover damages for personal injuries. Affirmed.

See same case below, 81 C. C. A. 399, 152 Fed. 166.

The facts are stated in the opinion.

Mr. Charles W. Fuller argued the cause and filed a brief for petitioner:

The power of the alleged master to direct and control the acts of the alleged servant is the criterion by which the relation of master and servant is to be determined, both within the *respondeat superior* and the fellow-servant doctrines.

The Harold, 21 Fed. 428; Lonergan v. The Islands, 28 Fed. 478; The Elton, 73 C. C. A. 467, 142 Fed. 367; Brady v. Chicago & G. W. R. Co. 57 L.R.A. 712, 52 C. C. A. 48, 114 Fed. 100; Sargent Co. v. Baublis, 215 Ill. 428, 74 N. E. 455; 2 Street, Foundations of Legal Liability, p. 468. Murray v. Currie, L. R. 6 C. P. 24; Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205, 46 L. J. C. P. N. S. 283, affirming L. R. 1 C. P. Div. 556; Jones v. Scullard [1898] 2 Q. B. 565; Donovan v. Laing, W. & D. Constr. Syndicate [1893] 1 Q. B. 629; Waldo v. Winfield [1901] 2 Q. B. 596; Hastings v. Le Roi, No. 2, 34 Can. S. C. 177, affirming 10 B. C. 9; Parkhurst v. Swift, 31 Ind. App. 521, 68 N. E. 620; Kimball v. Cushman, 103 Mass. 194, 4 Am. Rep. 528; Johnson v. Boston, 118 Mass. 114; Clapp v. Kemp, 122 Mass. 481; Ward v. New England Fibre Co. 154 Mass. 419, 28 N. E. 299; Hasty v. Sears, 157 Mass. 123, 34 Am. St. Rep. 267, 31 N. E. 759; Morgan v. Smith, 159 Mass. 570, 35 N. E. 101; Reagan v. Casey, 160 Mass. 374, 36 N. E. 58; Geary v. Stevenson, 169 Mass. 23, 47 N. E. 508; Haskell v. Boston Dist. Messenger Co. 190 Mass. 189, 2 L.R.A.(N.S.) 1091, 112 Am. St. Rep. 324, 76 N. E. 215, 5 A. & E. Ann. Cas. 796; Ewan v. Lippincott, 47 N. J. L. 192, 54 53 L. ed.

Am. Rep. 148; Delaware, L. & W. R. Co. v. Hardy, 59 N. J. L. 35, 34 Atl. 986, 59 N. J. L. 562, 35 Atl. 1130; Norman v. Middlesex & S. Traction Co. 68 N. J. L. 728, 54 Atl. 835; Samuelian v. American Tool & Mach. Co. 168 Mass. 12, 46 N. E. 98; Grace & H. Co. v. Probst, 208 Ill. 147, 70 N. E. 12; Consolidated Fireworks Co. v. Koehl, 190 Ill. 145, 60 N. E. 87; Delory v. Blodgett, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078; Coughlan v. Cambridge, 166 Mass. 268, 44 N. E. 218.

New York is the only state, so far as has been ascertained, by a thorough search for decisions on this question by the state courts, in which may be found decisions opposed to the contention of the petitioner. The cases of Sanford v. Standard Oil Co. 118 N. Y. 571, 16 Am. St. Rep. 787, 24 N. E. 313, and Johnson v. Netherlands American Steam Nav. Co. 132 N. Y. 576, 30 N. E. 505, are directly opposed to that contention. But the opinions delivered in these cases do not contain any discussion of the principle applied, and the authority which they might otherwise possess is further impaired by the fact that there are other decisions by the same court, of a later date, expounding and applying principles which are wholly inconsistent with the judgments rendered in these cases, and which give support to the contention of the petitioner.

Wyllie v. Palmer, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; Anderson v. Boyer, 156 N. Y. 93, 50 N. E. 976, reversing 13 App. Div. 258, 43 N. Y. Supp. 87; Higgins v. Western U. Teleg. Co. 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500, reversing 11 Misc. 32, 31 N. Y. Supp. 841; Murray v. Dwight, 161 N. Y. 301, 48 L.R.A. 673, 55 N. E. 901; Quinn v. National Sugar Ref. Co. 102 App. Div. 47, 92 N. Y. Supp. 95; Breslin v. Sparks, 97 App. Div. 69, 89 N. Y. Supp. 627; Baldwin v. Abraham, 57 App. Div. 67, 67 N. Y. Supp. 1079, affirmed in 171 N. Y. 677, 64 N. E. 1118.

Mr. Bertrand L. Pettigrew argued the cause and filed a brief for respondent:

The power of selection and discharge in the particular employment is an essential element in the doctrine of *respondeat superior*.

Laugher v. Pointer, 5 Barn. & C. 547; Quarman v. Burnett, 6 Mees. & W. 499; Murray v. Currie, L. R. 6 C. P. 24; Rourke v. White Moss Colliery Co. L. R. 2 C. P. Div. 205; 1 Shearm. & Redf. Neg. 5th ed. p. 245, § 162, note 4; Donovan v. Laing, W. & D. Constr. Syndicate [1893] 1 Q. B. 629; Jones v. Liverpool, L. R. 14 Q. B. Div. 890; Cameron v. Nystrom [1893] A. C. 308; Union S. S. Co. v. Claridge [1894] A. C. 185; Jones v. Scullard [1898] 2 Q. B. 565; St. John

Gaslight Co. v. Hatfield, 23 Can. S. C. 164; Little v. Hackett, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391; The Clarita and The Clara (The Clara Clarita v. Cox) 23 Wall. 1, 23 L. ed. 146; Sproul v. Hemmingway, 14 Pick. 1, 23 Am. Dec. 350; Dalyell v. Tyrer, El. Bl. & El. 899; Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique, 182 U. S. 406, 412, 45 L. ed. 1155, 1159, 21 Sup. Ct. Rep. 831; The Maria, 1 W. Rob. 106; The Halley, L. R. 2 P. C. 201; 1 Thomp. Neg. 2d ed. § 579; 4 Thomp. Neg. § 5185; Otis Steel Co. v. Wingle, 82 C. C. A. 62, 152 Fed. 914.

Of all the cases relied upon in *The Elton*, 73 C. C. A. 467, 142 Fed. 367, the only ones in which the opinions do not expressly state that the power of rejection and substitution on the part of the particular employer existed are those of *Rourke v. White Moss Colliery Co.* and *The Joseph John*, 30 C. C. A. 199, 52 U. S. App. 592, 86 Fed. 471; and it is believed that, at least in the former of those two, the court regarded the power as existing.

There can be no doubt as to the standing of the respondent upon the facts of this case before the courts of the state of New York.

Sanford v. Standard Oil Co. 118 N. Y. 571, 16 Am. St. Rep. 787, 24 N. E. 313; *Johnson v. Netherlands American Steam Nav. Co.* 132 N. Y. 576, 30 N. E. 505; *De Naio v. Standard Oil Co.* 68 App. Div. 167, 74 N. Y. Supp. 165; *Lauro v. Standard Oil Co.* 74 App. Div. 4, 76 N. Y. Supp. 800; *Ford v. Arbuckle*, 107 App. Div. 221, 94 N. Y. Supp. 1097; *Murray v. Dwight*, 161 N. Y. 301, 48 L.R.A. 673, 55 N. E. 901; *Anderson v. Boyer*, 156 N. Y. 93, 50 N. E. 976; *Kilroy v. Delaware & H. Canal Co.* 121 N. Y. 22, 24 N. E. 192.

Prior to the decision of *The Elton* by the circuit court of appeals of the third circuit, it seems to have been regarded as settled upon authority by the lower Federal courts that the winchman furnished by the ship was not a fellow servant of the employees of the stevedore.

The Harold, 21 Fed. 428; *Lonergan v. The Islands*, 28 Fed. 478; *The Victoria*, 69 Fed. 160; *The Lisnacrieve*, 87 Fed. 570; *The Slingsby*, 116 Fed. 227, 57 C. C. A. 52, 120 Fed. 750; *The Gladestry*, 63 C. C. A. 198, 128 Fed. 591.

218] *Mr Justice Moody delivered the opinion of the court:

The respondent, hereafter called the plaintiff, brought an action in the circuit court of the United States for the eastern district of New York to recover damages for personal injuries alleged to have been suffered by him through the negligence of a serv-

ant of the petitioner, hereafter called the defendant.

The plaintiff was employed as a longshoreman by one Torrence, a master stevedore, who, under contract with the defendant, was engaged in loading the ship *Susquehanna* with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered. The ship was alongside a dock belonging to the defendant, and the cases of oil were conveyed from the dock to the hatch by hoisting them from the dock to a point over the hatch, whence they were lowered and guided into the hold. The work was done with great rapidity. The motive power was furnished by a steam winch and drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope, and hoisting rope. The tackle and ropes were furnished and rigged by the stevedore, and the winch and drum were owned by the defendant and placed on its dock, some 50 feet distant from the hatch. All the work of loading was done by employees of the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant. The case was tried before a jury and the plaintiff had a verdict. The verdict establishes that the plaintiff was in the use of due care, and that his injuries were suffered by reason of the negligence of the winchman in improperly lowering the draft of cases into the hold.

The only question presented is whether the winchman was, at the time the injuries were received, the servant of the defendant or of the stevedore. If he was the servant of the defendant, as he was found to be by the courts below, the defendant was responsible for his negligence. If not, that is the *end of the case, and it is not neces-[219 sary to inquire what would be the measure of liability of the stevedore.

The decision of this question requires us to consider some further facts which were not disputed. The winchman was hired and paid by the defendant, who alone had the right to discharge him. The stevedore agreed to pay the defendant \$1.50 a thousand for the hoisting. The stevedore had no control over the movements and conduct of the winchman, except as follows: The hours of labor of the winchman necessarily conformed to the hours of labor of the longshoremen. The winch and winchman were at a place where it was impossible to determine the proper time for hoisting and lowering the draft of cases of oil, and the winchman necessarily depended upon signals from others. These signals were given by an employee of the stevedore, called

a gangman, who stood upon the deck of the ship and gave signals to hoist or lower by the blowing of a whistle which could be heard for a long distance. The negligence consisted in lowering a draft of cases before receiving this signal.

This case is here by certiorari from the circuit court of appeals, which affirmed the judgment of the circuit court, because of the supposed conflict of decision in the lower Federal courts. Upon a state of facts much resembling each other, it was held by the circuit court of appeals for the second circuit, in *The Slingsby*, 57 C. C. A. 52, 120 Fed. 748, that the winchman was the servant of him who furnished the winch and power; and in *The Elton*, 73 C. C. A. 467, 142 Fed. 367, the contrary conclusion was reached by the circuit court of appeals for the third circuit. In the latter case, it is true, the judgment was rested upon a question of pleading, and the observations of the court upon this subject were unnecessary to the decision. It is by no means certain that both cases do not differ materially from the case at bar as we view it, and we do not deem it necessary to question the conclusions reached in them.

We have examined the authorities selected with discrimination, and pressed upon the attention of the court in the brief, *compact, and otherwise excellent arguments of counsel, though we do not deem it necessary to refer to all of them.

One who employs a servant to do his work is answerable to strangers for the negligent acts or omissions of the servant, committed in the course of the service. The plaintiff rests his right to recover upon this rule of law, which, though of comparatively modern origin, has come to be elementary. But, however clear the rule may be, its application to the infinitely varied affairs of life is not always easy, because the facts which place a given case within or without the rule cannot always be ascertained with precision. The servant himself is, of course, liable for the consequences of his own carelessness. But when, as is so frequently the case, an attempt is made to impose upon the master the liability for those consequences, it sometimes becomes necessary to inquire who was the master at the very time of the negligent act or omission. One may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, so that he becomes the servant of that person, with all the legal consequences of the new relation.

It is insisted by the defendant that the winchman, though in its general employ, had ceased to be its servant, and had become, for

the time being, with respect to the work negligently performed, the servant of the master stevedore. This may be true, although the winchman was selected, employed, paid, and could be discharged by the defendant. If it is true, the defendant is not liable. The case, therefore, turns upon the decision of the question, Whose servant was the winchman when he was guilty of the negligence which caused the injury?

It will aid somewhat in the ascertainment of the true test for determining this question to consider the reason and extent of the rule of a master's responsibility. The reason for the rule is not clarified much by the Latin phrases in which it is sometimes clothed. They are rather restatements than explanations of the rule. The accepted reason for it is that given by *Chief Justice Shaw in the case of *Farwell v. Boston & W. R. Corp.* 4 Met. 49, 38 Am. Dec. 339. In substance, it is that the master is answerable for the wrongs of his servant, not because he has authorized them nor because the servant, in his negligent conduct, represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured. It is said in that case that this is a "great principle of social duty," adopted "from general considerations of policy and security." But whether the reasons of the rule be grounded in considerations of policy or rested upon historical tradition, there is a clear limitation to its extent. *Guy v. Donald*, 203 U. S. 399, 406, 51 L. ed. 245, 247, 27 Sup. Ct. Rep. 63. The master's responsibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it.

It sometimes happens that one wishes a certain work to be done for his benefit, and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work, and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them. In the first case, he to whom the workmen are furnished is responsible for their negligence in the conduct of the work, because the work is his work, and they are, for the time, his

workmen. In the second case, he who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of it, because, though it is done for the ultimate benefit of the other, it is still, in its doing, his own work. To determine whether a given case falls within the one class or the other [222] we must inquire *whose is the work being performed,—a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary co-operation, where the work furnished is part of a larger undertaking.

These principles are sustained by the great weight of authority, to which some reference will now be made. The simplest case, and that which was earliest decided, was where horses and a driver were furnished by a liveryman. In such cases the hirer, though he suggests the course of the journey, and, in a certain sense, directs it, still does not become the master of the driver, and responsible for his negligence, unless he specifically directs or brings about the negligent act. *Quarman v. Burnett*, 6 Mees. & W. 499; *Jones v. Liverpool*, L. R. 14 Q. B. Div. 890; *Little v. Hackett*, 116 U. S. 366, 29 L. ed. 652, 6 Sup. Ct. Rep. 391. Though even in such cases, if the exclusive control over the driver be in the hirer, he may be responsible as master. *Jones v. Scullard* [1898] 2 Q. B. 565.

In the case of *Murray v. Currie*, L. R. 6 C. P. 24, these facts appeared: The defendant was the owner of a ship which was provided with a winch, worked by a donkey engine, which was used for loading and unloading the cargo. He engaged a master stevedore to do the work of unloading the vessel, and agreed to supply him with the winch, the power, and such sailors as the stevedore might need, deducting the amount of their wages from the agreed compensation for unloading. The stevedore selected the work for the sailors to do, and had control over it and direction over the men. One of the sailors, while operating the winch, conducted himself so negligently that the plaintiff, who was in the employ of the stevedore, was injured, and brought this action against the defendant to recover damages, alleging that the winchman was the servant of the defendant. It was held that the winchman at the time was not the servant of the defendant, but of the stevedore; **Bovill*, Ch. J., saying: "The work of unloading was done by Kennedy [the stevedore] under a special contract. He was acting on his own behalf, and did not in any sense stand in the rela-

tion of servant to the defendant. He had entire control over the work, and employed such persons as he thought proper to act under him. He had the option of using the services of the crew of the ship; but he was under no obligation to do so. Whether he selected independent laborers or part of the crew, they were all his servants, and their acts were his acts, and not the acts of the owner. . . . Davis [the winchman] was employed in this way by the stevedore, and was doing his work, and under his control and superintendence." *Willes*, J., added: "The question here is whether Davis, who caused the accident, was employed at the time in doing Kennedy's work or the shipowner's. . . . The liability of a master for the acts of his servant extends only to such acts of the servant as are done by him in the course of the master's service. The master is not liable for acts done by the servant out of the scope of his duty, even though the master may have entered into a bargain that his servant should be employed by another, and is paid for such service, as was done here." *Brett*, J., added: "But I apprehend it to be a true principle of law that, if I lend my servant to a contractor, who is to have the sole control and superintendence of the work contracted for, the independent contractor is alone liable for any wrongful act done by the servant while so employed. The servant is doing, not my work, but the work of the independent contractor."

The case of *Rourke v. White Moss Colliery Co.* L. R. 2 C. P. Div. 205, frequently has been cited and approved by American courts. The defendant in that case was the owner of a colliery, and had employed, for an agreed price, a contractor to sink a shaft. It was stipulated as part of the agreement that the defendant should provide the contractor with power, ropes, and an engineer to work the engine, but with the distinct understanding that the engineer and the engine *should be under the control of the [224] contractor. The engineer operated the engine so negligently that he caused injuries to the plaintiff, a servant of the contractor, who brought this action against the defendant to recover damages for his injuries, alleging that the engineer was the servant of the defendant. It was held that the engineer was not the servant of the defendant, but, for the time being, was the servant of the contractor. *Cockburn*, Ch. J., after remarking that the engineer, through whose fault the injury occurred, was undoubtedly the general servant of the defendant, said: "But these circumstances afford no ground, in point of law, for visiting the defendants with the result of the man's negligence, if he was not,

in point of fact, their servant at the time, in the sense of being actually employed to do their work." He then proceeds to say that if the defendants had undertaken thus to do the work of hoisting by their machinery and servants, then they would have been liable, "for in that case Lawrence, the engineman, would have continued to be the servant of the company, and would have been working as their servant at their work." And see *Donovan v. Laing* [1893] 1 Q. B. 629, and *Union S. S. Co. v. Claridge* [1894] A. C. 185.

The two cases which have just been reviewed are much relied upon by the defendant, and for that reason have been fully stated. It should be observed that in each of them it clearly appeared in point of fact that the general servants of the respective defendants had ceased for the time being to be their servants, and had passed under the direction and control of another person, upon whose work they were engaged.

In the case of *Higgins v. Western U. Teleg. Co.* 156 N. Y. 75, 66 Am. St. Rep. 537, 50 N. E. 500, where a similar question was under consideration, O'Brien, J., thus expressed the principle: "The question is whether, at the time of the accident, he was engaged in doing the defendant's work or the work of the contractor. . . . The master is the person in whose business he is engaged at the time, and who has the right to control [225] and direct his conduct." *In many cases this test has been followed. Among them are *Parkhurst v. Swift*, 31 Ind. App. 521, 68 N. E. 620; *Kilroy v. Delaware & H. Canal Co.* 121 N. Y. 22, 24 N. E. 192; *Wyllie v. Palmer*, 137 N. Y. 248, 19 L.R.A. 285, 33 N. E. 381; *Anderson v. Boyer*, 156 N. Y. 93, 50 N. E. 976; *Murray v. Dwight*, 161 N. Y. 301, 48 L.R.A. 673, 55 N. E. 901; *Delaware, L. & W. R. Co. v. Hardy*, 59 N. J. L. 35, 34 Atl. 986; *Consolidated Fireworks Co. v. Koehl*, 190 Ill. 145, 60 N. E. 87; *Grace & H. Co. v. Probst*, 208 Ill. 147, 70 N. E. 12; *Kimball v. Cushman*, 103 Mass. 194, 4 Am. Rep. 528; *Johnson v. Boston*, 118 Mass. 114; *Delory v. Blodgett*, 185 Mass. 126, 64 L.R.A. 114, 102 Am. St. Rep. 328, 69 N. E. 1078; *The Elton*, 73 C. C. A. 467, 142 Fed. 367.

In many of the cases the power of substitution or discharge, the payment of wages, and other circumstances bearing upon the relation are dwelt upon. They, however, are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control.

Let the facts in evidence now be considered in the light of the foregoing principles of law. Was the winchman, at the time he negligently failed to observe the signals, engaged in the work of the master stevedore, under his rightful control, or was he rather

engaged in the work of the defendant, under its rightful control? We think that the latter was the true situation. The winchman was, undoubtedly, in the general employ of the defendant, who selected him, paid his wages, and had the right to discharge him for incompetency, misconduct, or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended, and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum, and the winchman were its own. It did not furnish them, but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control.

*Much stress is laid upon the fact that [226] the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be co-operation and co-ordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information; and the obedience to those signals showed co-operation rather than subordination, and is not enough to show that there has been a change of masters. The case of *Driscoll v. Towle*, 181 Mass. 416, 63 N. E. 922, is in point here. In that case the defendant was engaged in a general teaming business. He furnished a horse, wagon, and driver to the Boston Electric Light Company. The driver reported to the electric light company and received directions as to what to do and where to go from an employee of that company, but at night returned the horse and wagon to the defendant's stable and received pay from the defendant. While traveling to carry out an order received from the company he negligently injured the plaintiff, who brought an action to recover for the injuries, alleging that the driver was the defendant's servant. It was held that there was evidence which would warrant the jury in finding that the driver continued to be the defendant's servant. It was said in the opinion of the court, delivered by Holmes, Ch. J. (now Mr. Justice Holmes):

"But the mere fact that a servant is sent

to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant; more than that is necessary to take him out of the relation established by the only contract which he has made, and to make him a voluntary subject of a new sovereign,—as the master sometimes was called in the old books. . . .

"In this case the contract between the defendant and the electric light company was not stated in terms, but it fairly could have been found to have been an ordinary contract 227] by *the defendant to do his regular business by his servants in the common way. In all probability it was nothing more. Of course, in such cases the party who employs the contractor indicates the work to be done and in that sense controls the servant, as he would control the contractor, if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act."

We think that the courts below correctly held that the winchman remained the servant of the defendant. Upon facts not differing in principle from those before us, the same conclusion was reached in *Sanford v. Standard Oil Co.* 118 N. Y. 571, 16 Am. St. Rep. 787, 24 N. E. 313; *Johnson v. Netherlands American Steam Nav. Co.* 132 N. Y. 576, 30 N. E. 505; *The Victoria*, 69 Fed. 160; *The Lisnacrieve*, 87 Fed. 570; *McGough v. Ropner*, 87 Fed. 534; *The Gladestry*, 63 C. C. A. 198, 128 Fed. 591; *The City of San Antonio*, 75 C. C. A. 27, 143 Fed. 955.

Judgment affirmed.

CONTINENTAL WALL PAPER COMPANY, Petitioner,
v.

LOUIS VOIGHT & SONS COMPANY.

(See S. C. Reporter's ed. 227-274.)

Monopolies — right to recover on monopolistic contract.

1. A recovery upon an account for goods sold and delivered by a corporation created to effectuate a combination of wall paper manufacturers, intended and having the effect directly to restrain and monopolize trade and commerce, in violation of the anti-trust act of July 2, 1890 (26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200), 486

cannot be had where the account is made up, within the knowledge of both buyer and seller, with direct reference to, and in execution of, the agreements which constitute the illegal combination.

[For other cases, see *Monopoly*, 16-18, in Digest Sup. Ct. 1908.]

Pleading — demurrer to answer — action on monopolistic contract.

2. Defendants in an action for goods sold and delivered are entitled to judgment on a demurrer admitting the allegations of a defense set up by the answer, which in substance disclose that plaintiff is the selling agent of a combination of wall paper manufacturers which offends against the anti-trust act of July 2, 1890, that, in carrying out such combination, defendants were virtually compelled to sign a jobber's agreement which, in effect, bound them to buy from the plaintiff all the wall paper needed in their business at certain fixed prices, and not to sell at lower prices or upon better terms than those at which plaintiff itself sells to dealers other than jobbers, that the goods in question were ordered pursuant to such agreement and at the prices fixed, that such prices were unreasonable, and that all the transactions between the parties were in furtherance of the illegal combination.

[No. 15.]

Argued April 24, 27, 1908. Decided February 1, 1909.

NOTE.—On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689.

On the rights and liabilities of parties generally, contracting with trust or combination in restraint of trade—see note to *Chicago Wall Paper Mills v. General Paper Co.* 78 C. C. A. 612.

Right of member of combination offending against modern anti-trust laws to enforce collateral agreements.

The defense that a contract is in violation of the act of Congress of July 2, 1890, may be set up by a private individual when sued thereon, and, if proved, constitutes a good defense to the action, as the act makes illegal every contract violative of its provisions. *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747.

But the violation of that act by the formation of a combination in restraint of trade does not preclude the company thus illegally formed from recovering on collateral contracts for the purchase price of goods. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

The owner and claimant of a vessel which has been libeled in the United States district court by the owner of a tug, for moneys earned by the tug in towing such vessel, cannot be permitted to repudiate his just debts to the owner of the tug upon an

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of Ohio, dismissing a suit to recover a balance on an account for goods sold and delivered in the execution of a monopolistic agreement. Affirmed.

See same case below, 78 C. C. A. 567, 148 Fed. 939.

Statement by Mr. Justice Harlan:

The Continental Wall Paper Company, a corporation of New York, brought this action against the Lewis Voight & Sons Company, a corporation of Ohio, to recover the sum of \$56,762.10, as the alleged balance

allegation and proof that such owner was, with the owners of other tugs, a member and party to a contract, combination, or association which was illegal under the Federal anti-trust act. The Charles E. Wisewall, 74 Fed. 802, affirmed in 42 L.R.A. 85, 30 C. C. A. 339, 57 U. S. App. 179, 86 Fed. 671.

A recovery of the treble damages authorized by that act in case of injury sustained by violation of its provisions can be had only by direct action, and not by way of set-off, in an action brought for the price of goods by a company illegally formed in violation of the act,—especially when the state practice does not permit the set-off of unliquidated damages. Connolly v. Union Sewer Pipe Co. *supra*.

Nor does that act prevent a member of a combination created to stifle competition in violation of its provisions from maintaining an action for a breach by the vendee in a contract for the sale and delivery of goods. Hadley Dean Plate Glass Co. v. Highland Glass Co. 74 C. C. A. 462, 143 Fed. 242.

But one of several railroad companies which was a member of a combination known as the Trunk Line Association, composed of railroads which operated in different states, with a view to avoid and stifle competition, upon an agreed division of receipts, is precluded from bringing an action in equity to restrain ticket brokers or scalpers from selling the return tickets of such railroad by a fraudulent connivance with the persons of whom they bought them and those to whom they sell them; which action it could have maintained but for the fact that the combination mentioned is in violation of the act of Congress of July 2, 1890, known as the Federal anti-trust act. Delaware, L. & W. R. Co. v. Frank, 110 Fed. 689.

The mere fact that a corporation is a member of an illegal trust or combination in restraint of trade will not disable or prevent it from selling goods within or affected by the provisions of such trust or combination, and recovering their price or value. National Distilling Co. v. Cream 53 L. ed.

on an account for merchandise sold and delivered to the defendant.

The petition and answer were both amended. The amended answer contained six separate defenses, the last three of which were made counterclaims and cross petitions. The plaintiff demurred to the second, third, fourth, and fifth defenses upon the ground that neither of them stated facts sufficient to constitute a defense; and it demurred to the first and second counterclaims and cross petitions upon the ground that they did not state facts sufficient to constitute a cause of action against the plaintiff. It also replied to the sixth defense and to the third counterclaim.

The cause was submitted in the circuit court on the demurrers, and the court sus-

City Importing Co. 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864.

The anti-trust laws of some of the states declare unenforceable contracts made by members of illegal combinations. This is the case in Arkansas (Frank A. Menne Factory v. Harback, 85 Ark. 278, 107 S. W. 991), Illinois (Wiley v. National Wall Paper Co. 70 Ill. App. 543; Chicago Wall Paper Mills v. General Paper Co. 78 C. C. A. 607, 147 Fed. 491, 8 A. & E. Ann. Cas. 889), Kansas (Barton v. Mulvane, 59 Kan. 313, 52 Pac. 883), Missouri (National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 247; Ferd Heim Brewing Co. v. Belinder, 97 Mo. App. 64, 71 S. W. 691), and Tennessee (American Handle Co. v. Standard Handle Co. [Tenn. Ch. App.] 59 S. W. 709).

Construing the Illinois statute, the court, in Lafayette Bridge Co. v. Streator, 105 Fed. 729, held that before a defendant could evade the payment of the purchase price of commodities actually received, on the ground that the seller is a member of an illegal combination, there should be an adjudication in a direct proceeding that such seller is a trust or combination in the sense contemplated by the statute, which is silent as to the method to be pursued in determining whether a corporation seeking to enforce a claim comes within the prohibition of the act.

And some courts have held that even a provision of this character does not avoid contracts which do not relate to the monopoly itself.

Thus, where a boiler company sold two large boilers to a person, and took in part payment therefor his two promissory notes, and the contract was made and signed by the maker and indorser of the notes, by which it was agreed that the boiler company should retain, as security for the payment of the notes, the ownership and title of the boilers, and that, if the debt was not paid when due, the possession of the boilers might be taken by the boiler company; and the notes and contract were thereafter assigned to one who brought an action of replevin against the maker and indorser of the notes,

tained the demurrer to the second, fourth, and fifth defenses and to the first and second 234] counterclaims *and cross petitions, but overruled the demurrer to the third defense. The parties not desiring to plead further, it was adjudged that, upon the allegations of the third defense, the defendant was entitled to judgment (and judgment was entered) dismissing the petition and amended petition; and was likewise entitled to judgment (and judgment was entered) dismissing the first and second counterclaims and cross petitions. The case was carried by the continental Wall Paper Company to the circuit court of appeals, where it

was assigned for error that the circuit court erred in overruling the demurrer to the third defense, and in dismissing the suit. The circuit court of appeals affirmed the judgment, thereby sustaining the sufficiency of that defense. The case is fully reported in 78 C. C. A. 567, 148 Fed. 939.

If the facts stated in the third defense—taking them to be true, as upon demurrer we must do—are sufficient to prevent any recovery whatever, by the plaintiff, it is not necessary to go further and consider any other questions. In view of the peculiar character of the case it is deemed just to the parties, however much it may lengthen or bur-

to recover the possession of the boilers, and, after the commencement of the action, assigned the notes and the contract securing their payment to the plaintiff herein, who had been substituted as such,—an answer that the plaintiff was a member of a trust created by a combination of two salt companies, which had combined to control the quantity of sale to be produced, the proportion of the salt business which should be done by each corporation, and the price at which it should be sold to consumers, is no defense to the action, as, although the language of the Kansas anti-trust act is general, it is manifest that the legislature, in aiming to prevent the enforcement of the illegal arrangements or contracts prohibited by the act, evidently did not intend to deprive persons of any civil rights, or place them outside the protection of the law, or to inflict penalties or punishments without a trial conducted under the safeguards which the Constitution provides; and the provision invoked was intended to apply where the unlawful arrangement, contract, or interest was sought to be enforced, or some step taken, designed to promote the operation of the unlawful trust, combination, or conspiracy. *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883.

So, in *Wiley v. National Wall Paper Co.* 70 Ill. App. 543, a demurrer to pleas setting up, as a bar to an action for goods sold, the Illinois statute of June 20, 1893, against trusts and conspiracies against trade, was sustained because, among other facts, such pleas failed to show that the sale was in furtherance of or connected with the unlawful combination.

But notes given for the purchase price of goods purchased in pursuance of a contract violating Tex. Rev. Stat. 1895, § 5313, against trusts and conspiracies against trade, are unenforceable, although no aid from the contract is required to establish the right of recovery. *Columbia Carriage Co. v. Hatch* (Tex. Civ. App.) 47 S. W. 288.

The Tennessee statute expressly limits this defense to causes of action growing out of the illegal arrangement. Under this statute the selling agent of an illegal combination cannot assert a claim to moneys advanced by it to one of the other members of the combination in anticipation of ship-

ments of goods. *American Handle Co. v. Standard Handle Co.* supra.

So, the fact that an insurer is a member of a combination which offends against the Mississippi statute does not prevent its enforcing a right of subrogation to the claim against one wrongfully destroying the property, since the subrogation agreement does not relate to the business of the combine. *Freed v. American F. Ins. Co.* 90 Miss. 72, 11 L.R.A. (N.S.) 368, 122 Am. St. Rep. 307, 43 So. 947.

State statutes invalidating contracts of members of an illegal combination can, of course, have no application to contracts which involve interstate commerce.

Thus, the Missouri statute cannot apply to a contract for the sale of goods to be manufactured by the vendor in Pennsylvania and delivered to the vendee in Missouri, without infringing upon the exclusive authority of Congress to regulate commerce among the several states. *Hadley Dean Plate Glass Co. v. Highland Glass Co.* 74 C. C. A. 462, 143 Fed. 242.

So, contracts for the sale of goods, made outside the state with a foreign corporate member of a trust, pool, or combination, and completed by delivery within the state, are unaffected by the provisions of the Arkansas anti-trust act of January 23, 1905, making unlawful the sale of any article by any individual, company, or corporation transacting business in the state contrary to the provisions of the act, and relieving the purchaser of any liability for the unpaid part of the purchase price, and authorizing him to recover back money paid. Any other construction of the statute would render it void as a regulation of interstate commerce. *Frank A. Menne Factory v. Harback*, supra.

Nor can such a statutory provision be invoked where the seller is a foreign corporation organized as the selling agent for a combination in restraint of trade effected outside the state, when such provision, in effect, inflicts a penalty for a violation of the act, since the state cannot punish an act done outside of its territorial limits. *Chicago Wall Paper Mills v. General Paper Co.* 78 C. C. A. 607, 147 Fed. 491, 8 A. & E. Ann. Cas. 889.

den this opinion to do so, to set out that defense fully and in the words of the answer.

The third defense—the facts stated therein being admitted by the demurrer—gives the names of numerous companies and firms (more than thirty in number) which formed a combination by the name of the Continental Wall Paper Company, and also sets out the various agreements under which, it was alleged, the combination was organized to restrain and monopolize interstate commerce. The defendant corporation alleged that on the 1st day of July, 1898, the National Wall Paper Company was the owner of factories for the manufacture of wall paper in certain cities in New York, Pennsylvania, New Jersey, and Massachusetts, and that there were like factories owned by persons and corporations in other states; that “all of said companies and firms were engaged in the manufacture of wall paper and in selling their product in the states where their said manufactories were situated, and 235] in all the *other states and territories of the United States and in foreign countries, and were each and all engaged in commerce between the states and territories and with foreign nations, and they produced and sold upwards of ninety-eight (98) per cent of all the wall paper manufactured and sold in the several states and territories of the United States. Contriving and intending and conspiring with each other to form a combination and trust by which to limit the production of wall paper in the United States, and also to enhance the price thereof to the jobbers, the wholesalers, the retailers, and the consumers of wall paper, which is an article of commodity of general necessity and use among the United States and foreign countries, and, as such, was and is used and sold everywhere for the preservation, protection, and decoration of buildings and dwelling houses; and, contriving and intending and conspiring with each other to unlawfully control and restrain trade and commerce between the several states and territories of the United States, and with foreign countries, the firms and corporations hereinbefore mentioned agreed with each other that while said corporations and persons retain the ownership of their several plants and business, and preserve and continue their separate identities, and operate said several manufactories and business as before, the control of said several businesses, and all matters relating to and affecting the production of said establishments, and the prices and sale of wall paper manufactured thereby, should be placed under the control of a committee to be appointed by said several corporations and firms, each to have a voice in such appointment, in proportion to the capacity of the several factories owned

by them respectively; that said committee should adopt rules and regulations governing the manner of conducting the business of all said persons, firms, and corporations, the hours said factories, owned by them, should be operated, the patterns of wall paper to be manufactured by them, the times when samples of the goods to be manufactured for the ensuing season should be submitted to a pricing committee, appointed by said committee, to enable it to classify and *fix [236 the list prices thereof; to fix and determine list prices, discounts, terms of sale, equalization of freight rates, and all other matters affecting the production and regulation of prices, and the classification of the dealers in wall paper in the United States; and the prices at which wall paper should be sold to and by such several classes; and the division of the profits thence arising among said corporations and firms, not in proportion to their production and sales, but in proportion to their capacity; and, further, that, to secure the faithful performance by each of said persons and corporations of the provisions of said trust agreement, they should each pay a sum into a common pool, in proportion to the capacity of their respective manufactories, which said sum should be forfeited by any of said manufacturers who should break said agreement, compete with the other parties to said agreement, or sell at other or different prices than those to be fixed by said committee.”

“The National Wall Paper Company, for itself and the members of said combination, hereinbefore alleged to be represented by it, should select three (3) so-called directors of said the Continental Wall Paper Company, and said other firms and corporations should select three (3) other so-called directors of said company, which six (6) so-called directors should select a seventh (7th), who should decide all disputed matters; that said corporation and firms, calling itself, or themselves, respectively, the vendor, should sign a printed contract or agreement with said the Continental Wall Paper Company, calling itself the company, a copy of which contract or agreement is attached hereto marked ‘Exhibit 1’ [which is given in the margin†], the said agreement

†Exhibit 1.

An agreement, made this — day of ——— in the year one thousand eight hundred and ninety-eight, by and between ——— a corporation organized under the laws of the state of ——— (hereinafter called the vendor), party of the first part, and the Continental Wall Paper Company, organized under the laws of the state of New York (hereinafter called the company), party of the second part.

237]being printed with blanks for *the necessary signatures as well as numbers of shares allotted, the sum to be paid therefor, and the name of the so-called vendor.

238] *"For the purposes and with the intentions aforesaid, it was further agreed that said the Continental Wall Paper Company should, in some form so as to disguise the real nature of the transaction, compel all 239]dealers in wall paper, whether *jobbers or wholesalers, to sign an agreement obligating the jobbers or wholesalers to buy from no one but said members of said combination and trust, and at the prices fixed in schedule B, attached to said 'Exhibit 1,' and 240]likewise an agreement *by such jobbers not to sell goods to dealers other than

jobbers, at lower prices or upon better or more favorable terms than those shown in schedule C, attached to said 'Exhibit 1,' under the penalty that, if they refused so to do, no wall paper should *be sold to [241 such jobber by any of said corporations or firms, and that, thereby, such jobbers should be driven out of business; and that, in some form or other, so as to disguise the real nature of the transaction, all wholesalers other than jobbers should be compelled to make an agreement in writing, with said corporations or firms, not to sell such goods, on terms better or more favorable than those specified in schedule C, attached to said 'Exhibit 1,' under penalty that, if such wholesaler refuse to sign and carry out said agreement, no wall

Whereas, the vendor is engaged in the manufacture and sale of wall paper, borders, and other articles usually produced and handled in connection therewith, and the company is desirous of action as its selling agent in handling the entire product of the vendor; and

Whereas, the company has an authorized capital of \$200,000, divided into 16,000 shares, of the par value of \$12.50 each; and

Whereas, the vendor is desirous of acquiring shares of the stock of said company at par, and to that end has offered to enter into this agreement and to secure the performance thereof by the deposit of said shares.

Now, therefore, in consideration of the foregoing recitals, and for other good and valuable considerations, it is agreed between the parties hereto, as follows:

First. The vendor hereby agrees to sell unto the company, and the latter agrees to purchase, the entire product of wall paper that may be manufactured by the vendor for the period from July 20th, 1898, to the 1st day of July, 1899.

The prices at which the merchandise shall be sold to the company are set forth in a schedule hereto annexed, marked "A," and hereby made part of this agreement.

The vendor further grants unto the company the right to two renewals of said contract of one year each, provided that, in the event of the election of the company to avail itself of either of said renewals, it shall so signify in writing to the vendor before the first day of June next preceding the renewal term, and provided further that such election to renew shall be accompanied by the written consents of all the registered stockholders of the company, including that of the vendor.

Second. That the goods acquired by the company from the vendor hereunder which are to be sold to jobbers, shall be so sold by the company, and not by the vendor, for the account of the company. Such sale shall be made by the company at discounts from road prices fixed in the schedule hereto annexed, marked "B," which is hereby made part of this agreement. The vendor will deliver such goods upon the direction of

the company, at the risk and for the account of the latter, f. o. b. at the place of manufacture, provided, however, that, in all cases in which the goods are manufactured at places other than the cities of New York or Philadelphia, the vendor will equalize the freights with either of said cities out of the proceeds receivable for such goods. Memorandum invoices shall be supplied to the customers and to the company immediately upon the shipment and delivery of such goods, said invoices specifying quantities and road prices.

Third. There shall be furnished by the vendor to the company, on the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next preceding day), a just and true statement of all shipments and deliveries of merchandise included in this contract which the vendor may make for the account of the company, which statement shall contain the names of the purchasers, the character of the goods sold, and the prices at which they are sold, to the end that the company may make the proper charges, and in order to entitle the vendor to be credited with the agreed cost price for such goods.

Each of such statements of shipment shall be accompanied by an affidavit of one of the officers of the vendor and one of its bookkeepers and of one of its shipping clerks, to the effect that the information contained therein is true.

Fourth. The vendor will, at the option of the company, sell for the latter such of the goods manufactured by the vendor as are to be disposed of to purchasers not classified as jobbers, which sales shall be made at the cost and expense of the vendor, said vendor hereby guaranteeing all credits connected with such sales. The prices at which and the terms upon which such goods are to be sold are designated in this agreement as the "road prices," and are contained in a schedule hereto annexed, marked "C," which is hereby made a part of this agreement.

On the 7th, 14th, 21st, and last days of each month (except when those days fall on Sundays, and then on the next succeeding days), the vendor will furnish to the com-

paper would be sold to him by any of said corporations or firms, and he should be driven out of the business; and that the profits made by such prevention of competition and enhancement of price should be divided among said corporations and firms nominally as dividends upon said stock, but in reality, in proportion to their respective holdings, as aforesaid, and that said committee of said corporations and said firms, calling themselves such directors, should regulate all the matters hereinbefore averred, prevent competition between said corporations and firms, limit production and enhance prices, and close all channels by which the consumer or retailer could obtain wall paper from the producers thereof.

"In pursuance of said agreement, said plaintiff was nominally incorporated with the stock aforesaid, divided into the *num-[242] ber of shares aforesaid, of the par value aforesaid, which were divided among the parties to said agreement aforesaid, in the manner aforesaid, and said contracts signed by said the National Wall Paper Company and said persons and corporations being, at once, subscription for stock by said so-called vendors, the acceptance of such subscription by said the Continental Wall Paper Company, and by it, nominally, each so-called vendor sold unto the company, and the latter agreed to purchase, the entire product of wall paper manufactured by each of said vendors for the period from

pany a statement showing all the shipments made on account of such sales, which statement shall contain the names of the purchasers, the character of the goods, and the prices at which they were sold, and such sales shall be credited to the vendor by the company at the prices fixed in schedule "A," and shall be charged against said vendor at the prices at which they were sold, which shall in no event be less than those designated in schedule "C."

The vendor is to receive for its services and expenses connected with such sales and allowances discounts equal to those who are designated in a classification made by the parties hereto as "second-class jobbers," less the discounts made on sales to purchasers designated in the accompanying schedules as "quantity purchasers" on which the vendor has allowed the quantity discount, except that where special and exclusive goods are sold there shall be an allowance of 30 per cent discount to the vendor.

The prices of goods as fixed by schedule "A" and "C" may be altered from time to time, but the discounts allowed to jobbers shall not be altered at any time during the term of this agreement.

Fifth. The vendor will make collections of all accounts for goods sold by it for the accounts of the company under the provisions of the agreement, except for sales to jobbers (which accounts the company is to collect), and will, on the 10th of each and every month during the term of this agreement, account to the company. Such accounts shall be accompanied by a payment by the vendor to the company of the difference between the prices at which the goods are agreed to be sold to the company, as embodied in schedule "A," and the prices at which the vendor has agreed to dispose of said goods as contained in schedule "C."

The purchases made by the company from the vendor hereunder shall be upon the same credit and terms as those accorded to other dealers, but the company shall have the right to anticipate the due date of all such purchases, and will pay, on the 10th day of each month, to the vendor, a sum on account of all shipments of the preceding month

equal to not less than 30 per cent of the road prices of goods shipped to the jobbers by the company.

Sixth. The vendor hereby grants unto the company the right, and it shall be the duty of the latter, through its officers selected for that purpose, to audit the books of accounts of the vendor at such times and in such manner as the company may, from time to time, deem necessary or proper. This provision is of the essence of the agreement, and a failure on the part of the vendor to faithfully perform the same shall operate as a breach of the contract, entitling the company to abrogate the agreement, and to such damages as it may be able to establish in addition to the absolute transfer and surrender to it of the stock to be pledged as hereinafter provided.

Seventh. There shall be a committee selected from the company, to be known as an auditing committee, which shall be made up from among the directors. Said committee shall have power to establish such a system of bookkeeping as, in its judgment, may be advisable.

In order to conform as nearly as may be to the laws of the various states in which the factories of the vendor are located, it is understood that the vendor shall not be at liberty to require from the company the acceptance of the product of more than ten hours per day of any one of said factories.

The product intended to be sold to the company hereunder and which the latter undertakes to acquire, does not contemplate the enlargement of the manufacturing facilities of the vendor, but nothing herein contained shall be construed as affecting the right of the vendor to substitute new machinery of the same capacity for any now in use which may become useless through wear or through destruction by fire or other casualty.

The power to designate the parties who are to be classed as jobbers, and the discounts to which they are entitled, is expressly reserved by the company, and such designation is to be made through its board of directors; but the vendor shall have the right to select the jobbers through whom

July 20th, A. D. 1898, to the 1st day of July, A. D. 1899.

"Said contract further fixed prices at which the merchandise should be nominally sold to the company, said prices being the cost of production with a slight profit added thereto, sufficient to cover incidental expenses merely. The prices at which said goods were to be nominally sold by said so-called vendors to said company are set forth in the schedule attached to said 'Exhibit 1' and marked 'A.'

"Said agreement further nominally provided that the goods pretended to be acquired by the company from the so-called vendor, which were to be sold by jobbers, should be so sold by the company, and not by the vendor, for the account of the company, but that the goods acquired by the company from the so-called vendor, which should be sold to wholesalers other than jobbers, should be sold by the so-called vendor for the account of the company.

"The schedule attached to said agreement contained a list of prices for all commodities in the wall paper line, which were called 'list' or 'road price,' and said contract provided that sales made to jobbers should be made at discounts from said 'list' or 'road prices' fixed in the schedule marked 'B,' annexed to said 'Exhibit 1,' but that, in all cases in which the goods were manufactured at places other than the cities of New York or Philadelphia, and sold to jobbers, the vendor should equalize the freights with either of the said cities, out of the proceeds receivable for such goods.

243] "In reality, the agreement was, and so the business was carried on, that the manufacturers should maintain sample

the goods manufactured by it are to be distributed.

All orders placed with the vendor by jobbers on behalf of the company must at once be reported to the latter.

Eighth. The company hereby agrees to sell, and the vendor agrees to purchase, — shares of the common stock of the company, for which stock the vendor agrees to pay the sum of — in cash as soon after the execution and delivery of this agreement as the same may be demanded by the company, but only if and when the entire share capital of the company shall have been fully subscribed at not less than par.

The vendor will, after paying for said shares of stock, indorse the certificates representing the same, and deliver the certificates so indorsed in blank unto the company, upon the trust and agreement that the company shall hold said certificates as security for the performance by the vendor of each and all of the covenants and conditions of this agreement and that, upon the refusal, neglect, or omission of the vendor, its successors or assigns, to perform this

rooms and selling agents, and should solicit and receive the orders from all wholesalers, whether jobbers or so-called 'road' or 'quantity buyers;' that the entire business should be done by said so-called vendors, but payments should be made by the jobbers to the so-called company, and by the wholesalers, other than jobbers, directly to the so-called vendors.

"Said contract further provided, in order to protect said corporations and firms against competition from each other, and to insure against violation of said agreement, or any of them, that, from time to time, invoices should be supplied at once to the customer and to the company, upon shipment and delivery of such goods, specifying quantities and road prices; that each vendor should furnish to the company, at periods stated, just, true, and sworn statements of all shipments and deliveries of merchandise made by the vendors direct to the purchasers, which statements should contain the names of the purchasers, the character of the goods sold, and the prices at which they were sold, so that the company might receive the difference between the prices at which the goods were nominally billed to said company, and at which they were sold to the purchaser, to the end that this difference, being the net profits derived from such purchase and sale, should be divided among such corporations and firms, in proportion to the capacity of their respective businesses, determined as aforesaid, without regards to the amount sold by each.

"The prices at which, and the terms upon which, goods were to be sold by the vendors to all wholesalers other than jobbers, were

agreement, or any part thereof, the said shares of stock and certificates represented thereby shall be immediately sold by the company at public or private sale, without notice, upon such terms and at such price as the company or its officers may deem reasonable, and that the proceeds of the sale be paid into the treasury of the company as agreed and liquidated damages to the company for the breach of said agreement.

The parties hereto have fixed upon the said stock, and the proceeds thereof, as liquidated damages, because of the difficulty in establishing, in a court of law, the actual damage that would be suffered by the company in the event of the refusal, neglect, or omission to perform this agreement, and in order to avoid the difficulty of such proof.

In witness whereof, the vendor and the company have respectively caused this agreement to be executed by their respective presidents and their respective corporate seals to be hereto attached pursuant to resolutions of their respective boards of directors, the day and year first above written.

designated 'road' or 'list' prices, and were contained in the schedule marked 'C,' annexed to said 'Exhibit 1,' and forming a part thereof.

"For the further purpose of carrying out said agreement, and ascertaining said net profits, and for further disguising the real nature of the transaction, it was provided that the so-called vendor should receive from 244]sales made by it to so-called *quantity buyers,' the difference between the discounts allowed to those designated in the classification hereinbefore referred to as 'second-class jobbers' and the discounts provided in said agreement to be made to purchasers styled, in said schedules, 'quantity buyers' in which the vendor is allowed the quantity discount, except that, where special and exclusive goods were sold, there should be an allowance of thirty (30 per cent) per cent discount to said vendor.

"Said agreement further stipulated that the prices of goods as fixed by said schedules A and C might be altered from time to time, but the discounts allowed to jobbers should not be altered at any time during the term of the agreement.

"Said written contract further provided that the so-called vendor should make collections of accounts for goods sold to wholesalers other than the jobbers, but that the company should collect the proceeds of sales to the jobbers, and that accounts should be stated between the so-called vendors and the company at stated periods, and the account accompanied by payment, by the so-called vendor, to the so-called company, of the difference between the prices at which the goods were to be billed to the company and the prices at which the so-called vendors had agreed to charge the 'quantity buyers.'

"It was further stipulated in said agreement that monthly divisions should be made by said company of at least thirty (30) per cent of the 'road prices' of goods shipped to jobbers by the company.

"For the further purpose of protecting said corporations and firms and individuals from each other, preventing and stifling competition, and enforcing said combination, trust, and monopoly, each of said corporations and vendors gave the company the right, and made it the duty of the company, to audit the books of account of said so-called vendors, at such times and in such manner as the company might, from time to time, deem necessary or proper. It was further stipulated that this right to examine and audit the books was of the essence of the agreement, and that a failure on the 245]part of the so-called vendor *to permit the same should operate as a breach of the contract, entitling the company to abrogate the agreement, to recover such damages as

it might be able to establish, and to the forfeiture of the stock held by said vendor in such company.

"It was further provided that said so-called company should appoint an auditing committee from its directors, which should establish such a system of bookkeeping as it thought advisable.

"It was further a part of said agreements, though not reduced to writing, save as it set forth in said exhibit that all jobbers and other wholesalers of wall paper should be forced to sign an agreement, binding themselves to purchase their entire stock of wall paper, nominally either from plaintiff or from said corporations or firms, at prices fixed in said 'Exhibit 1,' and that they should only sell at prices fixed in the schedules attached to said 'Exhibit 1,' under the penalty, which the combination of all of said corporations and firms enabled them to enforce, that such jobbers or wholesalers, in case of refusal to accede to the terms so imposed, or in case of violation thereof, should be unable to buy wall paper; should be driven out of business, and should sacrifice the good will and capital therein invested.

"In the further carrying out of said purpose, said plaintiff and other persons, natural or artificial, engaged in the manufacture and sale of wall paper in different states of the Union, and in trade and commerce between the several states and foreign countries, whose names and locations these defendants are unable to state, entered into contracts substantially similar to 'Exhibit 1,' except that, instead of such persons pledging stock in plaintiff as security for the performance, by them, of the stipulations of said contract, they gave other security, the nature of which these defendants are unable to state, and which such other persons assume obligations, and gave to said plaintiff rights and powers, and said plaintiff exercised, as to them, such rights and powers, as were created by said instrument *'Exhibit 1,' and were exercised by[246 plaintiff and its officers and directors in relation to the persons, natural or artificial, who were theretofore members of such combination and trust.

"In the further carrying out of said scheme to stifle competition; to restrain commerce between the states and territories of the United States and with foreign countries; to unduly and unreasonably enhance prices,—it was further agreed between the members of said combination and trust that the so-called directors of plaintiff, being really a committee appointed, as aforesaid,

by said the members of said trust or combination, should arbitrarily classify the wholesale dealers of wall paper in the United States and territories thereof, into two (2) classes; namely, jobbers and 'road' or 'quantity buyers;' that they should further arbitrarily classify the jobbers into 'first class,' and 'second class' and 'third class' jobbers; that they should further arbitrarily classify the other wholesalers into 'road' or 'quantity buyer,' and 'special buyers;' that, being thus classified, they should all be compelled to sign written agreements, nominally with said company, really with said members of said combination or trust, obligating them to buy their entire stock of merchandise from said company.

"A copy of said agreement, so to be signed by said jobbers, is attached hereto, marked 'Exhibit 2' [which is in margin†] 247]and *made part thereof, the same being printed forms with blanks for names, dates, and amounts of purchases.

"To conceal the fact that it was an agreement to purchase from no one but said company, and the members of said combination and trust, the amount of purchases made by the buyer in the previous year, from all the members of said combination or trust, being the entire amount of pur-

chases made by such *buyer during[248 the preceding year, was ascertained, and an amount at least double thereof, being an amount supposed to be, and which was in fact, more than, by any possibility, could be needed by such buyer, was inserted in said blank as the amount to be purchased by such buyer from the company.

"By said agreement, the prices to be paid by the jobber were fixed according to the class in which he was arbitrarily placed, at prices enumerated in schedules B, attached to said 'Exhibit 1,' and the prices at which, alone, said jobber could sell, were fixed as shown by schedule C, attached to said 'Exhibit 1.'

"Schedule A, attached to said 'Exhibit 2,' is the same, so far as relates to jobbers of the class with whom the agreement is made, as the corresponding provisions of schedule B, attached to said 'Exhibit 1' and schedule B, attached to 'Exhibit 2' is the same as schedule C, attached to 'Exhibit 1.' The members of said combination and trust, and said plaintiff, further to carry out said agreement, compelled all other wholesale and quantity buyers to sign agreements in the form attached to this answer, marked 'Ex-

†Exhibit 2.

An agreement made this — day of ———, in the year one thousand eight hundred and ninety-eight, between the Continental Wall Paper Company, a corporation organized under the laws of the state of New York (hereinafter called the company), party of the first part, and ———, of ——— (hereinafter called the jobber), party of the second part.

In consideration of the sum of one dollar, paid by the jobber unto the company for granting of this agreement, the receipt whereof is hereby acknowledged, and other valuable considerations, it is agreed between the parties hereto as follows:

First. That the company will sell, subject to such credit limitation as it may impose, and the jobber will purchase, the entire requirements of the jobber in his business of selling wall paper for the business year ending July 1st, 1899, to the amount of a gross value, without discounts, of ———, the jobber reserving to himself the right to purchase such merchandise as he may need in excess of ——— from others.

The company is to deliver the goods without additional charge f. o. b. at New York or Philadelphia, or to equalize freights from the places at which it makes deliveries to either of said cities.

Second. The jobber shall be allowed discounts at the rates shown in the accompanying schedule, marked "A," which is hereby embodied in this agreement as a part thereof.

The terms of payment to be as follows: Four months from the date of invoice, with discount at the rate of 1 per cent per month for anticipated payment; provided settlement be made within 30 days from date of shipment, either by cash or note. Invoices for all goods shipped between October 15th and March 1st to take the latter date.

Third. Attached hereto, marked "B," is a schedule of the road prices at which the company sells its goods for the term embraced in this contract to dealers other than jobbers, and also a statement of discounts allowed to such customers other than jobbers for quantity purchases, together with the terms of credit and freight allowance to which such customers are entitled.

It is an essential condition of this agreement that the jobber will not, directly or indirectly, sell or offer for sale any of the merchandise purchased from the company hereunder at lower prices or upon better or more favorable terms than those shown in schedule "B," the intent hereof being to assure the company against the use by the jobbers of this agreement to undersell the company.

The prompt performance by the jobber of the provisions of this agreement as to payment and otherwise is a condition precedent to exacting the continuous performance of said agreement by the company.

In witness whereof the company has caused this instrument to be executed, and the jobber has hereunto set his hand, the day and year first above written.

hibit 3' [which is in the margin†], and 249]*filed herewith; the same being a printed form with blanks for signatures, and having attached thereto the prices shown in schedule C, attached to 'Exhibit 1,' which are the list prices referred to in said agreement.

"All said agreements, 'Exhibits 1, 2, and 3' were drawn for the purpose, and with the intent, of disguising the real nature of the transaction and the real purpose, as herein set forth.

"In further carrying out said combination, and with said purpose and intent, agreements were made by plaintiff and the members of said combination and trust, and persons, natural and artificial, in the Dominion of Canada, by which each agreed not to compete with the other, nor cut prices, the Americans in Canada, the Canadians in the United States.

"On, before, and after said 1st day of July, A. D. 1898, this defendant had a large and profitable business of long standing, possessing a valuable good will, and in which they had a large capital invested, being what is generally called the business of a jobber or wholesaler of wall paper in the state of Ohio and throughout the states and territories of the United States.

"The defendant and all other persons engaged in the wholesale wall paper business, at the beginning of each season, which commenced in September and closed the first of July, following, according to the custom of the trade, bought from the various persons engaged in the manufacture and sale of wall paper in the *United States, being the persons, members of said combination and monopoly, their stock of wall paper to be sold by them during the ensuing year, such stock to be manufactured for them from samples submitted at the beginning of said season, in wholesale lots, and those for defendant to be shipped to Cincinnati, Ohio, and there resold by defendant, from time to time, to retail dealers throughout the states of Ohio, Kentucky, Indiana, Illinois, and other states and territories of the United States.*

"At said time said members of said combination and trust having, by the agreements and acts aforesaid, obtained the control of the wall paper trade throughout the United States, at once greatly advanced the price of said wall paper, and threatened defendant that, unless it signed said agreement, 'Exhibit 2,' no wall paper would be sold to it; that said combination would make it impossible for it to buy wall paper, or to continue its business, and would drive it out of its said business, and compel it to sacrifice the good will owned by it as aforesaid, and the capital invested by it in said business.

"Said combination or trust then, and from that time thereafter, until the first day of July, A. D. 1900, had the power, by means of said combination and said agreements, and the will, to carry out its said threats, and deprive these defendants or any person, firm, or corporation engaged in the business of selling wall paper in the United States, of the power to obtain wall paper for its or their trade, and the will and the power to drive out of business any person, firm, or corporation engaged in the business of selling wall paper; deprive them of their good will, and compel them to sacrifice the capital invested in the business.

"In like manner, by the same means, all other jobbers and wholesalers of wall paper in the United States, and all persons engaged in commerce in the wall paper trade between the several states of the Union and foreign countries, were compelled to, and did, sign the agreements attached to this answer, as 'Exhibits 2 and 3.'

"The immediate, intended, and direct effect of the said combination and agreements was the stifling of competition between said manufacturers and vendors of wall paper, and between the jobbers and wholesalers thereof, and to unduly enhance the price of wall paper, making it one half more than the price which it would be had the same been left to free and unrestrained competition; to compel said jobbers and wholesalers to pay such unduly enhanced and un-[251

†Exhibit 3.

In consideration of your having sold us wall paper, etc., at list prices and at quantity discounts as per following schedule:

	Per ct.	Per ct.
Up to 5½c. inc.	600 rolls, 5	1200 rolls, 10
6c. to 9c. inc.	300 rolls, 7½	600 rolls, 12½
10c. to 15c. inc.	200 rolls, 10	400 rolls, 15
16c. and up.	100 rolls, 10	200 rolls, 15

Discount on borders and ceiling papers follow the discounts on the hangings they match.

Plain ingrains.

Varnish tiles, 200 rolls or more, 10 per cent.

53 L. ed.

Ingrain borders, 26 rolls of a kind, 10 per cent.

Ingrain borders, 50 rolls or over, 15 per cent.

We hereby agree not to sell any of such goods to others on terms better or more favorable than those specified in the above schedule nor lower than said list prices, and our faithful performance of this agreement is a condition precedent to the filing of our order.

The intent hereof is to protect you fully against being undersold by us among customers to whom you do allow quantity discounts.

reasonable price to plaintiff and to members of said combination, and to exact from others an unduly enhanced price.

"After the making of said agreements, as before, the members of such combination solicited and received orders from this defendant, and all other wholesalers; filled their orders; charged the prices fixed in said schedules attached to said 'Exhibit 1,' and directed that payment for such merchandise should be made by the jobbers to said plaintiff combination for said several members of said combination and trust, to be divided in the manner aforesaid. Said combination contrived, intended, and did prevent free and unrestrained competition between the producers and between the purchasers of wall paper, and between the jobbers and wholesalers of wall paper throughout the United States.

"Defendant avers that said plaintiff and the members of said combination as aforesaid, being more than two persons, firms, corporations, partnerships, and associations, combined capital and skill for each and all of the following purposes, to wit: To create restrictions in trade and commerce; to carry out restrictions in trade and commerce; to limit the product of wall paper; to reduce the production of wall paper; to increase the price of wall paper; to prevent competition in the manufacturing and making of wall paper; to prevent competition in the sale of wall paper; to prevent competition in the purchase of wall paper; to fix a standard or figure whereby its price to the public or consumer should be controlled and established as to an article or commodity of merchandise, to wit: wall paper intended for sale, use, and consumption in the states of Ohio, Indiana, Kentucky, and Illinois; to make and enter into contracts, obligations, and agreements by which they bound themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to carry out contracts, obligations, and agreements by which they bound themselves not to sell or dispose of wall paper below a common standard figure or fixed value; to make and enter into contracts, obligations *and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to carry out contracts, obligations, and agreements by which they agreed to keep the price of wall paper at a fixed or graduated figure; to make and enter into contracts, obligations and agreements by which they established and settled the price of wall paper between themselves and between themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition among themselves, and among themselves and purchasers, and among purchasers in the sale of wall

paper; to carry out contracts, obligations, and agreements by which they established and settled the price of wall paper between themselves and themselves and others, so as to both directly and indirectly preclude a free and unrestricted competition both between themselves and between themselves and purchasers, and between purchasers in the sale of wall paper; to make and enter into contracts, obligations, and agreements by which they agreed to pool, combine, and both directly and indirectly unite the interests they had connected with the sale of wall paper so that its price might be affected; to carry out contracts, obligations, and agreements by which they agreed to pool, combine, and both directly and indirectly unite the interests that they had connected with the sale of wall paper so that its price might be affected.

"Said contracts and agreements were each and all combinations and conspiracies in restraint of trade and commerce among the several states and with foreign nations, and had the intent and effect of restraining trade and commerce between the several states and with foreign nations, and were an attempt, by combinations and conspiracy, between the members of said combination and trust, to monopolize the trade and commerce in wall paper among the several states and with foreign nations, and, by said contracts, and the acts done by members thereof, and by said plaintiff under and in pursuance thereof, said plaintiff and the said members of said combination or trust did monopolize and attempt to monopolize the trade and *commerce in wall[253] paper among the several states and with foreign nations.

"In further carrying out of said scheme and combination the members thereof delivered to this defendant, in the year from September, A. D. 1898, to September, A. D. 1899, wall paper for which this defendant paid to said plaintiff, for and per direction of the members of said combination, the sum of one hundred and forty-four thousand, eight hundred and fifty-four dollars and fourteen cents (\$144,854.14).

"These defendants aver that the prices charged in said Exhibit attached to said amended petition [which are itemized accounts, showing each article and the price therefor alleged to have been sold and delivered to the defendant] *are the prices fixed and determined in pursuance of and by the combination or trust agreement, as above set forth, and are unreasonable, unjust, and excessive, and at least one half more than they would otherwise have been. In transacting all business aforesaid, at all said times, said business was transacted under and in pursuance of said combination or*

trust agreement, and for the purposes, and each of them, above specified, and not otherwise.

"The allegations in said plaintiff's petition set forth as a suit on account are an attempt to enforce, carry out, and recover upon and by virtue of said unlawful combination, aforesaid, *the prices fixed by such combination, and the prices therein sought to be recovered for said merchandise are unreasonable, excessive, and above the fair market price of such merchandise by more than the amount so sought to be recovered.*

"Each and all of the provisions of said contract and agreement between said members of said combination and each other; between said so-called vendors and said plaintiff; between said members of said combination and said plaintiff and the so-called jobbers; between the members of said combination and trust and said plaintiff and the so-called 'road' or 'quantity buyers,'—are each and all contrary to the provisions of the statutes of the state of New York, where said plaintiff was organized; contrary to the provisions of the laws of the 254] state of Ohio, where the merchandise was delivered; contrary to the laws of the several states where each of the members of said combinations did business; contrary to the laws of the United States; and made criminal by the laws of each of said several states and by the laws of the United States; and each and all of said agreements aforesaid are contrary to public policy, and in violation of the rights of the defendant, and injurious to the interests of the consumer and of the public."

Mr. Louis Marshall argued the cause, and, with Mr. Joseph Wilby, filed a brief for petitioner:

Although a party may be guilty of a violation of the law, yet that fact does not debar him from the enforcement of a collateral agreement, *e. g.*, one for the sale of merchandise, such as that in the present case.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; Strait v. National Harrow Co. 51 Fed. 819; Edison Electric Light Co. v. Sawyer-Man Electric Co. 3 C. C. A. 605, 11 U. S. App. 712, 53 Fed. 598; American Soda-Fountain Co. v. Green, 69 Fed. 333; Brown Saddle Co. v. Troxel, 98 Fed. 620; National Folding-Box & Paper Co. v. Robertson, 99 Fed. 985; Otis Elevator Co. v. Geiger, 107 Fed. 131; National Distilling Co. v. Cream City Importing Co. 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864; Dennehy v. McNulta, 41 L.R.A. 609, 30 C. C. A. 422, 59 U. S. App. 264, 86 Fed. 825; Empire Distilling Co. v. McNulta, 23 C. C. A. 415, 46 U. S. 53 L. ed.

App. 578, 77 Fed. 700; Olmstead v. Distilling & Cattle Feeding Co. 73 Fed. 44; Armstrong v. Toler, 11 Wheat. 258, 268, 6 L. ed. 468, 471; Ocean Ins. Co. v. Polleys, 13 Pet. 164, 10 L. ed. 108; Armstrong v. American Exch. Nat. Bank, 133 U. S. 467, 33 L. ed. 759, 10 Sup. Ct. Rep. 450; Buchanan v. Drovers' Nat. Bank, 5 C. C. A. 83, 6 U. S. App. 566, 55 Fed. 226; Morris v. Norton, 21 C. C. A. 553, 43 U. S. App. 739, 75 Fed. 926; Phalen v. Clark, 19 Conn. 432, 50 Am. Dec. 253; The Charles E. Wiswall, 42 L.R.A. 85, 30 C. C. A. 339, 57 U. S. App. 179, 86 Fed. 674; Phenix Ins. Co. v. Clay, 101 Ga. 332, 65 Am. St. Rep. 307, 28 S. E. 853; Erb v. German-American Ins. Co. 98 Iowa, 611, 40 L.R.A. 845, 67 N. W. 583; Niagara F. Ins. Co. v. DeGraff, 12 Mich. 136; Tracy v. Talmage, 14 N. Y. 175, 67 Am. Dec. 132; Curtis v. Leavitt, 15 N. Y. 245; Mandlebaum v. Gregovich, 17 Nev. 95, 45 Am. Rep. 433, 28 Pac. 121; Planters' Bank v. Union Bank, 16 Wall. 500, 21 L. ed. 480; Ware v. Curry, 67 Ala. 274; Martin v. Hodge, 47 Ark. 378, 58 Am. Rep. 763, 1 S. W. 694; Minnesota Lumber Co. v. Whitebreast Coal Co. 56 Ill. App. 248; Congress & E. Spring Co. v. Knowlton, 103 U. S. 49, 26 L. ed. 347; Welch v. Wesson, 6 Gray, 506; Levin v. Chicago Gaslight & Coke Co. 64 Ill. App. 393; Ingraham v. National Salt Co. 65 C. C. A. 54, 130 Fed. 676; Yarlborough v. Avant, 66 Ala. 526.

A person does not become an outlaw and lose all rights by doing an illegal act.

National Bank & L. Co. v. Petrie, 189 U. S. 425, 47 L. ed. 880, 23 Sup. Ct. Rep. 512.

Assuming that the plaintiff was a trust, and that it could have been lawfully proceeded against under the act of Congress of July 2, 1900, yet that fact does not prevent the plaintiff from recovering for the goods which it sold and delivered to the defendants.

Connolly v. Union Sewer Pipe Co. *supra*; The Charles E. Wiswall, 42 L.R.A. 85, 30 C. C. A. 339, 57 U. S. App. 179, 86 Fed. 671; Dickerman v. Northern Trust Co. 176 U. S. 195, 44 L. ed. 431, 20 Sup. Ct. Rep. 311; Lafayette Bridge Co. v. Streater, 105 Fed. 729; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 185, 50 L. ed. 428, 433, 26 Sup. Ct. Rep. 208.

The validity of such a contract as the present was not only necessarily adjudged in the Connolly Case, but was expressly held in United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, subsequently affirmed here in 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96.

See also American Strawboard Co. v. Haldeman Paper Co. 27 C. C. A. 634, 54 U. S. App. 416, 83 Fed. 619; Hitchcock v. An-

thony, 28 C. C. A. 80, 54 U. S. App. 439, 83 Fed. 779; *Dunlop v. Gregory*, 10 N. Y. 241, 61 Am. Dec. 746; *Hodge v. Sloan*, 107 N. Y. 244, 1 Am. St. Rep. 816, 17 N. E. 335; *Oregon Steam Nav. Co. v. Winsor*, 20 Wall. 64, 22 L. ed. 315.

Other decisions indicate the validity of the contract.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; *Dolph v. Troy Laundry Machinery Co.* 28 Fed. 553; *Stines v. Dorman*, 25 Ohio St. 580; *New York Bank Note Co. v. Hamilton Bank Note Engraving & P. Co.* 83 Hun, 593, 31 N. Y. Supp. 1060; *Brett v. Ebel*, 29 App. Div. 256, 51 N. Y. Supp. 573; *Walsh v. Dwight*, 40 App. Div. 513, 58 N. Y. Supp. 91; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 54 App. Div. 227, 66 N. Y. Supp. 615, 175 N. Y. 1, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136; *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454; *Phillips v. Iola Portland Cement Co.* 61 C. C. A. 19, 125 Fed. 593; *Garst v. Harris*, 177 Mass. 72, 58 N. E. 174; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *Sperry & H. Co. v. Mechanics' Clothing Co.* 128 Fed. 800; *Fowle v. Park*, 131 U. S. 88, 91, 33 L. ed. 67, 70, 9 Sup. Ct. Rep. 658; *Anderson v. United States*, 171 U. S. 604, 43 L. ed. 300, 19 Sup. Ct. Rep. 50; *Continental Ins. Co. v. Fire Underwriters*, 67 Fed. 310; *Matthews v. Associated Press*, 136 N. Y. 340, 32 Am. St. Rep. 741, 32 N. E. 981; *Newell v. Meyendorff*, 9 Mont. 264, 8 L.R.A. 440, 18 Am. St. Rep. 738, 23 Pac. 333; *Meyer v. Estes*, 164 Mass. 457, 32 L.R.A. 283, 41 N. E. 683; *Com. v. Grinstead*, 111 Ky. 203, 56 L.R.A. 709, 63 S. W. 427; *Crystal Ice Mfg. Co. v. San Antonio Brewing Asso.* 8 Tex. Civ. App. 1, 27 S. W. 210; *Clark v. Frank*, 17 Mo. App. 602; *Keith v. Herschberg Optical Co.* 48 Ark. 138, 2 S. W. 777; *Brown v. Rounsavell*, 78 Ill. 589; *Roller v. Ott*, 14 Kan. 609; *Fuqua v. Pabst Brewing Co.* (Tex. Civ. App.) 36 S. W. 479; *Barber Asphalt Paving Co. v. Brand*, 4 Silv. Sup. Ct. 519, 7 N. Y. Supp. 744.

Cases which have been cited to sustain the proposition that such a contract as the present is invalid will, on analysis, be found to differ most materially in their facts and circumstances. They either involve the formation of combinations between producers of or dealers in merchandise to limit the production or supply of an article, or they are cases in which a corporation of a quasi public character, charged with a public duty, as, for example, a railway company or a gas company, enters into a contract restrictive of its business, and which disables or hampers it from performing the duty which it owes to the public,

This distinction was recognized by the supreme court of Minnesota in *National Benefit Co. v. Union Hospital Co.* 45 Minn. 272, 11 L.R.A. 440, 47 N. W. 806.

The contract was not invalid even if the defendants were practically prevented from obtaining goods from the plaintiff except on condition that they would enter into such a contract.

Cooley, Torts, pp. 278, 688; *Brewster v. C. Miller's Sons Co.* 101 Ky. 368, 38 L.R.A. 505, 41 S. W. 301.

The facts alleged in the answer do not take this case out of the purview of the decision in *Connolly v. Union Sewer Pipe Co.* supra, since they clearly allege that the defendant was not a member of the trust, but the victim of the trust.

Epithets do not make out fraud, and averments substantially of legal conclusions are not admitted by a demurrer.

Kent v. Lake Superior Ship Canal, R. & I. Co. 144 U. S. 91, 36 L. ed. 358, 12 Sup. Ct. Rep. 650; *National Protective Asso. v. Cumming*, 170 N. Y. 315, 58 L.R.A. 135, 88 Am. St. Rep. 648, 63 N. E. 369; *John D. Park & Sons Co. v. National Wholesale Druggists' Asso.* 175 N. Y. 21, 62 L.R.A. 632, 96 Am. St. Rep. 578, 67 N. E. 136.

If the covenant now under consideration was in restraint of trade, it was only incidentally and indirectly so, and, being merely ancillary to a valid contract of sale, and reasonable at common law, does not come within the purview of the Sherman act.

United States v. Joint Traffic Asso. 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 25; *United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 50 L. ed. 428, 26 Sup. Ct. Rep. 208; 20 *Green Bag* (1908) p. 193.

Even assuming that the clause contained in the contract between the plaintiff and the defendants, which prohibited the latter from selling any of the merchandise purchased from the former at lower prices than those specified in the schedule annexed, was illegal, the only effect of such illegality would be to nullify that provision, and not to prevent the plaintiff from recovering for merchandise actually received and kept by the defendants.

Pigot's Case, 11 Coke, 27b; *Hammon, Contr.* § 251; *Anson, Contr.* 8th ed. 206; *Pickering v. Ilfracombe R. Co.* L. R. 3 C. P. 235; *United States v. Bradley*, 10 Pet. 343, 9 L. ed. 448; *Hynds v. Hays*, 25 Ind. 31; *Kerrison v. Cole*, 8 East, 231; *Gelpcke v. Dubuque*, 1 Wall. 221, 17 L. ed. 531; *Gaskell v. King*, 11 East, 165; *Erie R. Co. v. Union Locomotive & Exp. Co.* 35 N. J. L. 240; *Baines v. Geary*, L. R. 35 Ch. Div. 154; 212 U. S.

Wallis v. Day, 2 Mees. & W. 273; Haynes v. Doman [1899] 2 Ch. 13; Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64, 22 L. ed. 315; Western U. Teleg. Co. v. Burlington & S. W. R. Co. 3 McCrary, 130, 11 Fed. 1; Presbury v. Fisher, 18 Mo. 50; More v. Bonnet, 40 Cal. 251, 6 Am. Rep. 621; Hanauer v. Gray, 25 Ark. 350, 99 Am. Dec. 226; Price v. Green, 16 Mees. & W. 346; Wilcy v. Baumgardner, 97 Ind. 66, 49 Am. Rep. 427; Dean v. Emerson, 102 Mass. 480; Peltz v. Eichele, 62 Mo. 171; United States v. Bradley, 10 Pet. 343, 360, 364, 9 L. ed. 448, 455, 456; Trenton Potteries Co. v. Oliphant, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723; Thomas v. Miles, 3 Ohio St. 274; Smith's Appeal, 113 Pa. 579, 6 Atl. 251; Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299; Wald's Pollock, Contr. 321, note; King v. King, 63 Ohio St. 363, 52 L.R.A. 157, 81 Am. St. Rep. 635, 59 N. E. 111; Leavitt v. Palmer, 3 N. Y. 37, 51 Am. Dec. 333; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 185, 50 L. ed. 428, 433, 26 Sup. Ct. Rep. 208; Mallan v. May, 11 Mees. & W. 653; Green v. Price, 13 Mees. & W. 695; 16 Mees. & W. 346; Hurley v. Donovan, 182 Mass. 68, 64 N. E. 685; Cook v. Sherman, 4 McCrary, 20, 20 Fed. 167; Lincoln Sav. Bank & S. D. Co. v. Allen, 27 C. C. A. 87, 49 U. S. App. 498, 82 Fed. 148; Stewart v. Lehigh Valley R. Co. 38 N. J. L. 505; Greenhood, Pub. Pol. pp. 20, 21; Lange v. Werk, 2 Ohio St. 531; Wido v. Webb, 20 Ohio St. 435, 5 Am. Rep. 664.

Messrs. **Orris P. Cobb** and **Morison R. Waite** argued the cause and filed a brief for respondent:

Plaintiff's corporate organization cannot be used as a cloak to cover the illegal contracts between the parties to the scheme, nor does it make legal that scheme which, without it, would be clearly illegal.

Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; *Harding v. American Glucose Co.* 182 Ill. 551, 64 L.R.A. 738, 74 Am. St. Rep. 189, 55 N. E. 577; *Richardson v. Buhl*, 77 Mich. 656, 6 L.R.A. 457, 43 N. W. 1102; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 179, 15 L.R.A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

The scheme or combination must be treated as a whole.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 245, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96; *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 45, 48 L. ed. 608, 53 L. ed.

611, 24 Sup. Ct. Rep. 307; *Loewe v. Lawlor*, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 309; *Continental Wall Paper Co. v. Findlay* (Fed.; unreported).

The combination was an illegal trust and an unlawful combination within the meaning of the statutes.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271, affirmed in 175 U. S. 211, 244, 44 L. ed. 136, 148, 20 Sup. Ct. Rep. 96; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Asso.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, 63 L.R.A. 58, 52 C. C. A. 621, 115 Fed. 27; *Northern Securities Co. v. United States*, supra; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. ed. 518, 25 Sup. Ct. Rep. 276; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 49 L. ed. 689, 694, 25 Sup. Ct. Rep. 379; *United States v. Jellico Mountain Coal & Coke Co.* 12 L.R.A. 753, 3 Inters. Com. Rep. 626, 46 Fed. 432; *American Biscuit & Mfg. Co. v. Klotz*, 44 Fed. 721; *Oliver v. Gilmore*, 52 Fed. 562; *Chicago, M. & St. P. R. Co. v. Wabash, St. L. & P. R. Co.* 4 Inters. Com. Rep. 578, 9 C. C. A. 659, 27 U. S. App. 1, 61 Fed. 997; *National Harrow Co. v. Hench*, 39 L.R.A. 299, 27 C. C. A. 349, 55 U. S. App. 53, 83 Fed. 38, 84 Fed. 226; *United States v. Coal Dealers' Asso.* 85 Fed. 252; *Cravens v. Carter-Crume Co.* 34 C. C. A. 479, 92 Fed. 485; *Lowry v. Tile, Mantel, & Grate Asso.* 106 Fed. 38; *United States ex rel. Griggs v. Chesapeake & O. Fuel Co.* 105 Fed. 93; *Chesapeake & O. Fuel Co. v. United States*, 53 C. C. A. 256, 115 Fed. 610; *Atlanta v. Chattanooga Foundry & Pipe Co.* 101 Fed. 900; *Jayne v. Loder*, 7 L.R.A. (N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 A. & E. Ann. Cas. 294; *Wheeler-Stenzel Co. v. National Window Glass Jobbers Asso.* 10 L.R.A. (N.S.) 972, 81 C. C. A. 658, 152 Fed. 864; *McConnell v. Camors-McConnell Co.* 152 Fed. 321; *John D. Park & Sons Co. v. Hartman*, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24; *Finck v. Schneider Granite Co.* 187 Mo. 244, 106 Am. St. Rep. 452, 86 S. W. 213; *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.* 60 W. Va. 508, 10 L.R.A. (N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; *Hastings Industrial Co. v. Baxter*, 125 Mo. App. 494, 102 S. W. 1075; *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.) 59 S. W. 709; *Cummings v. Union Blue Stone Co.* 164 N. Y. 404, 52 L.R.A. 262, 79 Am. St. Rep. 655, 58 N. E. 525; *Cohen v. Berlin & J. Envelope Co.* 166 N. Y. 300, 59 N. E. 906; *Burrows v. Interborough Metropolitan Co.* 156 Fed. 389; *Southern Electric Secur-*

ities Co. v. State, 91 Miss. 195, 124 Am. St. Rep. 638, 44 So. 785; Distilling & Cattle Feeding Co. v. People and Harding v. American Glucose Co. supra; Richardson v. Buhl, 77 Mich. 632, 6 L.R.A. 457, 43 N. W. 1102; Detroit Salt Co. v. National Salt Co. 134 Mich. 103, 96 N. W. 1; Straus v. American Publishers' Asso. 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; Nester v. Continental Brewing Co. 161 Pa. 473, 24 L.R.A. 247, 41 Am. St. Rep. 894, 29 Atl. 102; Vulcan Powder Co. v. Hercules Powder Co. 96 Cal. 510, 31 Am. St. Rep. 242, 31 Pac. 581; Beechley v. Mulville, 102 Iowa, 602, 63 Am. St. Rep. 479, 70 N. W. 107, 71 N. W. 428; Bailey v. Master Plumbers' Asso. 103 Tenn. 99, 46 L.R.A. 561, 52 S. W. 853; Klingel's Pharmacy v. Sharp & Dohme, 104 Md. 218, 7 L.R.A.(N.S.) 976, 118 Am. St. Rep. 399, 64 Atl. 1029, 9 A. & E. Ann. Cas. 1184.

A contract in restraint of trade, though on its face not unreasonable, and hence not void at common law, may become such if it is simply a part of a general scheme or one step towards the accomplishment of the purpose to restrain competition and establish a monopoly.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Cravens v. Carter-Crume Co. 34 C. C. A. 479, 92 Fed. 485; Detroit Salt Co. v. National Salt Co. 134 Mich. 120, 96 N. W. 1; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 Pac. 36; Finck v. Schneider Granite Co. supra.

Of course, parties to such a combination cannot plead an honest intent in forming the combination, or the reasonableness of the restraint; under statutes forbidding such combination or agreement such defenses are immaterial.

United States v. Joint Traffic Asso. 171 U. S. 505, 565, 43 L. ed. 259, 286, 19 Sup. Ct. Rep. 25; Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 44 L. ed. 136, 20 Sup. Ct. Rep. 96; United States ex rel. Griggs v. Chesapeake & O. Fuel Co. supra; Chesapeake & O. Fuel Co. v. United States, 53 C. C. A. 256, 115 Fed. 619; United States v. Hopkins, 82 Fed. 529; United States v. Coal Dealers' Asso. supra; United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 278.

Contracts and conspiracies which prevent free and unrestricted competition in interstate commerce are within the condemnation of the Federal statute.

W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307; Northern Securities Co. v. United States, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. 500

Rep. 436; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301.

Cases cited by plaintiff are founded upon well-recognized distinctions which differentiate them from the case at bar. They fall under various classes, as follows and must be distinguished from the case at bar:

1st. We must distinguish a sale made under and in pursuance of, and in carrying out, a contract void because forbidden by statutes and the law prohibiting trusts and trust agreements, restraint of trade, enhancing prices, etc., and a sale made entirely outside, as to a person who is not a member of the trust.

2d. We must distinguish between contracts unenforceable under the common law and cases arising where a statute has made contracts in restraint of trade or competition void; have forbidden them under penalty and have made them criminal.

3d. We must distinguish cases where the contract itself is legal, but the time or manner of making the contract alone is forbidden.

4th. We must distinguish cases arising under statutes enacted for a particular class of persons, where the enforcement of the prohibition would frustrate the purpose of the statute.

5th. We must distinguish cases where, by agreement of the parties to the illegal transaction, the illegal transaction has been ended, and money delivered by one person to a mere agent, to be delivered to a third person, the delivery to the agent vesting title to the money or property in the other party.

6th. We must distinguish cases where the agreement which would be otherwise unlawful is held valid for the reason that the agreement is but a method upon the part of the owner of a legal monopoly of dividing up or dealing with that monopoly; as, for instance, an agreement respecting patented or copyrighted articles.

The fact that the consideration has all been executed on one side cannot alter the matter. There have been many cases holding that there can be no recovery for goods sold and delivered under trust contracts or other contract creating an illegal monopoly in restraint of trade. Among these are:

Detroit Salt Co. v. National Salt Co. 134 Mich. 103, 96 N. W. 1; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Unckles v. Colgate, 148 N. Y. 538, 43 N. E. 59; Clancey v. Onondaga Fine Salt Mfg. Co. 62 Barb. 405; Houck v. Anheuser-Busch Brewing Asso. 88 Tex. 184, 30 S. W. 869; Fuqua v. Pabst Brewing Co. 90 Tex. 298, 35 L.R.A. 241, 38 S. W. 29, 750; Texas Brewing Co. v. Templeman, 90 Tex. 277, 212 U. S.

38 S. W. 27; Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 120, 47 S. W. 288.

Other cases of executed consideration for which recovery was denied by reason of the contract being illegal because tending to create a monopoly or in restraint of trade are:

Cravens v. Carter-Crume Co. 34 C. C. A. 479, 92 Fed. 479; Bishop v. Palmer, 146 Mass. 469, 4 Am. St. Rep. 339, 16 N. E. 299.

Cases in which recovery has been denied either of the contract price when suing on the contract, or on the common counts, ignoring the contract, are numerous.

Alexander v. Owen, 1 T. R. 225; Biggs v. Lawrence, 3 T. R. 454; Waymell v. Reed, 5 T. R. 599; Ribbans v. Crickett, 1 Bos. & P. 266; Bensley v. Bignold, 5 Barn. & Ald. 335; Marchant v. Evans, 2 J. B. Moore, 14; Law v. Hodson, 11 East, 300; Cope v. Rowlands, 2 Mees. & W. 149; Jennings v. Throgmorton, Ryan & M. 251; Perace v. Brooks, L. R. 1 Exch. 213; Foster v. Taylor, 3 Nev. & M. 244, 5 Barn. & Ad. 887; Cundell v. Dawson, 4 C. B. 397; Little v. Poole, 9 Barn. & C. 192; McMullen v. Hoffman, 174 U. S. 639, 655, 43 L. ed. 1117, 1123, 19 Sup. Ct. Rep. 839; Gibbs v. Consolidated Gas Co. 130 U. S. 396, 412, 32 L. ed. 979, 985, 9 Sup. Ct. Rep. 553; Irwin v. Williar, 110 U. S. 499, 28 L. ed. 225, 4 Sup. Ct. Rep. 160; Embrey v. Jemison, 131 U. S. 336, 348, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776; Miller v. Ammon, 145 U. S. 421, 427, 36 L. ed. 759, 762, 12 Sup. Ct. Rep. 884; Hanauer v. Doane, 12 Wall. 342, 20 L. ed. 439; Sprott v. United States, 20 Wall. 459, 22 L. ed. 371; Kohn v. Milcher, 10 L.R.A. 439, 43 Fed. 641; Peck v. Burr, 10 N. Y. 297; Johnston v. Dahlgren, 166 N. Y. 358, 59 N. E. 987; Brinkman v. Eisler, 40 N. Y. S. R. 866, 16 N. Y. Supp. 154; Berka v. Woodward, 125 Cal. 120, 45 L.R.A. 420, 73 Am. St. Rep. 31, 57 Pac. 777; Smith v. Albany, 61 N. Y. 444; Finn v. Donahue, 35 Conn. 217; Pike v. King, 16 Iowa, 52; Meader v. White, 66 Me. 92, 22 Am. Rep. 551; Dodson v. Harris, 10 Ala. 569; Troewert v. Decker, 51 Wis. 47, 37 Am. Rep. 808, 8 N. W. 26; Simpson v. Nicholls, 3 Mees. & W. 243; Stewart v. Thayer, 170 Mass. 562, 49 N. E. 1020.

Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect.

Coppell v. Hall, 7 Wall. 542, 558, 19 L. ed. 244, 248; McMullen v. Hoffman, 174 U. S. 639, 665, 43 L. ed. 1117, 1127, 19 Sup. Ct. Rep. 839; Armstrong v. Toler, 11 Wheat. 258, 274, 6 L. ed. 468, 473.

A direct proceeding by the state or Federal authorities to have the plaintiff de-

clared a trust or combination within the meaning of the anti-trust law is not necessary before a valid defense to a suit on the illegal contract can be set up.

E. Bement & Sons v. National Harrow Co. 186 U. S. 70, 46 L. ed. 1058, 22 Sup. Ct. Rep. 747; Ford v. Chicago Milk Shippers' Asso. 155 Ill. 166, 27 L.R.A. 298, 39 N. E. 651; National Lead Co. v. S. E. Grote Paint Store Co. 80 Mo. App. 265.

The contract between the plaintiff and the defendant, even when considered separately from the agreements between the manufacturers and plaintiff, was one in restraint of trade, so as to debar the plaintiff from recovering for goods sold and delivered under it to the defendant.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271; Cravens v. Carter-Crume Co. supra; Pacific Factor Co. v. Adler, 90 Cal. 110, 25 Am. St. Rep. 102, 27 L. ed. 36; Santa Clara Valley Mill & Lumber Co. v. Hayes, 76 Cal. 387, 9 Am. St. Rep. 211, 18 Pac. 391; Straus v. American Publishers' Asso. 85 App. Div. 450, 83 N. Y. Supp. 271, affirmed in 177 N. Y. 473, 64 L.R.A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107; Detroit Salt Co. v. National Salt Co. 134 Mich. 120, 96 N. W. 1; Finck v. Schneider Granite Co. 187 Mo. 269, 106 Am. St. Rep. 452, 86 S. W. 213; E. Bement & Sons v. National Harrow Co. supra; Wheeler-Stenzel Co. v. National Window Glass Jobbers' Asso. 10 L.R.A.(N.S.) 972, 81 C. C. A. 658, 152 Fed. 864.

This contract and its respective provisions being illegal and void, while at common law they furnished no basis for a cause of action or a criminal prosecution, they nevertheless constituted a defense to any suit brought to enforce them.

United States v. Addyston Pipe & Steel Co. 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 279.

Even if the restrictions contained in the contracts were reasonable at common law, yet, under the Federal and state statutes, whether reasonable or unreasonable, they were void and nonenforceable.

United States v. Trans-Missouri Freight Asso. 166 U. S. 290, 328, 41 L. ed. 1007, 1023, 17 Sup. Ct. Rep. 540; United States v. Joint Traffic Asso. 171 U. S. 505, 568, 43 L. ed. 259, 287, 19 Sup. Ct. Rep. 25; Loewe v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 304.

The illegality is not partial and separable, but vitiates and invalidates the whole contract.

Santa Clara Valley Mill & Lumber Co. v. Hayes, supra; Cincinnati, P. B. S. & P. Packet Co. v. Bay, 200 U. S. 179, 185, 50 L. ed. 428, 433, 26 Sup. Ct. Rep. 208; Erie

R. Co. v. Union Locomotive & Exp. Co. 35 N. J. L. 240; 17 Yale L. J. 338, 341; United States v. Bradley, 10 Pet. 343, 360, 9 L. ed. 448, 455; Gelpcke v. Dubuque, 1 Wall. 175, 221, 17 L. ed. 520, 531; Hammon, Contr. § 251a; Anson Contr. 8th ed. pp. 185, 208-210, 9th ed. pp. 190, 213-215; Burlington, C. R. & N. R. Co. v. Northwestern Fuel Co. 31 Fed. 657.

Contracts may be void, illegal, and unenforceable even though there be no agreement by either party that is criminal. This follows from the immediate connection of the contract with the illegal purpose of one of the parties.

Pollock, Contr. 6th ed. pp. 351-354; Wald's Pollock, Contr. 3d ed. **484, 485; Gaslight & Coke Co. v. Turner, 5 Bing. N. C. 666; Lightfoot v. Tenant, 1 Bos. & P. 551; Arnot v. Pittston & E. Coal Co. 68 N. Y. 558, 23 Am. Rep. 190; Hanauer v. Doane, 12 Wall. 342, 349, 20 L. ed. 439, 442.

The preventing of unrestricted competition by fixing or keeping up the price of any article or commodity of trade, particularly when coupled with a refusal to deal with, or sell to, one violating the provisions of such an agreement, is a restraint of trade or commerce; and hence, if affecting interstate commerce, within the prohibition of the Sherman act.

Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 244, 44 L. ed. 136, 148, 20 Sup. Ct. Rep. 96; Loder v. Jayne, 142 Fed. 1014; W. W. Montague & Co. v. Lowry, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307.

Mr. Justice Harlan (after making the above statement) delivered the opinion of the court:

The anti-trust act of 1890 declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, and also declares it to be a misdemeanor, punishable by fine or imprisonment, or both, for anyone to make any such contract or to engage in any such combination or conspiracy. § 1. It is also made a misdemeanor, punishable by fine or imprisonment, or both, for anyone to monopolize or attempt to monopolize, or combine or conspire with any other person or persons to monopolize, any part of the trade or commerce among the several states or with foreign nations. § 2. Similar provisions were made in reference to contracts, combinations in the form of trust or otherwise, or conspiracies, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or between any such territory

or another, or between any such territory or territories and any state or states or the District of Columbia or with foreign nations, or between the District of Columbia and any state or states or foreign nations. § 3. The act further provided that any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful may sue therefor in the circuit court of the United States in the district where the defendant resides or is found, without regard to the amount *in controversy, [255 and recover threefold the damages sustained by him. § 3. 26 Stat. at L. 209, chap. 647, U. S. Comp. Stat. 1901, p. 3200.

The defendant contends that, under the facts admitted by the demurrer, it must be taken that the Continental Wall Paper Company is the representative in this suit of a combination or trust formed for the purpose of restraining and monopolizing trade and commerce among the several states in the manufacturing, buying, selling, and dealing in wall paper; that this combination has the direct effect to accomplish that purpose; that the defendant, engaged in buying and selling wall paper in Ohio and other states, was compelled to become a party to the illegal combination or go out of business; that the account in suit was made up, as to prices and terms of sale, not upon the basis of an independent, collateral contract for goods sold and delivered, but with direct reference to, in conformity with, and for the object of enforcing, the agreements that constituted, or out of which came, the illegal combination whose business is carried on under the name of the Continental Wall Paper Company; that a judgment against the defendant upon the account in suit will, in effect, legally and practically aid the combination to reap the fruits of agreements that were illegal under the acts of Congress, and the making of which was declared by that act a crime; consequently, that the petition, upon the facts admitted, was properly dismissed.

That the combination represented by the plaintiff company is within the prohibitions of the above act of Congress is clear from the facts admitted by the demurrer. We assume, therefore, without discussion—for discussion is unnecessary—that there is a combination, of which the Continental Wall Paper Company is the representative, and that, in violation of that act, such combination was formed with the intent, and will have the effect, directly to restrain as well as monopolize trade and commerce among the several states and with foreign nations, as involved in the manufacture, sale, and transportation of wall paper among the several states and with foreign nations. This

part of the case is forcibly presented by the 256]circuit *court of appeals, which, in its opinion, delivered by Judge Lurton, well said: "The conspiring mills were situated in many states. The consumers [of wall paper] embraced the whole citizenship of the United States. The jobbers and wholesalers, who were to be coerced into contracts to buy their entire demands from the Continental Wall Paper Company or be driven out of business, were in every state. Before the combination each of the combining companies was engaged in both state and interstate commerce. The freedom of each, with respect to prices and terms, was restrained by the agreement, and interstate commerce directly affected thereby, as well as by the enhancement of prices which resulted. A more complete monopoly in an article of universal use has probably never been brought about. It may be that the wit of man may yet devise a more complete scheme to accomplish the stifling of competition. But none of the shifts resorted to for suppressing freedom of commerce and securing undue prices, shown by the reported cases, is half so complete in its details. None of the schemes with which this may be compared is more certain in results, more widespread in its operation, and more evil in its purposes. It must fall within the definition of a 'restraint of trade,' whether we confine ourselves to the common-law interpretation of that term, or apply that given to the term as used in the Federal act." 78 C. C. A. 567, 575, 148 Fed. 939, 947.

But it is contended that however illegal the combination represented by the plaintiff may be, and whatever may be the effect of a judgment against the defendant, the plaintiff company is entitled to a judgment under the principles announced in *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 545, 46 L. ed. 679, 684, 22 Sup. Ct. Rep. 431. Let us see what that case was and whether it may not be distinguished from the one now before us.

The Union Sewer Pipe Company, a corporation of Ohio, doing business in Illinois, brought suit against Connolly, a citizen of Illinois, upon promissory notes given in Illinois on account of the purchase by the defendant from that company, under contracts made in that state, of sewer pipe 257]known as *Akron pipe. It also brought suit against one Dee, a citizen of Illinois, upon an open account for the value of similar sewer pipe sold to him under a written contract, also made in that state. In each case the defendant disputed his liability for the value of the goods obtained from the Sewer Pipe Company upon the ground that, at the time of their respective purchases, that company was in a combination with

certain firms, corporations, and companies engaged in the manufacture of Akron pipe, which combination, it was alleged, was in illegal restraint of trade, and forbidden by the principles of the common law, as recognized and enforced both in Ohio and Illinois. The defense was also made that the Sewer Pipe Company was a combination doing business throughout the United States and between Ohio and Illinois, in the form of a trust, in restraint of trade and commerce among the several states, contrary not only to the anti-trust act of Congress of July 2d, 1890, chap. 647, but contrary to the Illinois anti-trust statute of January 1st, 1893, forbidding, under penalties, the combination of capital, skill, or acts for certain specified purposes. 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200. Ill. Laws 1893, p. 182; Hurd's Rev. Stat. (Ill.) 1899, p. 618, title "Criminal Code."

The defense based upon the principles of the common law was overruled in the *Connolly* Case, the court saying: "Assuming, as defendants contend, that the alleged combination was illegal if tested by the principles of the common law, still it would not follow that they could, at common law, refuse to pay for pipe bought by them under special contracts with the plaintiff. The illegality of such combination did not prevent the plaintiff corporation from selling pipe that it obtained from its constituent companies, or either of them. It could pass a title by a sale to anyone desiring to buy, and the buyer could not justify a refusal to pay for what he bought and received by proving that the seller had previously, in the prosecution of its business, entered into an illegal combination with others in reference, generally, to the sale of Akron pipe." Again, after referring to several cases establishing the general *principle that a court will not[258 lend assistance to carry out the terms of an illegal contract, and that one purchasing and receiving goods under a contract, expressed or implied, to pay for them, cannot refuse to pay simply because of the illegal character of his vendor, the court proceeded: "In the present [*Connolly*] case other considerations must control. This is not an action to enforce or which involves the enforcement of the alleged arrangement or combination between the plaintiff corporation and other corporations, firms, and companies in relation to the sale of Akron pipe. As already suggested, the plaintiff, even if part of a combination illegal at common law, was not, for that reason, forbidden to sell property it acquired or held for sale. The purchases by the defendants had no necessary or direct connection with the alleged illegal combination; for the contracts between the defendants and the plaintiff could

have been proven without any reference to the arrangement whereby the latter became an illegal combination. If, according to the principles of the common law, the Union Sewer Pipe Company could not have sold or passed title to any pipe it received and held for sale, because of an illegal arrangement previously made with other corporations, firms, or companies, a different question would be presented. But we are aware of no decision to the effect that a sale similar to that made by the present plaintiff to the defendants respectively would, in itself, be illegal or void under the principles of the common law. The contracts between the plaintiff and the respective defendants were, in every sense, collateral to the alleged agreement between the plaintiff and the other corporations, firms, or associations whereby an illegal combination was formed for the sale of sewer pipe."

Turning to the defense based on the anti-trust act of Congress, the court in the Connolly Case said: "Much of what has just been said in reference to the first special defense based on the common law is applicable to this part of the case. If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination *thereby formed, was illegal under the act of Congress, then all those, whether persons, corporations, or associations, directly connected therewith, became subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, of property if acquired or which came into its possession for the purpose of being sold,—such property not being, at the time, in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation and the alleged arrangement made by it with other corporations, companies, and firms. The contracts under which the pipe in question was sold were, as already said, collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid." Further: "Nor

can the defendants refuse to pay for what they bought upon the ground that the 7th section of the Sherman act gives the right to any person 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful' by the act, to sue and recover treble the damage sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and *other corporations, firms, or companies. Such damages cannot be said, as matter of law, to have directly grown out of that arrangement or combination, and are, besides, unliquidated. Besides, it is well settled in Illinois that 'unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute.'"

We need not here refer to that part of the Connolly Case relating to the defense based on the anti-trust act of Illinois; for the court adjudged that act to be void because of a certain provision in it which, contrary to the Constitution of the United States, denied the equal protection of the laws to all persons within the jurisdiction of the state, except a named favored class.

The present case is plainly distinguishable from the Connolly Case. In that case the defendant, who sought to avoid payment for the goods purchased by him under contract, had no connection with the general business or operations of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, *nor part of nor in execution of any general plan or scheme that the law condemned.* The contract of purchase was wholly collateral to and independent of the agreement under which the combination had been previously formed by others in Ohio. It was the case simply of a corporation that dealt with an entire stranger to its management and operations and sold goods that it owned to one who wished to buy them. In short, the defense in the Connolly Case was that the plaintiff corporation, although owning the pipe in question and having authority to sell and pass title to the property, was precluded by reason *alone* of its illegal character from having a judgment against the purchaser. We held that that

defense could not be sustained, either upon the principles of the common law or under the anti-trust act of Congress.

261] *The case now before us is an entirely different one. The Continental Wall Paper Company seeks, in legal effect, the aid of the court to enforce a contract for the sale and purchase of goods which, *it is admitted by the demurrer, was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme.* We state the matter in this way because the plaintiff, by its demurrer, admits, for the purposes of this case, the truth of all the facts alleged in the third defense. It is admitted by the demurrer to that defense that the account sued on has been made up *in execution of the agreements* that constituted or out of which came the illegal combination formed for the purpose and with effect of both restraining and monopolizing trade and commerce among the several states.

The present suit is not based upon an implied contract of the defendant company to pay a reasonable price for goods that it purchased, but upon agreements, to which both the plaintiff and the defendant were parties, and *pursuant to which* the accounts sued on were made out, and which had for their object, and which it is admitted had directly the effect, to accomplish the illegal ends for which the Continental Wall Paper Company was organized. If judgment be given for the plaintiff the result, beyond all question, will be to give the aid of the court in making effective the illegal agreements that constituted the forbidden combination. These considerations make it evident that the present case is different from the Connolly Case. In that case the court regarded the record as presenting the question whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, which owned the goods, was an illegal combination or trust. We held that he could not, and nothing more touching that question was decided or intended to be decided in the Connolly Case. The question here is whether the plaintiff company can have judgment upon an account which, it is admitted by demurrer, was made 262] up, with the knowledge of *both seller and buyer, with direct reference to and in execution of certain agreements under which an illegal combination, represented by the seller, was organized. Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give

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effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way, to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay.

In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interests must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law.

In *Hanauer v. Doane*, 12 Wall. 342, 349, 20 L. ed. 439, 441, this court said: "The whole doctrine of avoiding contracts for illegality and immorality is founded on public policy. It is certainly contrary to public policy to give the aid of the courts to a vendor who knew that his goods were purchased, or to a lender who knew that his money was borrowed, for the purpose of being employed in the commission of a criminal act, injurious to society or to any of its members."

In *McMullen v. Hoffman*, 174 U. S. 639, 654, 669, 43 L. ed. 1117, 1123, 1128, 19 Sup. Ct. Rep. 839, 845, 851, where *the au- [263] thorities are reviewed and the whole subject carefully examined, the court said: "The authorities from the earliest time to the present unanimously hold that no court will lend its assistance in any way towards carrying out the terms of an illegal contract,"—citing many English and American cases. "The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for the defendant who sets it up, but only on account of the public interest. It has been often stated in similar cases that the defense is a very dishonest one, and it lies ill in the mouth of the defendant to allege it, and it is only allowed for public considerations and in order the better to secure the public against dishonest transactions. To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it

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tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined will they be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." In that case the principle announced in *Coppell v. Hall*, 7 Wall. 542, 558, 19 L. ed. 244, 248, was reaffirmed, namely: "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded upon its violation."

In *Embrey v. Jemison*, 131 U. S. 336, 348, 33 L. ed. 172, 177, 9 Sup. Ct. Rep. 776, 780, where the defendant was sued upon promissory notes given in execution of a previous verbal contract that was illegal, this court said that plaintiff could not "be permitted to 264] withdraw attention from this *feature of the transaction by the device of obtaining notes for the amount claimed under that illegal agreement; for they are not founded on any new or independent consideration, but are only written promises to pay that which the obligor had verbally agreed to pay. They do not, in any just sense, constitute a distinct or collateral contract based upon a valid consideration. Nor do they represent anything of value in the hands of the defendant which, in good conscience, belongs to the plaintiff or to his firm. Although the burden of proof is on the obligor to show the real consideration, the execution of the notes could not obliterate the substantive fact that they grew immediately out of and are directly connected with a wagering contract. They must, therefore, be regarded as tainted with the illegality of that contract, the benefits of which the plaintiff seeks to obtain by this suit. That the defendant executed the notes with full knowledge of all the facts is of no moment. The defense he makes is not allowed for his sake, but to maintain the policy of the law. *Coppell v. Hall*, supra."

In *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 45, 46, 48 L. ed. 608, 611, 612, 24 Sup. Ct. Rep. 307, 309, which involved, in part, the question whether a particular contract made in California for the purchase of tiles related to interstate commerce, and

was illegal, the court said: "The provision as to this sale is but a part of the agreement, and it is so united with the rest as to be incapable of separation without, at the same time, altering the general purpose of the agreement. The whole agreement is to be construed as one piece, in which the manufacturers are parties as well as the San Francisco dealers, and the refusal to sell on the part of the manufacturers is connected with and a part of the scheme which includes the enhancement of the price of the unset tiles by the San Francisco dealers. The whole thing is so bound together that, when looked at as a whole, the sale of unset tiles ceases to be a mere transaction in the state of California, and becomes a part of a purpose which, when carried out, amounts to and is a contract or combination in restraint of interstate trade or commerce."

*So, in *Swift & Co. v. United States*, [265 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276, 279: "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful. *Aikens v. Wisconsin*, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3."

In *E. Bement & Sons v. National Harrow Co.* 186 U. S. 70, 87, 88, 46 L. ed. 1058, 1067, 1068, 22 Sup. Ct. Rep. 747, 754, the court, after referring to that section of the act of Congress relating to suits by the Attorney General and by persons injured in their business or property, said: "Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract may set up as a defense that it is a violation of the act of Congress, and if found to be so, that fact will constitute a good defense to the action. The first section of the act provides that 'every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court.

The act provides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue, but that does not prevent a private individual, when sued upon a contract which is void as in violation of the act, from setting it up as a defense, and we think when proved it is a valid defense 266]*to any claim made under a contract thus denounced as illegal."

Again, in the recent case of *Loewe v. Lawlor*, 208 U. S. 274, 301, 52 L. ed. 488, 502, 28 Sup. Ct. Rep. 301, 309, which involved the inquiry whether certain acts could be regarded as in restraint of interstate commerce, the court said: "So that, although some of the means whereby the interstate traffic was to be destroyed were acts within a state, and some of them were, in themselves, as a part of their obvious purpose and effect, beyond the scope of Federal authority, still, as we have seen, the acts must be considered as a whole, and the plan is open to condemnation, notwithstanding a negligible amount of intrastate business might be affected in carrying it out. If the purposes of the combination were, as alleged, to prevent any interstate transportation at all, the fact that the means operated at one end before physical transportation commenced, and at the other end after the physical transportation ended, was immaterial." See also *Gibbs v. Consolidated Gas Co.* 130 U. S. 396, 412, 32 L. ed. 979, 985, 9 Sup. Ct. Rep. 553.

The adjudged cases all hold that, upon the question whether the particular contract sought to be enforced arises out of an illegal transaction, the court will not be restricted to a partial statement of the facts, but will consider all the circumstances connected with the transaction, so as to ascertain its real nature. In *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 245, 44 L. ed. 136, 149, 20 Sup. Ct. Rep. 96, 109, the court said that "all the facts and circumstances are, however, to be considered in order to determine the fundamental question, whether the necessary effect of the combination is to restrain interstate commerce."

Upon the whole case, and without further citation of authorities, we adjudge, upon the admitted facts, that the combination represented by the plaintiff in this case was illegal under the anti-trust act of 1890; that it is to be taken as one intended, and which will have the effect, directly to restrain and monopolize trade and commerce among the several states and with foreign states; and 53 L. ed.

that the plaintiff cannot have a judgment for the amount of the account sued on, because, for *the reasons we have stated, [267 such a judgment would, in effect, aid the execution of the agreements which constituted that illegal combination. We consequently hold that the circuit court of appeals properly sustained the third defense, and rightly dismissed the suit. Its judgment must be affirmed.

It is so ordered.

Mr. Justice Holmes, dissenting:

This action is for goods admitted to have been sold and delivered by the plaintiff to the defendant, and the question arises, as has been explained, on demurrer to the third defense. The elements of that defense may be stated in a few words. Nearly all the manufacturers of wall paper in the United States formed a combination which, under the present policy of the law, was an illegal attempt to restrain and monopolize trade in and among the several states. As a part of the scheme the plaintiff corporation was created, which, by the agreement, because the purchaser of the products of the constituent companies, and was to sell the same, although the constituent companies continued to manufacture and to carry on the business of soliciting orders. The only material facts about this agreement are that under it the plaintiff got title to the goods, that it fixed prices at which goods were to be sold, and that it contemplated compelling the jobbers and others who bought to purchase at those prices, if they were to get any paper at all. The conspirators threatened, and had the power, to drive any jobber out of business who did not come in.

In pursuance of the combination and its purpose the defendant, a jobbing house, and all other jobbers, were compelled to sign a contract which, in effect, bound them to buy all the wall paper needed in their business from the plaintiff at the above-mentioned prices, and which made it an "essential condition of this agreement" that they should not sell at lower prices *or upon [268 better terms than those at which the plaintiff sold. After these two contracts were made the defendant ordered the goods in question at the prices named. It is alleged that those prices were unreasonable, and it is alleged, repeatedly and with much detail, that all the arrangements were made and all the business was done in furtherance of the plan set forth, contrary to the law of the United States and of the states concerned, and in violation of the defendant's rights, this suit being the final step in the attempt to carry out the plan.

It seems to me that the foregoing facts

show no defense. I will consider them in their successive degrees of connection with the affair, and, in the first place, will take up the terms of the actual contracts in suit. These were ordinary parol sales made by the owner of goods. The suit was not upon the general agreement between the plaintiff and defendant. That by itself sold nothing, and it may be questioned whether it purported absolutely to bind the defendant to buy a roll of paper. See *Dennis v. Slyfield*, 54 C. C. A. 520, 117 Fed. 474; *Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co.* 162 Fed. 848, 850. The actual contracts by which the plaintiff bound itself to deliver, and the sales under which it did deliver, the specific goods for which it seeks to recover the price, were made after the making of the general agreement, as it is apparent on the face of that agreement that they must have been, and as is alleged by the answer in so many words. Each was a separate transaction. There is nothing alleged concerning the terms of these parol sales that has any element of illegality about it.

Next, as to the effect of the general agreement between the plaintiff and defendant. It is alleged that after it was made the members of the combination solicited, received, and filled orders, and charged the prices fixed in the original combination agreement. It is not alleged that either agreement was referred to, even by implication. The sales are left by the answer as so many distinct transactions. But if, in order to help the defendant to escape, we are to infer that the orders were given with implied reference to the general contract, what effect could such a reference have? Plainly, only to fix the price; and for this purpose it was simply a schedule, figures on a piece of paper or in the memory of the parties, which were adopted by pointing to them in some way, as if they had been written on a blackboard. It did not matter whether the document pointed at was lawful or unlawful, as the whole business was done by the later contracts. See *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 84, 85, 52 L. ed. 111, 114, 115, 28 Sup. Ct. Rep. 26.

If the condition in the general agreement between the plaintiff and defendant made it bad, still it went only to that agreement and to the plaintiff's promise to sell at certain prices, not to any subsequent sales, or to the defendant's title to goods got under subsequent sales. If it had been incorporated in any way into the specific sales, it would be necessary to consider the case of *Cincinnati, P. B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 185, 50 L. ed. 428, 433, 26 Sup. Ct. Rep. 208. But no such

incorporation is alleged, or, in any probability, could have been alleged. So I think that I may assume that the parol sales were made no worse, on their face, by any reference to the content of the general agreement. And I may add that the unlawfulness of the general agreement would not make the sales bad from the outside, so to speak, if that was all that there was against them. A lawful purchase is not made unlawful merely by being the fulfilment of an unlawful contract.

It has been suggested that the plaintiff was not the real seller, and only got its standing from the general agreement with the defendant, and that therefore it had to rely upon an illegal contract to make out its case. But the defense does not deny that the plaintiff became the owner of the goods, or that the manufacturers sold in its name, as the original combination provided. It is true that it says that the arrangements were made with a view of disguising the real transaction and purpose, and that really the business was to be done by the manufacturers, as I have stated. But it adds that payments were to be made to the plaintiff, and it nowhere suggests that the first contract set forth did not operate, or that the plaintiff did not get the title it professed to transfer. Its illegality would not prevent the title passing. If the defendant meant to deny that it bought from the plaintiff goods which the plaintiff owned, it was very easy to deny it and to leave the plaintiff to set up the agreement if it did not join issue, as it naturally would. As the defense stands, I think it means, as I have no doubt is the fact, that the technical legal title to the goods was in the plaintiff, and that the defendant purported to contract with it, the manufacturers selling in its name.

I now pass to the mere remote considerations that are supposed to have a greater effect. It is said that the specific sales, the general agreement, and the original combination, all are steps in one illegal plan, and that the plan gives character to the whole. But we must be more precise. The plaintiff alone was party to the plan. The defendant represents itself as a victim, and says that the plan was against its rights. On what ground, then, does the illegal purpose of the plaintiff warrant the defendant in professing to buy its goods and then refusing to pay for them?

The plaintiff's unlawful purpose did not make it unlawful to buy the plaintiff's goods. It is decided, if decision is necessary, that a purchaser cannot escape merely on the ground that the seller is an unlawful trust. *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431; *Chattanooga Foundry & Pipe*

Works v. Atlanta, 203 U. S. 390, 397, 51 L. ed. 241, 244, 27 Sup. Ct. Rep. 65. I repeat that it is not alleged that the defendant in any way shared the plaintiff's intent, but to go further than I need, I will assume that it may be taken to have made the general contract with knowledge of that intent. But it cannot be contended that, therefore, it was party to a transaction illegal for that reason. Whenever a party knows that he is buying from an illegal trust, and still more, when he buys at a price that he thinks unreasonable, but is compelled to pay in order to get the goods he needs, he knows that he is doing an act in furtherance of the unlawful purpose of the trust, which always is to get the most it can for its wares. But that knowledge makes no difference, because the policy of not **271**] furthering the purposes of the trust is less important than the policy of preventing people from getting other people's property for nothing when they purport to be buying it. And if knowledge of the purchaser that he is furthering the purpose of the trust makes no difference, it makes no difference whether he is glad or sorry for the result. A man does not make conduct otherwise lawful unlawful simply by yearning that it should be so. In this case, however, the defendant was an unwilling accessory, exactly as Dee was in the Connolly Case.

The effect of the defendant's knowledge of the plaintiff's scheme is no greater because it signed the illegal general contract. I think that I have shown that the illegality of that contract, taken by itself, did not make the specific sale illegal, and from the point of view that all that was done was a carrying out of the plaintiff's illegal scheme, it does not matter to the legality of the sales whether a particular previous step was legal or not. If knowledge that the plaintiff was attempting to monopolize, and that it sold at prices fixed in aid of the intent, would not exonerate the defendant when it yielded to its necessities and bought, the same knowledge would have no greater effect if the same necessities led it to agree beforehand to do what it did.

Perhaps, in order to answer every aspect that this rambling defense presents, I ought to say in conclusion that the allegations that the price was unreasonable, and that the plaintiff threatened and had power to drive jobbers out of business that did not come into its arrangement, are not stated in such form as to make a case of duress. I think that that would have been the strongest ground on which the defense could have been put. Courts and legislation sometimes have recognized that the so-called freedom to contract or not may be made illusory by

the economic situation of one of the parties. *Schlemmer v. Buffalo, R. & P. R. Co.* 205 U. S. 1, 12, 51 L. ed. 681, 686, 27 Sup. Ct. Rep. 407. It would be extending the recognition further than it yet has been extended, so far as I am aware, to apply it to a case like this. But I express no opinion upon its possible application, *because, as I have **272** said the allegations are not directed to that end, and do not sufficiently show that the specific purchases were induced by fear. Moreover, as such duress, like fraud, goes only to motive (*The Eliza Lines*, 199 U. S. 119, 131, 50 L. ed. 115, 120, 26 Sup. Ct. Rep. 8), if the frightened or defrauded party would rescind, he must restore the consideration, or at least be ready to pay the reasonable price, of neither of which is there any hint.

I think that this decision must mean that *Connolly v. Union Sewer Pipe Co.* supra, ought to have been decided the other way. There, as here, there was, or was assumed to be, an illegal trust. In furtherance of the purposes of the trust a general agreement was made between the trust and the defendants, the purchasers, which required defendants to buy from the plaintiff alone at prices alleged to be unreasonable, they receiving a rebate upon that consideration, and which fixed a price at which the defendants would sell. There was just as much of a scheme and just the same scheme in that case as in this. In both the defendants co-operated as victims to the monopoly in precisely the same way. The facts spoke for themselves, and were the same. Nothing is added to the case by calling the arrangements set forth a scheme, but similar language was used in the former case, as appears from the record. The contract will be found in the same record. It was assigned as error and argued that the circuit court ruled that the said contract, again set forth, was not void. For these reasons I feel compelled to dissent from the judgment of the court. I am authorized to say that Mr. Justice Brewer, Mr. Justice White, and Mr. Justice Peckham concur in this dissent.

Mr. Justice Brewer, dissenting:

Concurring in the views expressed by Mr. Justice Holmes, it seems to me another matter is worthy of consideration.

The transactions between the plaintiff and defendant were, as held by the court, in violation of the anti-trust act (26 *Stat. at L. 209, chap. 647, U. S. Comp. **273** Stat. 1901, p. 3200). That act defines the rights and liabilities of the parties. The first three sections prohibit contracts and combinations in restraint of trade and monopolies, declare a person violating the provisions of

these sections guilty of a misdemeanor, and prescribe the punishment. Section 4 gives power to the circuit courts of the United States to prevent and restrain violations of the act. Section 6 provides for a forfeiture of property owned under any contract or combination or pursuant to any conspiracy, and seized while in course of transportation. Section 7 declares that any person injured in his business or property by reason of anything forbidden or declared to be unlawful in the act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold damages by him sustained.

The present case comes within the proposition that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes." *Farmer's & M. Nat. Bank v. Dearing*, 91 U. S. 29, 35, 23 L. ed. 196, 199; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555, 25 L. ed. 212. These two cases arose under the national banking act (13 Stat. at L. 99, chap. 106), and illustrate the doctrine referred to. That act prescribed the rate of interest which might be taken by national banks, and added that knowing and receiving a greater rate of interest should forfeit the entire interest; or, if the interest had been paid, that the person paying might recover in an action of debt twice the amount of interest thus paid. These cases held that relief for a violation of the statute was a forfeiture of the interest due and not paid, or, in case the interest had been paid, an action of debt to recover double the amount paid. See also *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580.

In *Stephens v. Monongahela Nat. Bank*, 111 U. S. 197, 28 L. ed. 399, 4 Sup. Ct. Rep. 336, it was decided that the remedy prescribed by the statute was exclusive. In *Driesbach v. Second Nat. Bank*, 104 U. S. 52, 26 L. ed. 658, it was held that usurious interest paid a national bank on renewing a series of notes could not, in an action by the bank on the last of them, be applied in satisfaction of the principal of the debt.

Now, the remedies given in the anti-trust act are three in number: First, a criminal prosecution; second, a forfeiture of property; and, third, an action by any person injured to recover threefold the damages by him sustained. These, being the remedies prescribed, are exclusive. The defendant sought neither of these remedies. It was not so anxious for the public welfare as to make complaint and secure criminal proceedings. There was no property to be for-

feited. It did not seek to recover threefold the damage it had sustained, but only to avoid paying for the property it had purchased. The reason therefor is suggested in the opinion of the circuit court of appeals (78 C. C. A. 578, 148 Fed. 950):

"The averment that they paid 50 per cent more for their gross purchases in consequence of the illegal combination has little merit in it, moral, or otherwise. They doubtless sold again at the great minimum profit they agreed to exact from retailers, and the retailers later exacted the undue profit from the consuming public."

Something of the same idea of the exclusiveness of a statutory remedy finds expression in *Texas & P. R. Co. v. Abilene Cotton Oil Co* 204 U. S. 426, 51 L. ed. 553, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, in which it was held that a shipper could not maintain an action at common law for excessive and unreasonable freight charges exacted on interstate shipments, where the rates charged were those which had been duly fixed by the carrier according to the interstate commerce act, and had not been found to be unreasonable by the Interstate Commerce Commission, and this notwithstanding the provision in § 22 of the act to regulate interstate commerce: "Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." [24 Stat. at L. 387, chap. 104, U. S. Comp. Stat. 1901, p. 3171.]

*UNITED STATES, Appt., [275

v.

EDWIN E. MARVIN.

(See S. C. Reporter's ed. 275-277.)

Clerks — per diem compensation.

A clerk of a Federal district and circuit court is entitled to his statutory *per diem* compensation for days on which he refers to the referee in bankruptcy voluntary petitions in bankruptcy filed during the absence of the judge from the district, though without written orders to open the court for that or any other purpose.

[For other cases, see Clerks, 18-22, in Digest Sup. Ct. 1908.]

[No. 436.]

Submitted January 7, 1909. Decided February 1, 1909.

APPEAL from the Court of Claims to review a judgment awarding to a clerk of the District and Circuit Courts of the United States for the District of Connecticut

his statutory *per diem* compensation for days on which he referred to the referee in bankruptcy voluntary petitions in bankruptcy filed during the absence of the judge from the district. Affirmed.

See same case below, 43 Ct. Cl. 597.

The facts are stated in the opinion.

Assistant Attorney General John Q. Thompson and Mr. Philip M. Ashford submitted the cause for appellant.

Mr. Charles C. Lancaster submitted the cause for appellee.

Per Curiam:

This suit was brought to recover the sum of \$535, "for services rendered on behalf of the United States from June, 1900, to April 1, 1906, to wit: For attendance on court while actually in session during the terms, with the judge presiding and judicial business actually transacted in court, as provided by §§ 574, 638, and 828, Revised Statutes (U. S. Comp. Stat. 1901, pp. 475, 519, 635), and chapter 2, § 2, bankruptcy act (30 Stat. at L. 545, chap. 541, U. S. Comp. Stat. 1901, p. 3420), 107 days at \$5.00 per day."

The court of claims filed its findings of fact and conclusion of law April 20, 1908, as follows:

Findings of fact.

1. During the times hereinafter mentioned, the claimant, *Edwin E. Marvin, was clerk of the district and circuit courts of the United States for the District of Connecticut.

2. For services on behalf of the United States during the period from July 1, 1900, to April 1, 1906, the claimant made up his supplemental accounts, duly verified, and presented the same to the United States court for approval in the presence of the district attorney, and orders approving the same as being just and according to law were entered of record. Said accounts were then presented to the Attorney General and the accounting officers of the Treasury Department for payment, and the payment of the items embraced in finding 3 was refused.

3. Said items, the payment of which was so refused, were alleged to be for attendance on court while actually in session during the terms, or when business was transacted in court upon order of the judge, and were for 107 days at \$5.00 per day, making \$535.

The business so transacted was the reference by the clerk to the referee of volun-

tary petitions in bankruptcy filed during the absence of the judge from the district. No written orders were received by the clerk to open the court for the purpose of making said references, or for any other purpose; the judge was not personally present, and no writs, orders, or decrees were received from the judge, sitting in chambers. The journal made by the claimant does not show that the court was open on any of the days for which *per diems* are claimed. The claimant, after learning of the decision of the court of claims in *Owen v. United States* (41 Ct. Cl. 69), went back in his district court journal, and, on the last day of every month over which his account extended, interlined the days in such month upon which he had made references, merely stating them as days in which court business in bankruptcy proceedings was transacted.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that, under *Owen v. United States*, *supra*, *and *United States v. Finnell*, 185 [277 U. S. 236, 46 L. ed. 890, 22 Sup. Ct. Rep. 633, the claimant is entitled to a judgment for five hundred and thirty-five dollars (\$535).

And entered judgment without an opinion. 42 Ct. Cl. 542.

The case was brought here by appeal and submitted on printed arguments.

Counsel for appellee referred to a certified copy of the order of court approving the account referred to in finding 2, stating that it was attached to the account of claimant now on file in the court of claims. That order contains, among other things: "It is hereby certified that, upon each day for which a *per diem* is charged in this account, the court was opened for business, and court business transacted in bankruptcy matters as stated."

The government objects on the ground that the order is not set forth in the findings, and, moreover, that the paragraph is of no effect, "because in the nature of a statement of a conclusion of law."

The various applicable statutory provisions will be found in *United States v. Finnell*, *supra*, and in *Owen v. United States*, *supra*.

We concur with the court of claims that the two cases cited govern the disposition of this case, and accordingly affirm the judgment.

278]*MARCELLUS THOMAS, Plff. in Err.,
v.
STATE OF TEXAS.

(See S. C. Reporter's ed. 278-283.)

Error to state court — review of facts — discrimination against negroes as grand jurors.

Whether or not discrimination against negroes because of their race or color was practised by the jury commissioners in the selection of grand and petit jurors is a question of fact, the decision of which by the state court is conclusive on the Federal Supreme Court, on writ of error, unless so grossly wrong as to amount to an infraction of the Federal Constitution.

[For other cases, see *Appeal and Error*, 2175-2208, in *Digest Sup. Ct.* 1908.]

[No. 6.]

Submitted November 3, 1908. Decided February 23, 1909.

IN ERROR to the Court of Criminal Appeals for the State of Texas to review a judgment which affirmed a conviction of murder in the District Court of Harris County, in that state. Affirmed.

See same case below, 49 Tex. Crim. Rep. 633, 95 S. W. 1069.

Statement by Mr. Chief Justice Fuller:

Thomas was convicted of the murder of John Blair, and his punishment fixed at death. Before arraignment and trial he filed his separate motions to quash the indictment and special venire drawn in this cause, which motions were sworn to, and alleged that "because of the race prejudice and ill feeling against the negroes in Harris county, and against this defendant in particular, on account of his color and race, and because of the sentiment against placing negroes, or persons of color, or of African descent, upon the grand juries and petit juries in said county . . . the grand jury finding and returning the bill of indictment against him herein was composed almost exclusively of white persons, there being not to exceed one negro, or person of African descent, and of the same race and color of this defendant upon said grand jury." It was also alleged that "because of the race prejudice and ill feeling 279]existing against *the negroes or persons of African descent in Harris county, and against this defendant in particular, on account of his color and race, there were no negroes or persons of African descent upon the venire list of persons drawn to serve

as jurors in this cause, and that the list of jurors drawn was composed exclusively of white persons, all negroes or persons of African descent having been intentionally excluded and left off of the special venire or list of jurors drawn in this cause by the jury commission, because of their race and color." It was further alleged that one fourth of the qualified jurors of Harris county were negroes or persons of African descent. By agreement and consent of the court evidence was heard upon the two motions at the same time, and considered by the court upon each, the same as if said motions had been heard separately.

Upon considering the evidence on the hearing of said motions, the same were each overruled by the court.

The case was taken on writ of error to the court of criminal appeals, the highest court of Texas for criminal cases, and the conviction affirmed. The action of the trial court in overruling the motions to quash was reviewed by the court of criminal appeals and the rulings sustained. 49 Tex. Crim. Rep. 633, 95 S. W. 1069. It was then brought here on writ of error.

Mr. Noah Allen submitted the cause for plaintiff in error:

Whenever, by any action of a state, whether through its legislature, courts, executive or administrative officers, all persons of the African race are excluded, solely because of race and color, from serving as grand or petit jurors in the criminal prosecution of a person of that race, the equal protection of the laws is denied to him, contrary to the 14th Amendment.

Strauder v. West Virginia, 100 U. S. 303, 25 L. ed. 664; *Virginia v. Rives* (Ex parte Virginia) 100 U. S. 313, 25 L. ed. 667; Ex parte Virginia, 100 U. S. 344, 25 L. ed. 678; *Neal v. Delaware*, 103 U. S. 370, 26 L. ed. 567; *Gibson v. Mississippi*, 162 U. S. 565, 40 L. ed. 1075, 16 Sup. Ct. Rep. 904; *Carter v. Texas*, 177 U. S. 442, 44 L. ed. 839, 20 Sup. Ct. Rep. 687; *Martin v. Texas*, 200 U. S. 316, 50 L. ed. 497, 26 Sup. Ct. Rep. 338.

A mixed jury, some of which shall be of the same race with the accused, cannot be demanded as of right in any case, nor is a jury of that character guaranteed by the 14th Amendment.

Virginia v. Rives; *Neal v. Delaware*; and *Martin v. Texas*,—*supra*.

The accused is entitled to demand, under the Constitution of the United States, that, in organizing the grand jury, as well as in impaneling the petit jury, there shall be no exclusion of his race, and no discrimination against them because of their race or color.

Virginia v. Rives, *supra*; *Re Wood*

NOTE.—On review of questions of fact on writ of error to a state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.

(Wood v. Brush) 140 U. S. 278-285, 35 L. ed. 505-508, 11 Sup. Ct. Rep. 738; Martin v. Texas, supra.

Mr. Frederick S. Tyler also submitted the cause for plaintiff in error. Mr. Noah Allen was on the brief:

The accused was denied the equal protection of the laws.

Farrow v. State, 91 Miss. 509, 45 So. 619; Montgomery v. State, 55 Fla. 97, 45 So. 879.

Messrs. Robert Vance Davidson and James DuBose Walthall submitted the cause for defendant in error:

Whether or not citizens of the race to which plaintiff in error belongs were, because of their race, excluded from the grand jury that found the indictment against him, and the special venire from which the jurors were drawn that tried him, is a pure question of fact; and this court will not revise the decision of the highest court of the state thereon.

Western U. Teleg. Co. v. Call Pub. Co. 181 U. S. 103, 45 L. ed. 771, 21 Sup. Ct. Rep. 561; Israel v. Arthur, 152 U. S. 355, 38 L. ed. 474, 14 Sup. Ct. Rep. 583; Dower v. Richards, 151 U. S. 663, 38 L. ed. 307, 14 Sup. Ct. Rep. 452; Turner v. New York, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 38; Thayer v. Spratt, 189 U. S. 353, 47 L. ed. 849, 23 Sup. Ct. Rep. 576; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Gleason v. White, 199 U. S. 54, 50 L. ed. 87, 25 Sup. Ct. Rep. 782; Bartlett v. Lockwood, 160 U. S. 357, 40 L. ed. 455, 16 Sup. Ct. Rep. 334; New Orleans Waterworks Co. v. Louisiana, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691.

The trial court having permitted plaintiff in error to introduce evidence and offer proof in support of his motion to quash the indictment and special venire drawn in his case, and having considered said evidence, and overruled the motion upon the ground that no discrimination against him was shown, and the court of criminal appeals, the highest court in Texas in criminal cases, after a full review of the testimony, having decided that the trial court acted properly in overruling said motion, such ruling will not be disturbed by the Supreme Court of the United States upon writ of error.

Barrington v. Missouri, 205 U. S. 484, 51 L. ed. 893, 27 Sup. Ct. Rep. 582; Allen v. State, 44 Tex. Crim. Rep. 205, 70 S. W. 85; Monroe v. State, 23 Tex. 210, 76 Am. Dec. 58; Nash v. State, 2 Tex. App. 362; Hawkins v. State, 27 Tex. App. 273, 11 S. W. 409; Shaw v. State, 32 Tex. Crim. Rep. 155, 22 S. W. 588.
53 L. ed.

Mr. Chief Justice Fuller delivered the opinion of the court:

It is not contended that the laws of Texas, under which grand and petit juries are selected, are in themselves discriminating and in violation of the Constitution of the United States. It is admitted by plaintiff in error that neither the Constitution nor statutes of Texas prescribed any rule for, or mode of procedure *in, the trial of[281 criminal cases which is not equally applicable to all citizens of the United States and to all persons within the jurisdiction of the state without regard to race, color, or previous condition of servitude. Nor is it contended that the Constitution and laws of the state had, at the time this prosecution was instituted, been so interpreted by the courts of Texas as to prevent the enforcement of rights secured equally to all citizens of the United States without regard to race or color. The only contention was that the jury commissioners, in the selection of the grand and petit juries who returned the indictment and tried plaintiff in error, did in fact exclude therefrom negroes or persons of African descent, because of their race and color. This was a question of fact; and the ordinary rule is that questions of fact will not be reviewed by this court on writs of error to state courts.

In the case of Re Kemmler, 136 U. S. 436, 449, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930, 934, it was intimated that if the highest court of a state "had committed an error so gross as to amount in law to a denial by the state of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States," this court might take jurisdiction; but the occurrence of such an instance was not suggested as probable.

In Barrington v. Missouri, 205 U. S. 484, 51 L. ed. 893, 27 Sup. Ct. Rep. 583, the plaintiff in error, before the trial of the cause commenced, applied for a change of venue on the ground of local prejudice. Upon the hearing of the application many witnesses were examined and testified, and the trial court decided that prejudice justifying a change of venue had not been made out, and denied the application. In dismissing the writ of error in the above case we said:

"It is now contended that the refusal to grant the change of venue deprived plaintiff in error of a fair and impartial trial, to which, under the Federal Constitution, he was entitled. The state supreme court held it to be a well-settled rule of law in Missouri that the granting of a change of venue in a criminal case rested largely in the discretion of the trial court, and that *where[282 the trial court has heard the evidence in

favor of and against the application, and a conclusion reached adversely to granting the change, such ruling will not be disturbed by this court, and should not be unless there are circumstances of such a nature as indicate an abuse of the discretion lodged in such court.' And the supreme court, after a full review of all the testimony, decided that the trial court had acted properly in overruling the application for a change of venue. In our judgment no Federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court had abused its discretion under the laws of the state of Missouri, although the supreme court of that state had held to the contrary."

It was ruled in *Martin v. Texas*, 200 U. S. 316, 50 L. ed. 497, 26 Sup. Ct. Rep. 338, as in other cases, that discrimination in organizing a grand jury and empaneling a petit jury cannot be established by merely proving that no one of the defendant's race was on either of the juries, and that an accused person cannot of right demand a mixed jury, some of which shall be of his race, nor is a jury of that kind guaranteed by the 14th Amendment to any race. And it was said: "What an accused is entitled to demand, under the Constitution of the United States, is that, in organizing the grand jury, as well as in the empaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color."

As before remarked, whether such discrimination was practised in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a negro juror on the grand jury which indicted plaintiff in error, and there were negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box. The court said:

"It may be that the jury commissioners did not give the negro race a full *pro rata* with the white race in the selection of the grand and petit jurors in this case; still this would not be evidence of discrimination.

If they fairly and honestly endeavored to discharge their duty, and did not in fact discriminate against the negro race in the selection of the jury lists, then the Constitution of the United States has not been violated. We understand the rule to be that mere error in administering the criminal law of the state, or in the conduct of a criminal trial, no Federal right being invaded or denied, is beyond the revisory power of the Supreme Court of the United States under the Constitution and the statutes regulating its jurisdiction."

No other point requiring consideration, the result is, judgment affirmed.

ALBERT L. JOHNSON, Plff. in Err.,

v.

WILLIAM MUESER.

(See S. C. Reporter's ed. 283, 284.)

Appeal and error — final judgment — patent cases.

A judgment of the court of appeals of the District of Columbia, affirming the decision of the Commissioner of Patents in an interference proceeding, and directing that its own decision be certified to the Commissioner, as required by law, is not final for the purpose of a writ of error from the Federal Supreme Court.

[For other cases, see *Appeal and Error*, I. d. in *Digest Sup. Ct. 1908*.]

[No. 67.]

Argued January 12, 1909. Decided February 23, 1909.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment affirming the decision of the Commissioner of Patents in an interference proceeding. Dismissed for want of jurisdiction.

See same case below, 29 App. D. C. 61.

The facts are stated in the opinion.

Mr. Melville Church argued the cause, and, with Mr. James A. Carr, filed a brief for plaintiff in error.

Mr. Stephen J. Cox argued the cause, and, with Mr. William Raimond Baird, filed a brief for defendant in error.

NOTE. — As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Madden*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; *Gibbons v. Ogden*, 5 L. ed. U. S. 302; and *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001.

212 U. S.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was a proceeding of interference in which the examiner of interferences awarded priority to Mueser. This decision was in turn affirmed by the examiners-in-chief and by the Commissioner. From the decision of the Commissioner an appeal was taken to the court of appeals of the District of Columbia, and that court affirmed the decision of the Commissioner of Patents, and directed that its own decision be certified to the Commissioner of Patents, as required by law. The court held that, in such a proceeding, it would not review the action of the Patent Office in deciding that the issue was a patentable one, but would confine its consideration to the question of priority alone. 29 App. D. C. 61. And in the course of its opinion the court said:

"It must be borne in mind that the final judgment of this court, entitling a claimant to a patent, in either an *ex parte* or an interference proceeding, is not conclusive of either patentability or priority. The patent, when issued, may be attacked in the courts by parties whose interests may be affected by the monopoly claimed thereunder; and the defeated party has another remedy by proceeding in a court of equity, as provided in § 4915, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3392)."

We think our ruling in *Frasch v. Moore*, 211 U. S. 1, ante, 65, 29 Sup. Ct. Rep. 6, is applicable, and that this writ of error must be disposed of accordingly. The application for certiorari must take the same course.

Writ of error dismissed.

Certiorari denied.

285]*E. C. ATKINS & COMPANY, Appt.
and Plff. in Err.,

v.

E. B. MOORE, Commissioner of Patents.

(See S. C. Reporter's ed. 285-291.)

Appeal and error — final judgment — trademark cases.

A decision of the court of appeals of the District of Columbia on an appeal from a decision of the Commissioner of Patents in proceedings arising under an application made pursuant to the act of February 20, 1905 (33 Stat. at L. 724, chap. 592, U. S.

NOTE. — As to what judgments or decrees are final for purposes of review—see notes to *Brush Electric Co. v. Electric Improv. Co.* 2 C. C. A. 379; *Central Trust Co. v. Mad-den*, 17 C. C. A. 238; *Prescott & A. C. R. Co. v. Atchison, T. & S. F. R. Co.* 28 C. C. A. 482; *Gibbons v. Ogden*, 5 L. ed. U. S. 302; and *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001.

53 L. ed.

Comp. Stat. Supp. 1907, p. 1008), § 1, for the registration of a trademark, which affirms the latter's decision, and directs the clerk to certify its opinion to the Commissioner, according to law, is not final for the purpose of an appeal to, or writ of error from, the Federal Supreme Court, since the proceedings under that act are governed by the same rules of practice and procedure as in patent cases.

[For other cases, see Appeal and Error, I. d, in Digest Sup. Ct. 1908.]

[No. 86.]

Argued January 22, 1909. Decided February 23, 1909.

APPEAL from, and IN ERROR to, the Court of Appeals of the District of Columbia to review a decision which affirmed the decision of the Commissioner of Patents in proceedings arising under an application for a trademark, and directed the clerk to certify its opinion to the Commissioner according to law. Dismissed for want of jurisdiction.

See same case below, 29 App. D. C. 385.

Statement by Mr. Chief Justice Fuller: Plaintiffs filed their application for a trademark on June 12, 1905, in which it was recited that—

"The trademark consists of a symbol composed of the letters 'AAA' . . . The trademark is usually displayed on the goods by etching, stamping, or otherwise marking the same upon the blade of the saw, and by inscribing same upon the packages containing such saws."

This was amended August 30, 1905, by adding the sentence—

"The trademark is shown with the letters arranged in the form of a monogram."

*The examiner suggested that the description of the trademark should be amended so as to read—

"The trademark consists of a monogram composed of the letters 'AAA.'"

Plaintiffs declined to comply with the suggestion, and appealed from the ruling of the examiner that such amendment should be made to the Commissioner of Patents, who, on February 20, 1906, overruled the decision of the examiner, and held that the description was sufficient.

April 27, 1906, plaintiffs were notified that their—

"Application for the registration of a trademark for a symbol composed of the letters 'AAA,' for saws of all kinds, filed June 12, 1905, Ser. No. 7998, has been examined and passed for publication, in compliance with § 6 of the act authorizing the registration of trademarks, approved February 20, 1905. The mark will be published in the Official Gazette of May 15, 1906."

The act of February 20, 1905 (33 Stat. at L. 724, chap. 592, § 1, U. S. Comp. Stat. Supp. 1907, p. 1008), provided that the applicant should file an application in writing, which should contain, among other things:

"A description of the trademark itself and a statement of the mode in which the same is applied and affixed to goods, and the length of time during which the trademark has been used. With this statement shall be filed a drawing of the trademark, signed by the applicant or his attorney, and such number of specimens of the trademark, as actually used, as may be required by the Commissioner of Patents."

This act was amended by the act of May 4, 1906 (34 Stat. at L. 168, chap. 2081, § 1, U. S. Comp. Stat. Supp. 1907, p. 1008), by inserting after the words "description of the trademark itself," the words "only when needed to express colors not shown in the drawing."

On June 21, 1906, the Patent Office sent plaintiffs the following communication:

"Attention is directed to the act approved May 4, 1906, providing for a description of the trademark itself only when needed to express colors not shown in the drawing. 287] *Inasmuch as the trademark covered by this application cannot be registered until after July 1, 1906, when said act takes effect, applicant should direct the cancellation of the present description and of all of the preamble to the statement following the words 'have adopted for my use,' and the substitution therefor of the following words: '*the trademark shown in the accompanying drawing.*'"

"If colors form a material part of the mark, a brief reference thereto should follow.

"An amendment as above indicated should be promptly filed to avoid delay in the use of the certificate."

Plaintiffs refused to comply with this suggestion, and, on July 16, 1906, the examiner declined to pass the application for registration.

A petition was thereupon presented by plaintiffs to the Commissioner, seeking the overruling of the action of the examiner, and, on November 22, 1906, the petition was denied.

An appeal was prosecuted to the court of appeals, which affirmed the decision of the Commissioner of Patents, and directed the clerk to "certify this opinion to the Commissioner of Patents, according to law."

An appeal and a writ of error were allowed.

Mr. Chester Bradford argued the cause, and, with Messrs. Arthur M. Hood and E.

W. Bradford, filed a brief for appellant and plaintiff in error.

Assistant Attorney General Fowler argued the cause and filed a brief for appellee and defendant in error.

Mr. Chief Justice Fuller delivered the opinion of the court:

In *Frasch v. Moore*, 211 U. S. 1, ante, 65, 29 Sup. Ct. Rep. 6, it was held that decisions in the court of appeals of the District of Columbia in appeals from the Commissioner of Patents under § 9 of the act of February 9, 1893 (chap. 74, 27 Stat. at L. 434, 436, U. S. Comp. Stat. 1901, p. 3391), were interlocutory, and not final, and not reviewable by this court under § 8 of that act, because not final judgments or decrees within the meaning of that section. When certified to the Commissioner of Patents, they "govern the further proceedings in the case" (Revised Statutes, § 4914, U. S. Comp. Stat. 1901, p. 3392), but are not final judgments or decrees at law or in equity within the purview of § 8.

In *Gaines v. Knecht* we applied the same rule to a writ of error to the decision of the court of appeals, rendered on appeal to that court from a decision of the Commissioner of Patents in proceedings arising under an application for a trademark, contenting ourselves with this memorandum, announced December 14, 1908 [212 U. S. 561, post, —, 29 Sup. Ct. Rep. 688]:

"Writ of error dismissed for want of jurisdiction. *Frasch v. Moore*, supra; see act of February 20, 1905, for the registration of trademarks, 33 Stat. at L. 724, chap. 592, §§ 9, 16-18 *et passim*, U. S. Comp. Stat. Supp. 1907, p. 1008."

Section 9, there referred to, provides:

"That if an applicant for registration of a trademark . . . is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the court of appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable."

**Gaines v. Knecht* was a case of opposition to the registration of a trademark under §§ 6 and 7 of the act of February 20, 1905, the objections being that the act was unconstitutional, and also that the applicant's mark was so similar to the mark of opponent that it would be likely to lead to confusion, and enable applicant to perpetrate a fraud on the public. The examiner of interferences dismissed the opposition, and from

his decision the case was appealed to the Commissioner, who affirmed the decision. An appeal was then taken to the court of appeals, and that court affirmed the Commissioner, and "ordered that this decision and the proceedings in this court be certified to the Commissioner of Patents, as required by law." The court said, among other things, that the appeal was "an appeal from the decision of an officer of the executive department, performing a ministerial act. He has treated the statute as valid, and so he ought to have treated it until it is otherwise determined by the courts. . . . It may be true that the Commissioner acts in a judicial capacity in determining whether the applicant is the owner of the trademark, and whether it is one of those marks the registration of which is prohibited; but, when he has determined these in favor of the applicant, the act to be performed by him is ministerial merely, and that is the act which it is claimed he should have refused to perform, on the ground that the statute is unconstitutional. Such judicial proceedings as there are issue and culminate in a purely ministerial act—the mere registration of a mark—which, if the statute is void, cannot possibly prejudice the right of the opponent or of anyone else. It is not as if the culminating act interfered with the person or property of others. We sit to review the action of the officer from the same standpoint which he was bound to take. Although the case is now before a court, the case itself is not changed, nor are the rules changed by which it should be decided. It is for this court to say merely whether his decision was right or wrong. We think he did not err in treating the act as valid. When some case shall arise in which rights of person or property 291] must be affected by the decision, *it will become necessary to consider the question now attempted to be raised; but to pass upon it now would be to decide a question of theory alone, and this is not the province of a court." 27 App. D. C. 530.

In the light of the various details of the act of February 20, 1905, and of the specific provisions of § 9, we were of opinion that proceedings under the act were governed by the same rules of practice and procedure as in the instance of patents, and the writ of error was accordingly dismissed. The same result must follow in the present case.

Under § 4914 of the Revised Statutes no opinion or decision of the court of appeals on appeal from the Commissioner precludes "any person interested from the right to contest the validity of such patent in any court wherein the same may be called in question;" and by § 4915 a remedy by bill in equity is given where a patent is re-

fused; and we regard these provisions as applicable in trademark cases under § 9 of the act of February 20, 1905.

Appeal and writ of error dismissed.

LAUREL OIL & GAS COMPANY, Appt.,
v.

ROBERT W. MORRISON, Charles W. S. Cobb, John E. McKinney, et al.

(See S. C. Reporter's ed. 291-296.)

Appeal — to circuit court of appeals — from courts of Indian territory.

1. Full appellate jurisdiction over the final decisions of the court of appeals in the Indian territory was conferred upon the circuit court of appeals for the eighth circuit by the provisions of the act of March 1, 1895 (28 Stat. at L. 693, chap. 145), § 11, that "writs of error and appeals from the final decision of said appellate court shall be allowed and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts," and such jurisdiction is not in any way measured or limited by the jurisdiction on appeal from or error to the district or circuit courts.

[For other cases, see Appeal and Error, III. c, in Digest Sup. Ct. 1908.]

Appeal — from circuit court of appeals — case arising in courts of Indian territory.

2. The absence of any specific reference to the Federal Supreme Court in the provisions of the act of March 1, 1895, § 11, and the act of March 3, 1905 (33 Stat. at L. 1081, chap. 1479, U. S. Comp. Stat. Supp. 1907, p. 208), § 12, for an appellate review in the circuit court of appeals for the eighth circuit of the final decisions of the court of appeals in the Indian territory in the same manner as decisions of the circuit courts, precludes any further review in the Supreme Court by appeal from or writ of error to the circuit court of appeals.

[For other cases, see Appeal and Error, 760-809, in Digest Sup. Ct. 1908.]

[No. 198.]

Argued October 14, 1908. Decided February 23, 1909.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a decree which reversed a decree of the Court of Appeals in the Indian Territory and the United States Court for the Western District of such Terri-

NOTE.—On the jurisdiction of the circuit court of appeals—see notes to *Lau Ow Bew v. United States*, 1 C. C. A. 6; *Salmon v. Mills*, 13 C. C. A. 374; and *United States Freehold Land & Immigration Co. v. Gallejos*, 32 C. C. A. 475.

tory, setting aside an executed judicial sale, and remanded the cause with directions to confirm such sale. Dismissed for want of jurisdiction.

See same case below, 83 C. C. A. 391, 154 Fed. 617.

Statement by Mr. Chief Justice Fuller:

This case on the merits is reported in 83 C. C. A. 391, 154 Fed. 617. The able opinion of Sanborn, J., speaking for the circuit court of appeals, is preceded by the following statement, which correctly sets forth the facts:

"Pursuant to an order of the United States court in the western district of Indian territory, which has the jurisdiction of a probate court, a lease of 160 acres of mineral land which had been allotted to Edith Durant, a minor Indian, was advertised for sale on sealed bids by Monday Durant, her guardian, and, on the day of sale, March 5, 1906, the highest bonus bid for it was \$3,490, and this bid was made by Robert W. Morrison, Charles W. S. Cobb, John E. McKinney, William J. Breene, and Frank M. Breene, who are now the appellants in this case, and will hereafter be so styled. The Laurel Oil & Gas Company, a corporation, one of the appellees, bid at the same time at this sale \$2,850 for this lease. On March 7, 1906, the appellants deposited the \$3,490 with the court, and on March 9, 1906, the guardian executed the lease of the land to the appellants, and they applied to the court for the confirmation of the sale and the approval of the lease. After notice to all parties in interest and a hearing, the court, on June 11, 1906, 'ordered, adjudged, and decreed that the lease executed by Monday Durant, guardian of Edith Durant, minor, on the 9th day of March, 1906 [to the appellants] be, and the same is hereby, in all things approved, ratified, and confirmed. On the next day the Laurel Company, the unsuccessful bidder at the former sale, made a motion for leave to bid again for the lease of this land, and offered to bid a bonus of \$8,000. Thereupon the court set aside the order of June 11, 1906, for the sole reason that a higher bonus could be obtained, and 293] on June 14, 1906, *it sold a lease of 80 acres of this land on the same terms as the former to the Galbraith Oil and Gas Company for a bonus of \$16,800 and a lease of the other 80 acres on the same terms to the Laurel Oil & Gas Company for \$2,000. The leases to these parties were subsequently made by the guardian, and the court confirmed these sales and approved these leases. The appellants then sued out a writ of error from the court of appeals of the Indian territory to reverse the order which set aside the decree of confirmation of the sale

and of approval of the lease to them, and they also appealed from that order. The court of appeals of the Indian territory consolidated the two cases, heard them as an appeal in equity, and affirmed the order below because the court was evenly divided in opinion. The appellants have brought the latter judgment here by writ of error and also by appeal.

"Since the case came to this court, the controversy over the 80 acres leased to the Galbraith Oil & Gas Company has been settled, and the only dispute remaining relates to the 80 acres leased to the Laurel Oil & Gas Company under the second lease."

The question in the case was whether a court of equity, during the term at which the confirmation is made, may lawfully avoid an executed judicial sale which it has confirmed, on the sole ground that a larger price may be obtained by a second sale, and was answered in the negative, and the decree was that the decree of the United States court of appeals in the Indian territory and the decree of the United States court for the western district of the Indian territory be reversed, and that "this cause be, and the same is hereby, remanded to the United States court for the western district of the Indian territory, with directions to confirm and enforce its order and decree which confirmed the sale and approved the lease to the appellants [appellees here], and to take any further proceedings necessary to that end." This decree was made and entered July 10, 1907. An appeal was thereupon allowed to this court, where the record was filed October 31 of that year.

Mr. George A. Murphey argued the cause and, with Messrs. William T. Hutchings and William P. Z. German, filed a brief for appellant.

Messrs. William J. Breene and John J. Shea argued the cause, and, with Mr. Edmond C. Breene, filed a brief for appellees.

Mr. Chief Justice Fuller delivered the opinion of the court:

By the act of Congress approved March 1, 1889 (chap. 333, 25 Stat. at L. 783), there was established a United States court for the Indian territory. The act conferred no jurisdiction over felonies, but, by the 5th section, exclusive original jurisdiction was conferred over all offenses against the laws of the United State committed within the Indian territory, not punishable by death or by imprisonment at hard labor. Jurisdiction was conferred in all civil cases between citizens of the United States who are residents of the Indian territory where the value of the thing in controversy

amounted to \$100 or more. The final judgment or decree of the court, where the value of the matter in dispute, exclusive of costs, exceeded \$1,000, might be reviewed and reversed or affirmed in the Supreme Court of the United States upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court.

By § 5 of the judiciary act of March 3, 1891 (chap. 517, 26 Stat. at L. 826, U. S. Comp. Stat. 1901, p. 488), as amended, appeals or writs of error might be taken from the district and circuit courts directly to this court in cases in which the jurisdiction of the court was in issue; of conviction of a capital crime; involving the construction or application of the Constitution of the United States; and in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, was drawn in question. 295] *By § 6, the circuit courts of appeals established by the act were invested with appellate jurisdiction in all other cases.

The 13th section read: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian territory to the Supreme Court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act."

The act of March 1, 1895 (28 Stat. at L. 693, chap. 145), provided for the appointment of additional judges of the United States court in the Indian territory, and created a court of appeals with such superintending control over the courts in the Indian territory as the supreme court of Arkansas possessed over the courts of that state by the laws thereof; and the act also provided that "writs of error and appeals from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States,"—which thus in terms deprived that court of jurisdiction of appeals from the Indian territory trial court, under § 13 of the act of 1891.

In *Harless v. United States*, 31 C. C. A. 397, 59 U. S. App. 745, 88 Fed. 97, the circuit court of appeals for the eighth circuit, in a careful opinion by District Judge Shiras, held that, in the act of March 1, 1895, creating the court of appeals for the Indian territory, and giving it full jurisdiction, civil and criminal, the provision of § 11, that "writs of error and appeals from the final decision of said appellate court

shall be allowed and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," conferred upon that court full appellate jurisdiction over the final decisions of the territorial appellate court, which jurisdiction was not in any way measured or limited by the jurisdiction on appeal *from or error to the district or cir- [296] cuit courts. And we concur in that view.

The rule was laid down by this court in *Brown v. United States*, 171 U. S. 631, 43 L. ed. 312, 19 Sup. Ct. Rep. 56, that, where a statute provides for a writ of error to a specific court of appeals, it must be regarded as a repeal of any previous statute which provided for a writ of error to another and different court, and that the decisions of the court of appeals of the United States for the Indian territory are final, except so far as they are made subject to review by some express provision of law. It was furthermore there ruled that the court of appeals in the Indian territory was analogous to the supreme court of the district of Columbia, and bore the same relation to the trial court in the Indian territory as the supreme court of the District of Columbia bore to the trial court in the District; and *Ex parte Bigelow*, 113 U. S. 328, 28 L. ed. 1005, 5 Sup. Ct. Rep. 542; *Re Heath*, 144 U. S. 92, 36 L. ed. 358, 12 Sup. Ct. Rep. 615; *Cross v. Burke*, 146 U. S. 82, 84, 36 L. ed. 896, 897, 13 Sup. Ct. Rep. 22, were cited to the point that no appeal could be taken from or writ of error sued out to the supreme court of the District of Columbia where not specifically provided for.

Section 12 of the act of March 3, 1905 (33 Stat. at L. 1081, chap. 1479, U. S. Comp. Stat. Supp. 1907, p. 208), in force when the proceedings in the present case were had, provides:

"That hereafter all appeals and writs of error shall be taken from the United States courts in the Indian territory to the United States court of appeals in the Indian territory, and from the United States court of appeals in the Indian territory to the United States circuit court of appeals for the eighth circuit in the same manner as is now provided for in cases taken by appeal or writ of error from the circuit courts of the United States to the circuit court of appeals of the United States for the eighth circuit."

We find no statute giving an appeal from that circuit court of appeals to this court, and perceive no reason for concluding that Congress intended that parties in such cases should be entitled to three appeals.

Appeal dismissed.

**297]*JURAGUA IRON COMPANY, LIMITED, Appt.,
v.
UNITED STATES.**

(See S. C. Reporter's ed. 297-311.)

War—reimbursement for destroying property.

1. There is no implied contract on the part of the United States to make compensation to an American corporation on account of the destruction of its property in Cuba in the course of military operations during the war with Spain, for the sole purpose of protecting the health and lives of the soldiers then actually engaged in the war.

[For other cases, see War, 81, 82, in Digest Sup. Ct. 1908.]

Prize and capture—enemy's property—domicil of owner.

2. An American corporation doing business in Cuba was, during the war with Spain, an enemy to the United States with respect of its property found and then used in Cuba, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war.

[For other cases, see Prize and Capture, 103-109, in Digest Sup. Ct. 1908.]

Claims—against the United States—contract or tort.

3. A claim against the United States for compensation on account of the unlawful and unnecessary destruction of property during the war, under the order of the general commanding, is one "sounding in tort" within the meaning of the act of March 3, 1887 (24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752), excluding cases of that character from the jurisdiction of the court of claims.

[For other cases, see Claims, 128-144, in Digest Sup. Ct. 1908.]

[No. 34.]

Argued December 2, 3, 1908. Decided February 23, 1909.

APPPEAL from the Court of Claims to review a judgment dismissing a petition in a suit to recover from the United States the alleged value of certain property destroyed in Cuba during the war with Spain, by military order. Affirmed.

See same case below, 42 Ct. Cl. 99.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney and John Spalding Flannery argued the cause, and, with Messrs. William Hitz and Wayne MacVeagh, filed a brief for appellant:

The obligation of a belligerent to pay for

NOTE.—On domicil of owner as determining character of property—see note to *The Mary & Susan*, 4 L. ed. U. S. 32.

private property taken or destroyed under circumstances not involving actual military operations—that is, in battle or the course of bombardment, and the like—is recognized and declared by practically all text writers who have treated of the subject.

Kent, Com. pp. 92, 93; Hall, International Law, pp. 441, 442; 2 Halleck, International Law, 67, 68; Davis, International Law, pp. 144-146.

Even if real property belongs absolutely to one of the belligerent states, it cannot rightly or legally be devastated by the forces of the other.

Hall, International Law, 437, 438.

The obligation of a belligerent to pay in proper cases has been recognized as a living, vital principle in several adjudicated cases of high authority.

United States v. Percheman, 7 Pet. 51, 8 L. ed. 604; *United States v. Padelford*, 9 Wall. 531, 540, 19 L. ed. 788, 791; *United States v. Klein*, 13 Wall. 137, 20 L. ed. 522; *Mitchell v. Harmony*, 13 How. 115, 14 L. ed. 75; *United States v. Russell*, 13 Wall. 623, 20 L. ed. 474; *United States v. Pacific R. Co.* 120 U. S. 227, 30 L. ed. 634, 7 Sup. Ct. Rep. 490; 4 Moore, International Arbitration, 3718; *Grant v. United States*, 1 Ct. Cl. 41; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

In the absence of circumstances constituting a good defense, the law implies a promise to pay to the owner the reasonable value of the property so taken and destroyed.

Carpenter v. United States, 17 Wall. 489, 21 L. ed. 680; *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 28 L. ed. 846, 5 Sup. Ct. Rep. 306; *Great Falls Mfg. Co. v. Atty. Gen.* (*Great Falls Mfg. Co. v. Garland*) 124 U. S. 581, 31 L. ed. 527, 8 Sup. Ct. Rep. 631; *United States v. Lynah*, supra; *Philippine Sugar Estates Development Co. v. United States*, 39 Ct. Cl. 237, 40 Ct. Cl. 33.

Assistant Attorney General John Q. Thompson argued the cause and filed a brief for appellee:

All property having its situs where international warfare is being waged is subject to seizure and destruction by the invading army when such action is necessary for the preservation, welfare, and safety of the force committing the destruction, regardless of the domicil of the owner, or his allegiance and loyalty to the country from which the invading party is sent forth.

Hall, International Law, 5th ed. pp. 471, 472, 474, 481, 500, 501, 504, 533, 535; Whiting, War Powers under Constitution, 2d ed. pp. 340-342, 347, 348; 2 Halleck, International Law, pp. 75-77; Taylor, International Pub. Law, p. 539; *The Cheshire* (*The Cheshire v. United States*) 3 Wall.

233, 18 L. ed. 176; *The Gray Jacket (The Grey Jacket v. United State)* 5 Wall. 369, 370, 18 L. ed. 653; *Miller v. United States (Page v. United States)* 11 Wall. 305, 306, 20 L. ed. 144, 145; *United States v. Pacific R. Co.* 120 U. S. 228, 30 L. ed. 634, 7 Sup. Ct. Rep. 490; *Lamar v. Browne*, 92 U. S. 194, 23 L. ed. 653; *Dow v. Johnson*, 100 U. S. 170, 25 L. ed. 636; *The Venice (United States v. Cooke)* 2 Wall. 258, 17 L. ed. 866; *The Venus*, 8 Cranch, 277, 3 L. ed. 561; *The William Bagaley (The Wm. Bagaley v. United States)* 5 Wall. 408, 18 L. ed. 589; *Young v. United States*, 97 U. S. 60, 24 L. ed. 997; *Hamilton v. Dillin*, 21 Wall. 94, 22 L. ed. 533.

Eliminating the question of the right of the United States to seize or destroy the property in issue, the act complained of becomes simply a wrong committed on the part of the agents of the United States, and therefore the case is one sounding in tort, and appellant company cannot recover.

J. Ribas y Hijo v. United States, 194 U. S. 323, 48 L. ed. 996, 24 Sup. Ct. Rep. 727.

Mr. Justice Harlan delivered the opinion of the court:

This action was brought in the court of claims to recover from the United States the 301]alleged value of certain property *destroyed in Cuba, during the war with Spain, by order of the officer who, at the time of its destruction, commanded the troops of the United States operating in the locality of the property.

The case depends altogether upon the facts found by the court. We cannot go beyond those facts.

The court of claims found that the Juragua Iron Company (Limited) was a corporation of Pennsylvania, having its principal office and place of business in Philadelphia, and was and for many years had been engaged in the business of mining and selling iron ore and other mineral products in the United States, Cuba, and elsewhere, and in manufacturing iron and steel products; that it was so engaged at the opening of the late war with Spain; and, to enable it to carry on business, it owned, leased, and operated mines in Cuba, maintaining offices, works, and the necessary tools, machinery, equipments, and supplies for its business in the province of Santiago de Cuba, at or near Siboney, Firmeza, and La Cruz; that, in addition to its mines, works, and their equipments, the company also owned real estate at or near Siboney, which was improved by 66 buildings of a permanent character, used for the purposes of its business, and occupied by its employees as dwellings and for other purposes; that in the year 1898, and "while the war

with Spain was in progress, the lives of the United States troops who were engaged in military operations in the province of Santiago de Cuba, in the belligerent prosecution of the war, became endangered by the prevalence of yellow fever, and it was deemed necessary by the officers in command, in order to preserve the health of the troops and to prevent the spread of the disease, to destroy all places of occupation or habitation which might contain the fever germs;" that on or about the 11th of July, 1898, General Miles, commanding the United States forces in Cuba, because of the necessity aforesaid, and by the advice of his medical staff, issued orders to destroy by fire these 66 buildings at Siboney, which belonged to the claimant, and had been used for the purposes aforesaid; that pursuant to that order such buildings and their contents were destroyed by fire by the military authorities of *the United States; that[302 the reasonable value of the buildings at the time and place of destruction was \$23,130, and the reasonable value of the drills, furniture, tools, and other personal property so destroyed by fire was seven thousand, nine hundred and eighty-six dollars (\$7,986), making a total of thirty-one thousand, one hundred and sixteen dollars (\$31,116).

As a conclusion of law the court found that the United States was not liable to pay any sum to the plaintiff on account of the damage aforesaid, and dismissed the petition.

It is to be observed at the outset that no fact was found that impeached the good faith, either of General Miles or of his medical staff, when the former, by the advice of the latter, ordered the destruction of the property in question; nor any fact from which it could be inferred that such an order was not necessary in order to guard the troops against the dangers of yellow fever. It is therefore to be assumed that the health, efficiency, and safety of the troops required that to be done which was done. Under these circumstances, was the United States under any legal obligation to make good the loss sustained by the owner of the property destroyed?

By the act of March 3d, 1887, providing for the bringing of suits against the government of the United States, the court of claims was given jurisdiction to hear and determine all claims "founded upon the Constitution of the United States or any law of Congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled

to redress against the United States, either in a court of law, equity, or admiralty if the United States were suable." 24 Stat. at L. 505, chap. 359, U. S. Comp. Stat. 1901, p. 752.

Manifestly, no action can be maintained under this statute unless the United States became bound by *implied* contract to compensate the plaintiff for the value of the property destroyed, or unless the case—regarding it as an action to recover damages—be one "*not* sounding in *tort*."

303] *The plaintiff contends that the destruction of the property by order of the military commander representing the authority and power of the United States was such a taking of private property for public use as to imply a constitutional obligation on the part of the government to make compensation to the owner. Const. Amend. 5. In support of that view, it refers to *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 656, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306; *Great Falls Mfg. Co. v. Atty. Gen.* 124 U. S. 581, 597, 598, 31 L. ed. 527, 532, 533, 8 Sup. Ct. Rep. 631; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349. Let us examine those cases.

United States v. Great Falls Mfg. Co. supra, was a case of the taking for public use by agents and officers of the United States, proceeding under the authority of an act of Congress, of certain private property—lands, water rights, and privileges—which were held and used by the government for nearly twenty years, without any compensation being made to the owner. A suit was brought against the United States in the court of claims, and judgment was rendered for the claimant. This court said: "It seems clear that these property rights have been held and used by the agents of the United States under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution,—upon which

question we express no opinion,—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under *its sovereign right of eminent domain, demand just compensation. *Kohl v. United States*, 91 U. S. 367, 374, 23 L. ed. 449, 452. In that view we are of opinion that the United States, having, by its agents, proceeding under the authority of an act of Congress, taken the property of the claimant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation where property to which the government asserts no title is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the court of claims of actions founded 'upon any contract, express or implied, with the government of the United States.'"

In reference to the subsequent case of *Great Falls Mfg. Co. v. Atty. Gen.* 124 U. S. 581, 597, 31 L. ed. 527, 532, 8 Sup. Ct. Rep. 631, 637, it may be said that, so far as it has any bearing upon the present controversy, it reaffirms the principle announced in *United States v. Great Falls Mfg. Co.* supra. The court said: "It is sufficient to say that the record discloses nothing showing that he [the Secretary of War] has taken more land than was reasonably necessary for the purposes described in the act of Congress, or that he did not honestly and reasonably exercise the discretion with which he was invested; and, consequently, the government is under a constitutional obligation to make compensation for any property or property right taken, used, and held by him for the purposes indicated in the act of Congress, whether it is embraced or described in said survey or map, or not. . . . Even if the Secretary's survey and map, and the publication of the Attorney General's notice, did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract, it appearing, as it does here, that the government recognizes and *retains the possession taken [305 in its behalf for the public purposes indicated in the act under which its officers have proceeded."

In *United States v. Lynah*, 188 U. S. 445, 464, 465, 47 L. ed. 539, 546, 547, 23 Sup.

Ct. Rep. 349, 355, which involved the inquiry whether the injury done to certain lands as the result of work done on the Savannah river by the United States was a taking of private property for public use, the court said: "The rule deducible from these cases is that when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates. . . . So the contention that the government had a paramount right to appropriate this property may be conceded, but the Constitution, in the 5th Amendment, guarantees that when this governmental right of appropriation—this asserted paramount right—is exercised, it shall be attended by compensation. . . . Whenever, in the exercise of its governmental rights, it takes property the ownership of which it concedes to be in an individual, it impliedly promises to pay therefor."

It is clear that these cases lend no support to the proposition that an implied *contract* arose on the part of the United States to make compensation for the property destroyed by order of General Miles. The cases cited arose in a time of peace, and in each it was claimed that there was, within the meaning of the Constitution, an actual taking of property for the use of the United States, and that the taking was by authority of Congress. That taking, it was adjudged, created by implication an obligation to make the compensation required by the Constitution. But can such a principle be enforced in respect of property destroyed by the United States in the course of military operations for the purpose, and only for the purpose, of protecting the health and lives of its soldiers actually engaged at the time in war in the enemy's country? We say "enemy's country" because, under the recognized rules governing the conduct of a war between two nations, Cuba, being a part of Spain, was enemy's country, and all persons, whatever their nationality, who resided there, were, pending 306] such war, to be *deemed enemies of the United States and of all its people. The plaintiff, although an American corporation, doing business in Cuba, was, during the war with Spain, to be deemed an enemy to the United States with respect of its property found and then used in that country, and such property could be regarded as enemy's property, liable to be seized and confiscated by the United States in the progress of the war then being prosecuted; indeed, subject, under the laws of war, to be destroyed whenever, in the conduct of military operations, its destruction was necessary for the 53 L. ed.

safety of our troops or to weaken the power of the enemy.

In *Miller v. United States* (Page v. United States) 11 Wall. 268, 305, 20 L. ed. 135, 144, the court, speaking of the powers possessed by a nation at war, said: "It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent,—a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality." In *Lamar v. Brown*, 92 U. S. 187, 194, 23 L. ed. 650, 653, the court said: "For the purposes of capture, property found in enemy territory is enemy property, without regard to the status of the owner. In war, all residents of enemy country are enemies." "All property within enemy territory," said the court in *Young v. United States*, 97 U. S. 39, 60, 24 L. ed. 992, 997, "is, in law, enemy property, just as all persons in the same territory are enemies. A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and, if it is hostile property, *sub- [307] ject to capture." Referring to the rules of war between independent nations as recognized on both sides in the late Civil War, the court, in *United States v. Pacific R. Co.* 120 U. S. 227, 233, 239, 30 L. ed. 634, 636, 638, 7 Sup. Ct. Rep. 490, 493, 495, said: "The rules of war, as recognized by the public law of civilized nations, became applicable to the contending forces. . . . The inhabitants of the Confederate States, on the one hand, and of the states which adhered to the Union, on the other, became enemies, and subject to be treated as such, without regard to their individual opinions or dispositions; while during its continuance commercial intercourse between them was forbidden, contracts between them were suspended, and the courts of each were closed to the citizens of the other. *Brown v. Hiatt*, 15 Wall. 177, 184, 21 L. ed. 128, 130. . . . More than a million of men were in the armies on each side. The injury and destruction of private property caused by their

operations, and by measures necessary for their safety and efficiency, were almost beyond calculation. For all injuries and destruction which followed necessarily from these causes no compensation could be claimed from the government. By the well-settled doctrines of public law it was not responsible for them. . . . The principle that, for injuries to or destruction of private property in necessary military operations during the Civil War, the government is not responsible, is thus considered established. Compensation has been made in several such cases, it is true; but it has generally been, as stated by the President in his veto message, 'a matter of bounty rather than of strict legal right.' See also *The Venus*, 8 Cranch, 253, 278, 3 L. ed. 553, 561; *The Venice* (*United States v. Cook*) 2 Wall. 258, 275, 17 L. ed. 866, 867; *The Cheshire*, 3 Wall. 233, 18 L. ed. 175; *The Gray Jacket*, 5 Wall. 342, 369, 18 L. ed. 646, 653; *The Freundschaft*, 4 Wheat. 105, 107, 4 L. ed. 525, 526; *Griswold v. Waddington*, 16 Johns. 438, 446, 447; *Vattel*, Law of Nations, bk. 3, chap. 5, § 70, and chap. 4, § 8; *Burlamaqui*, pt. 4, chap. 4, § 20.

So in Hall's *International Law*, 5th ed. 500, 504, 533: "A person, though not a resident in a country, may be so associated with it through having or being a partner in a house of trade as to be affected by its enemy character, in respect, at least, of the 308]*property which he possesses in the belligerent territory." In *Whiting's War Powers* under the Constitution, 340, 342, the author says: "A foreigner may have his personal or permanent domicile in one country, and, at the same time, his constructive or mercantile domicile in another. The national character of a merchant, so far as relates to his property engaged in trade, is determined by his commercial domicile. 'All such persons . . . are *de facto* subjects of the enemy sovereign, being residents within his territory, and are adhering to the enemy so long as they remain within his territory.' . . . A neutral, or a citizen of the United States, domiciled in the enemy's country, not only in respect to his property, but also as to his capacity to sue, is deemed as much an alien enemy as a person actually born under the allegiance and residing within the dominions of the hostile nation."

In view of these principles—if there were no other reason—the plaintiff corporation could not invoke the protection of the Constitution in respect of its property used in business in Cuba, during the war, any more than a Spaniard residing there could have done, under like circumstances, in reference to his property then in that island. 'If the

property destroyed by order of General Miles had belonged at the time to a resident Cuban, the owner would not have been heard in any court, under the facts found, to claim, as upon implied contract, compensation from the United States on account of such destruction. How, then, under the facts found, could an obligation, based on implied contract, arise under the Constitution in favor of the plaintiff, an American corporation, which, at the time, and in reference to the property in question, had a commercial domicile in the enemy's country? It is true that the Army, under General Miles, was under a duty to observe the rules governing the conduct of independent nations when engaged in war,—a duty for the proper performance of which the United States may have been responsible in its political capacity to the enemy government. If what was done was in conformity to those rules,—as, upon the facts found, we must assume that it was,—then the owner of [309 the property has no claim of any kind for compensation or damages; for, in such a case, the commanding general had as much right to destroy the property in question if the health and safety of his troops required that to be done, as he would have had if, at the time, the property had been occupied and was being used by the armed troops of the enemy for hostile purposes. In the circumstances disclosed by the record, it cannot reasonably be said that there was, in respect of the destruction of the property in question, any "convention between the parties," any "coming together of minds," or any circumstances from which a contract could be implied. *Russell v. United States*, 182 U. S. 516, 530, 45 L. ed. 1210, 1215, 21 Sup. Ct. Rep. 899; *Harley v. United States*, 198 U. S. 229, 234, 49 L. ed. 1029, 1030, 25 Sup. Ct. Rep. 634. Again, if, as contended,—without, however, any basis for the contention,—the acts of that officer were not justified by the laws of war, then the utmost that could be said would be that what was done pursuant to his order amounted to a tort, and a claim against the government for compensation on account thereof would make a case "sounding in tort." But of such a case the court would, of course, have no jurisdiction under the act of Congress.

In this connection we may refer to *J. Ribas y Hijo v. United States*, 194 U. S. 315, 322, 48 L. ed. 994, 995, 24 Sup. Ct. Rep. 727, 729, in which the United States was sued by a Spanish corporation for the value of the use of a merchant vessel taken by the United States in the port of Porto Rico, when that city was captured by our Army and Navy on July 28th, 1898, and kept and used by the Quartermaster's Department for some time thereafter. The

court said: "There is no element of contract in the case; for nothing was done by the United States, nor anything said by any of its officers, from which could be implied an agreement or obligation to pay for the use of the plaintiff's vessel. According to the established principles of public law, the owners of the vessel, being Spanish subjects, were to be deemed enemies, although not directly connected with military operations. The vessel was therefore to be deemed enemy's property. It was seized as property of that kind, for purposes of war, and 310]not for any purposes of gain." *After observing that the case did not come within the principle announced in *United States v. Great Falls Mfg. Co.* 112 U. S. 645, 656, 28 L. ed. 846, 850, 5 Sup. Ct. Rep. 306, the court proceeded: "The seizure, which occurred while the war was flagrant, was an act of war, occurring within the limits of military operations. The action, in its essence, is for the recovery of damages; but, as the case is one sounding in tort, no suit for damages can be maintained under the statute against the United States. It is none the less a case sounding in tort because the claim is in form for the use of the vessel after actual hostilities were suspended by the protocol of August 12, 1898. [30 Stat. at L. 1742.] A state of war did not in law cease until the ratification in April, 1899, of the treaty of peace. [30 Stat. at L. 1754.] . . . If the original seizure made a case sounding in tort, as it undoubtedly did, the transaction was not converted into one of implied contract, because of the retention and use of the vessel pending negotiations for a treaty of peace."

In our judgment there is no element of contract in the claim of the plaintiff. And even if it were conceded that its property was wrongfully and unnecessarily destroyed under the order of the general commanding the United States troops, the concession could mean nothing more, in any aspect of the case, than that a tort was committed by that officer in the interest of the United States. But, as already said, of a cause of action arising from such a tort the court of claims could not take cognizance, whatever other redress was open to the plaintiff.

It may be well to notice one other matter referred to in argument. Section 1066 of the Revised Statutes provided that the jurisdiction of the court of claims "shall not extend to any claim against the government not pending therein on December 1st, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes." 12 Stat. at L. 767, chap. 92, § 9, U. S. Comp. Stat. 1901, p. 739. We need not now consider or definitely determine whether that section

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was superseded or modified by the above act of March 3d, 1887; for, if it was, and if an implied contract could, in any case, arise from a treaty stipulation, there is nothing in any treaty with Spain *which [311 stood in the way of the destruction of the buildings in question under the circumstances stated in the findings without liability on the part of the United States for their value; and if that section was not superseded or modified, then the law is for the United States, because of the absence of any implied contract entitling the plaintiff, under the facts found, to be compensated for the loss sustained by it.

Having noticed all the questions that require consideration, and finding no error in the record, the judgment of the Court of Claims must be affirmed.

It is so ordered.

AMERICAN EXPRESS COMPANY, Plff. in
Err.,
v.

A. R. MULLINS.

(See S. C. Reporter's ed. 311-315.)

Error to state court — Federal question — full faith and credit.

1. The Federal Supreme Court has jurisdiction of a writ of error sued out to review the decision of a state court adverse to the contention that no recovery against the plaintiff in error can be had if the judgment of a court of a sister state be given the full faith and credit to which it is entitled under the Constitution and laws of the United States.

[For other cases, see Appeal and Error, 1969-1980, in Digest Sup. Ct. 1908.]

NOTE.—On review of decisions of state courts presenting the question of full faith and credit—see note to *Allen v. Alleghany Co.* 49 L. ed. U. S. 551.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On conclusiveness of judgments generally—see notes to *Sharon v. Terry*, 1 L.R.A. 572; *Bollong v. Schuyler Nat. Bank*, 3 L.R.A. 142; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 577; *Morrill v. Morrill*, 11 L.R.A. 155; *Shores v. Hooper*, 11 L.R.A. 308; *Bank of United States v. Beverly*, 11 L. ed. U. S. 76; *Johnson Steel Street R. Co. v. Wharton*, 38 L. ed. U. S. 429; and

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Judgment — of sister state — full faith and credit.

2. Holding an express company liable to the consignor of a shipment of intoxicating liquors which were seized and destroyed under a default judgment rendered in a court of another state in a proceeding in the nature of one *in rem* denies to such judgment the full faith and credit to which it is entitled under the Constitution and laws of the United States, where the company notified the consignor of the seizure in time, and received from him an assurance that he would contest its legality.

[For other cases, see Judgment, VI. b, in Digest Sup. Ct. 1908.]

Judgment — res judicata.

3. A judgment is no less conclusive because it is based upon a mistake of law. [Conclusiveness of Judgment, see Judgment, III. in Digest Sup. Ct. 1908.]

[No. 77.]

Argued January 14, 15, 1909. Decided February 23, 1909.

IN ERROR to the Circuit Court of Kenton County, in the State of Kentucky, to review a judgment against an express company for the value of a shipment of intoxicating liquors which were seized and destroyed under a default judgment rendered by a court of another state. Reversed.

Statement by Mr. Justice Brewer:

Defendant in error brought his action in the circuit court of Kenton county, Kentucky, against the plaintiff in error to recover the value of twenty packages of whisky which he had delivered to the company at Covington, Kentucky, on March 10, 1904, to carry C. O. D. to Oswego, Labette county, Kansas. Each package was consigned to a separate consignee. The petition alleged that the defendant failed to deliver the whisky, or to collect the money therefor, or to return the whisky to the plaintiff. The answer was in effect that the company carried the whisky to Oswego, where it was seized and taken out of its possession by the sheriff of the county, under a warrant with seizure clause attached, duly issued by the district court of the county, and that it was destroyed in pursuance of a judgment duly rendered by that court. It further al-

Southern P. R. Co. v. United States, 42 L. ed. U. S. 355.

As to full faith and credit to be given to state records and judicial proceedings—see notes to *Lindley v. O'Reilly*, 1 L.R.A. 79; *Cummington v. Belchertown*, 4 L.R.A. 131; *Rand v. Hanson*, 12 L.R.A. 574; *Wiese v. San Francisco Musical Fund Soc.* 7 L.R.A. 578; *Darby v. Mayer*, 6 L. ed. U. S. 367; *Mills v. Duryee*, 3 L. ed. U. S. 411; *D'Arcy v. Ketchum*, 13 L. ed. U. S. 648; and *Huntington v. Attrill*, 36 L. ed. U. S. 1123.

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leged that the district court had full jurisdiction in the premises, and was authorized to issue the warrant, and that it was valid on its face; that a notice was duly issued out of the court, notifying any and all persons claiming any interest in the whisky to appear at a day and hour named to answer the complaint made against the whisky, and show cause why it should not be forfeited and destroyed; that this notice was served on the company, and a true copy posted in its office where the whisky was seized; that the company promptly notified plaintiff of the seizure, and served on him a copy of the notice issued by the court, and that he acknowledged receipt thereof fifteen days before the day set for answer, and advised the company that he intended to contest the legality of the seizure. A copy of the proceedings in the Kansas court was attached to the answer as an exhibit.

The answer further claimed that the judgment of the district court of Kansas was entitled to full faith and credit under the Constitution and laws of the United States. A demurrer was sustained to the answer, and the company declining to plead further, judgment was rendered against it for the value of the *whisky. The circuit court [313 of Kenton county is the highest court of the state in which a decision could be had. Ky. Stat. 1903, § 950.

Mr. Joseph S. Graydon argued the cause, and, with Messrs. Lawrence Maxwell and Lewis Cass Ledyard, filed a brief for plaintiff in error:

This court has jurisdiction.

Green v. Van Buskirk, 7 Wall. 139, 145, 19 L. ed. 109, 111; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 642, 44 L. ed. 619, 620, 20 Sup. Ct. Rep. 506; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616.

Mullins is bound by the Kansas judgment. The proceedings were *in rem* and he had actual notice.

State v. McManus, 65 Kan. 724, 70 Pac. 700; *The Mary*, 9 Cranch, 126, 144, 3 L. ed. 678, 684.

The Kansas judgment forfeited the whisky, and made it impossible for defendant to deliver or return it.

Stiles v. Davis, 1 Black, 101, 17 L. ed. 33; *Wells v. Maine S. S. Co.* 4 Cliff. 228, Fed. Cas. No. 17,401; *Edwards v. White Line Transit Co.* 104 Mass. 159, 6 Am. Rep. 213; *Bliven v. Hudson River R. Co.* 35 Barb. 191, affirmed in 36 N. Y. 403; *Scott v. Shearman*, W. Bl. 977; *Buchanan v. Biggs*, 2 Yeates, 232; *Ohio & M. R. Co. v. Yohe*, 51 Ind. 181, 19 Am. Rep. 727; *Savannah, G. & N. A. R. Co. v. Wilcox*, 48 Ga. 432; *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St.

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501, 21 L.R.A. 117, 34 Am. St. Rep. 579, 32 N. E. 476; Moore, Carr. pp. 229-233.

Its validity and effect is denied in Kentucky if defendant is nevertheless held liable there for failing to do what the Kansas judgment prevented it from doing.

Hampton v. McConnel, 3 Wheat. 234, 235, 4 L. ed. 378, 379; Fauntleroy v. Lum, 210 U. S. 230, 236, 52 L. ed. 1039, 1041, 28 Sup. Ct. Rep. 641.

It is doubtless true, as said by this court in Harris v. Balk, 198 U. S. 215, 227, 49 L. ed. 1023, 1028, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084, that one cannot rely on a foreign judgment which has been procured by his negligence or fraud, but this court will examine and determine that question for itself.

Huntington v. Attrill, 146 U. S. 657, 684, 36 L. ed. 1123, 1133, 13 Sup. Ct. Rep. 224.

This court, in reviewing the decision of the Kentucky court that defendant has lost its right to rely on the Kansas judgment by its omission to litigate, will give due effect to the fact that plaintiff relieved the defendant of that duty.

Wells v. Maine S. S. Co. supra.

It is immaterial whether the Kansas judgment was right or wrong.

Fauntleroy v. Lum, 210 U. S. 230, 237, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641.

- No appearance for defendant in error.

Mr. Justice Brewer delivered the opinion of the court:

This court has jurisdiction because of the claim distinctly made in the Kentucky court that giving full faith and credit to the judgment of the Kansas court would prevent a recovery against the company,—a claim which was expressly denied by the Kentucky court. Green v. Van Buskirk, 7 Wall. 139, 145, 19 L. ed. 109, 111; Hancock Nat. Bank v. Farnum, 176 U. S. 640, 642, 44 L. ed. 619, 620, 20 Sup. Ct. Rep. 506; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616.

While it is the duty of a carrier to safely carry and promptly deliver to the consignee the goods intrusted to its care, yet that duty does not call upon it to forcibly resist the judicial proceedings in the courts of the state into or through which it is carrying them. The company carried the goods to Kansas in obedience to the terms of the shipment. On arrival in that state they were taken by judicial process out of its possession, and destroyed, the process being issued in a proceeding in the nature of one *in rem*. Undoubtedly, it was authorized to appear in the Kansas court and contest for the rightfulness of its possession, but it

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might also notify the owner of the property, and call upon him to carry on the litigation. This it did; notified him in time, and received from him an assurance that he would contest the legality of the seizure. This relieved the company from further responsibility, and the owner can no longer complain of it because the judgment of the Kansas court seized and disposed of the property. Stiles v. Davis, 1 *Black, [314 101, 17 L. ed. 33; Wells v. Maine S. S. Co. 4 Cliff. 228, Fed. Cas. No. 17,401; Edwards v. White Line Transit Co. 104 Mass. 159, 6 Am. Rep. 213; Bliven v. Hudson River R. Co. 36 N. Y. 403; Ohio & M. R. Co. v. Yohe, 51 Ind. 181, 19 Am. Rep. 727; Savannah, G. & N. R. Co. v. Wilcox, G. & Co. 48 Ga. 432; Baltimore & O. R. Co. v. O'Donnell, 49 Ohio St. 489, 501, 21 L.R.A. 117, 34 Am. St. Rep. 579, 32 N. E. 476.

In the opinion of the judge of the Kentucky circuit court it was said:

"The court is of the opinion that the conduct of the defendant in permitting the goods to be seized and destroyed under a judgment by default, as disclosed by its answer, without defending and asserting its rights as a carrier, which its duty as carrier required it to do, is in effect a fraud; and certainly no judgment suffered to be rendered by the consent, connivance, or fraud of the carrier can be relied upon to relieve the person by whose consent, connivance, or fraud it was rendered from a legal obligation."

It is undoubtedly true that if the carrier, through connivance or fraud, permits a judgment to be rendered against it, such judgment cannot be invoked by it as a bar to an action brought by the owner of the goods. But there is nothing in the answer, a demurrer to which was sustained, indicating any consent, connivance, or fraud, and this court will determine for itself whether there is anything in the record which shows any such consent, connivance, or fraud. Harris v. Balk, 198 U. S. 215, 49 L. ed. 1023, 25 Sup. Ct. Rep. 625, 3 A. & E. Ann. Cas. 1084.

It was further suggested in the opinion of the judge of the Kentucky court that the Kansas judgment was wrong and in conflict with the decision of this court in American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182. But, as held in Fauntleroy v. Lum, 210 U. S. 230, 237, 52 L. ed. 1039, 1042, 28 Sup. Ct. Rep. 641, 643:

"A judgment is conclusive as to all the *media concludendi* (United States v. California & O. Land Co. 192 U. S. 355, 48 L. ed. 476, 24 Sup. Ct. Rep. 266); and it needs no authority to show that it cannot be impeached either in or out of the state by showing that it was based upon a mistake of law."

315] *We are of opinion that the Circuit Court of Kentucky erred, and its judgment is reversed and the case remanded to that court for further proceedings not inconsistent with this opinion.

CHRIST NIELSEN, Plff. in Err.,

v.

STATE OF OREGON.

(See S. C. Reporter's ed. 315-321.)

States — power to punish criminally act authorized by other state.

The state of Oregon cannot, by virtue of its concurrent jurisdiction, under the act of Congress of February 14, 1859 (11 Stat. at L. 383, chap. 33), over the Columbia river, make criminal the operation of a purse net in that river within the territorial limits of the state of Washington, under authority and license from that state.

[For other cases, see Courts, 351, 352, in Digest Sup. Ct. 1908.]

[No. 593.]

Argued January 18, 19, 1909. Decided February 23, 1909.

IN ERROR to the Supreme Court of the State of Oregon to review a judgment which affirmed a judgment of the Circuit Court of Clatsop County, in that state, convicting a person operating a purse net in the Columbia river under authority and license from the state of Washington of an offense under the Oregon statutes. Reversed and remanded for further proceedings.

See same case below (Or.) 95 Pac. 720.

Statement by Mr. Justice Brewer:

Plaintiff in error was convicted in a justice's court of the precinct of Astoria, Clatsop county, Oregon, of maintaining *and operating a purse net on the Columbia river, contrary to the statutes of Oregon. This conviction was, by proper proceedings, taken to the supreme court of the state and the judgment affirmed. 95 Pac. 720. From that decision the case has been brought here on error.

According to the agreed statement of facts, plaintiff in error was an actual and bona fide resident and inhabitant of the state of Washington and a citizen of the United States. He had a license from the Fish Commissioner of Washington to operate a purse net on the Columbia river, and was on said river, within the limits of the state of Washington, operating such a purse net at the

time he was arrested and prosecuted in the courts of Oregon.

By § 1 of the act of Congress of March 2, 1853 (chap. 90, 10 Stat. at L. 172), all that part of the territory of Oregon lying north of the "main channel of the Columbia river" was organized into the territory of Washington, and by § 21 of the same act it is provided "that the territory of Oregon and the territory of Washington shall have concurrent jurisdiction over all offenses committed on the Columbia river, where said river forms a common boundary between said territories." Section 1 of the act of Congress admitting Oregon into the Union (act of Feb. 14, 1859, chap. 33, 11 Stat. at L. 383), after describing in detail the boundaries of the state, provides, "including jurisdiction in civil and criminal cases upon the Columbia river and Snake river, concurrently with states and territories of which those rivers form a boundary in common with this state." And in § 2 it is said, "the said state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same."

The legislative assembly of Oregon passed an act, the 1st section of which is as follows:

"Sec. 1. It shall hereafter be unlawful to operate or maintain *within any of the [317 rivers of this state or of the Columbia river, or in the Pacific ocean within 3 miles of the mouths of any of the rivers of this state, or of the Columbia river, any purse net or other like seine for the purpose of catching or taking salmon or other anadromous fish or sturgeon."

The 2d section makes one violating any of the provisions of the act guilty of a misdemeanor, and prescribes the penalty. Or. Sess. Laws 1907, p. 154. On the other hand, Washington passed an act (Wash. Sess. Laws 1899, p. 194) the 2d section of which reads as follows:

"Sec. 2. The use of pound nets, traps, weirs, fish wheels, and other fixed appliances, and purse nets, drag seines, and other seines for catching salmon, is hereby authorized in all the waters of this state where-in the same is not prohibited by § 1, subject to the regulation and license hereinafter provided for or otherwise required by law, and the use of the set nets, gill or drift nets, subject to said license and regulation for said purpose, is authorized in all the waters of this state, except as otherwise provided by law."

NOTE.— On jurisdiction over boundary river—see note to *Roberts v. Fullerton*, 65 L.R.A. 953.

The prohibition in § 1 referred to does not include the Columbia river. Section 6 of

the same act fixes the license fees for all first-class purse seines at \$50 and all second-class purse seines at \$25.

Mr. E. C. Macdonald argued the cause, and, with Messrs. John D. Atkinson, G. C. Fulton, S. H. Piles, J. B. Alexander, W. P. Bell, and H. M. Brooks, filed a brief for plaintiff in error:

Until the two states have passed the same or similar laws, neither state can enforce its laws, at least, across its boundary, and act within the territorial limits of another state.

Re Mattson, 69 Fed. 542; Ex parte Desjeiro, 152 Fed. 1004; Roberts v. Fullerton, 117 Wis. 222, 65 L.R.A. 953, 93 N. W. 1111; Central R. Co. v. Jersey City, 70 N. J. L. 81, 56 Atl. 239; McCready v. Virginia, 94 U. S. 391, 394, 24 L. ed. 248; Wedding v. Meyler, 192 U. S. 573, 585, 48 L. ed. 570, 575, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322.

Mr. A. M. Crawford argued the cause, and, with Mr. I. H. Van Winkle, filed a brief for defendant in error:

Jurisdiction unqualified, when applied to territory, is the sovereign authority to make, decide on, and execute laws.

Wedding v. Meyler, 192 U. S. 573, 584, 585, 48 L. ed. 570, 575, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; Daniels v. Tearney, 102 U. S. 415, 418, 26 L. ed. 187, 188; Grignon v. Astor, 2 How. 319, 337, 11 L. ed. 283, 290; Cornett v. Williams (Nash v. Williams) 20 Wall. 226, 249, 22 L. ed. 254, 258; Brown, Jurisdiction of Courts, 2d ed. § 2; Bouvier's Law Dict. Rawle's Rev. p. 57; Anderson's Law Dict. p. 580; 1 Abbott's Law Dict. p. 671.

The words "concurrent jurisdiction," as used in the act admitting Oregon into the Union, mean like authority conferred on each sovereign at the same time, over the same place, object, or thing, including the authority to enforce its commands or decrees over the same.

The Annie M. Smull, 2 Sawy. 226, Fed. Cas. No. 423; Carlisle v. State, 32 Ind. 56; Sherlock v. Alling, 44 Ind. 192; State v. Mullen, 35 Iowa, 201; State v. George, 60 Minn. 505, 63 N. W. 100; Wedding v. Meyler, 192 U. S. 573, 581, 48 L. ed. 570, 573, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; State v. Stevens, 1 Ohio Dec. Reprint, 82, reversed on other grounds in 14 Ohio, 386; Arnold v. Shields, 5 Dana, 20, 30 Am. Dec. 669; McFall v. Com. 2 Met. (Ky.) 396; Memphis & C. Packet Co. v. Pikey, 142 Ind. 308, 40 N. E. 527; Welsh v. State, 126 Ind. 74, 9 L.R.A. 664, 25 N. E. 883; Rorer, Interstate Law, chap. 34, sub. 3, p. 337; 2 Bouvier's Law Dict. Rawle's Rev. p. 57.

If the state has power to punish any

crime whatever committed on the river, it has power to punish all, as all are statutory crimes, punishable according to the penalties provided in the statute, and the power of the state to declare any violation of its police regulations a crime, and provide an appropriate penalty, cannot be doubted.

State v. Vowels, 4 Or. 326; State v. Gaunt, 13 Or. 120, 9 Pac. 55; State v. Nease, 46 Or. 438, 80 Pac. 897.

The right to fish in tide waters is a common right, and not a privilege granted by statute, and it may be regulated by the sovereignty having jurisdiction.

State v. Nielsen (Or.) 95 Pac. 720; State v. Schuman, 36 Or. 16, 47 L.R.A. 153, 78 Am. St. Rep. 754, 58 Pac. 661; Haggerty v. St. Louis Ice Mfg. & Storage Co. 143 Mo. 238, 40 L.R.A. 151, 65 Am. St. Rep. 647, 44 S. W. 1114; Smith v. State, 155 Ind. 611, 51 L.R.A. 404, 58 N. E. 1044.

Mr. Justice Brewer delivered the opinion of the court:

By the legislation of Congress the Columbia river is made the common boundary between Oregon and Washington, and to each of those states is given concurrent jurisdiction on the waters of that river. How that jurisdiction is to be exercised, what limitations there are, if any, upon the power of either state, is not in terms prescribed. It is true, in the 1st section of the act admitting Oregon, the jurisdiction was apparently limited to "civil and criminal cases;" but, in the 2d section of that act, there was given in general terms "concurrent jurisdiction." In Wedding v. Meyler, 192 U. S. 573, 584, 48 L. ed. 570, 575, 66 L.R.A. 833, 840, 24 Sup. Ct. Rep. 322, 324, construing the term "concurrent jurisdiction," as given to Kentucky and Indiana over the Ohio river, this court, reversing the court of appeals of Kentucky, said:

"Concurrent jurisdiction, properly so-called, on rivers, is familiar to our legislation, and means the jurisdiction of two powers over one and the same place. There is no reason to give an unusual meaning to the phrase. See Sanders v. St. Louis & N. O. Anchor Line, 97 Mo. 26, 30, 3 L.R.A. 390, 10 S. W. 595; Opsahl v. Judd, 30 Minn. 126, 129, 130, 14 N. W. 575; J. S. Keator Lumber *Co. v. St. Croix Boom Corp. 72 [320 Wis. 62, 7 Am. St. Rep. 837, 38 N. W. 529, and the cases last cited.

"The construction adopted by the majority of the court of appeals seems to us at least equally untenable. It was held that the words 'meant only that the states should have legislative jurisdiction.' But jurisdiction, whatever else or more it may mean, is *jurisdictio*, in its popular sense of authority to apply the law to the acts of men.

Vicat Vocab., sub v. See *Rhode Island v. Massachusetts*, 12 Pet. 657, 718, 9 L. ed. 1233, 1258. What the Virginia compact most certainly conferred on the states north of the Ohio was the right to administer the law below low-water mark on the river, and, as part of that right, the right to serve process there with effect. *State v. Mullen*, 35 Iowa, 199, 205, 206."

Undoubtedly one purpose, perhaps the primary purpose, in the grant of concurrent jurisdiction, was to avoid any nice question as to whether a criminal act sought to be prosecuted was committed on one side or the other of the exact boundary in the channel, that boundary sometimes changing by reason of the shifting of the channel. Where an act is *malum in se*, prohibited and punishable by the laws of both states, the one first acquiring jurisdiction of the person may prosecute the offense, and its judgment is a finality in both states, so that one convicted or acquitted in the courts of the one state cannot be prosecuted for the same offense in the courts of the other. But, as appears from the quotation we have just made, it is not limited to this. It extends to civil as well as criminal matters, and is broadly a grant of jurisdiction to each of the states.

The present case is not one of the prosecution for an offense *malum in se*, but for one simply *malum prohibitum*. Doubtless the same rule would apply if the act were prohibited by each state separately; but where, as here, the act is prohibited by one state and in terms authorized by the other, can the one state which prohibits prosecute and punish for the act done within the territorial limits of the other? Obviously, the 321]grant *of concurrent jurisdiction may bring up, from time to time, many and some curious and difficult questions, so we promptly confine ourselves to the precise question presented. The plaintiff in error was within the limits of the state of Washington, doing an act which that state in terms authorized and gave him a license to do. Can the state of Oregon, by virtue of its concurrent jurisdiction, disregard that authority, practically override the legislation of Washington, and punish a man for doing within the territorial limits of Washington an act which that state had specially authorized him to do? We are of opinion that it cannot. It is not at all impossible that, in some instances, the interests of the two states may be different. Certainly, as appears in the present case, the opinion of the legislatures of the two states is different, and the one state cannot enforce its opinion against that of the other; at least, as to an act done within the limits of that other state. Whether, if the act of the plaintiff in error had been

done within the territorial limits of the state of Oregon, it would make any difference, we need not determine; nor whether, in the absence of any legislation by the state of Washington authorizing the act, Oregon could enforce its statute against the act done anywhere upon the waters of the Columbia. Neither is it necessary to consider whether the prosecution should be in the names of the two states jointly. It is enough to decide, as we do, that, for an act done within the territorial limits of the state of Washington, under authority and license from that state, one cannot be prosecuted and punished by the state of Oregon.

There is little authority upon this precise question, but see *Re Mattson*, U. S. circuit court for the district of Oregon, 69 Fed. 535, and *Ex parte Desjeiro*, same court, 152 Fed. 1004. See also *Roberts v. Fullerton*, 117 Wis. 222, 65 L.R.A. 953, 93 N. W. 1111; *Rorer*, *Interstate Law*, p. 438, and following.

The judgment of the Supreme Court of the state of Oregon is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

*HAMMOND PACKING COMPANY,[322
Plff. in Err.,
v.

STATE OF ARKANSAS.

(See S. C. Reporter's ed. 322-354.)

Constitutional law — due process of law
— extraterritorial effect of state anti-trust law.

1. Property is not taken without due

NOTE. — As to what constitutes due process of law—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

On illegal trusts under modern anti-trust laws—see note to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689.

As to reserved power to alter, amend, or repeal corporate charters—see notes to *Greenwood v. Union Freight R. Co.* 26 L. ed. U. S. 961, and *Omaha Water Co. v. Omaha*, 77 C. C. A. 281.

On compulsory production of books and papers as unreasonable search or seizure—see notes to *Consolidated Rendering Co. v. Vermont*, 52 L. ed. U. S. 327.

As to persons against whom production and inspection of books or writings may be obtained—see note to *Cassatt v. Mitchell Coal & Coke Co.* 81 C. C. A. 96.

process of law, contrary to U. S. Const., 14th Amend., by Ark. act of January 23, 1905, § 1, imposing a penalty upon a foreign corporation doing business within the state while a member of a trust or combination to control prices, although such combination may not have been created in the state, and may not affect prices in such state, since the statute, as construed by the state courts, does not forbid or affix penalties to acts done beyond the state, but simply prohibits a corporation from continuing to do business within the state after it has done, either within or outside of the state, the enumerated acts.

[For other cases, see Constitutional Law, 598-600, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — classification between corporations and individuals.

2. The possible invalidity as to individuals of the provisions of Ark. act January 23, 1905, § 1, penalizing the doing of business within the state by members of a trust or combination to control prices, does not render such provisions invalid as to corporations, as denying the equal protection of the laws.

[For other cases, see Constitutional Law, IV, a, 3, in Digest Sup. Ct. 1908.]

Monopolies — penalizing doing business by member — domestic and foreign corporations.

3. Domestic as well as foreign corporations are embraced by the provisions of Ark. act January 23, 1905, § 1, imposing a penalty upon any corporation doing business within the state while a member of a trust or combination to control prices.

[For other cases, see Monopolies, II. in Digest Sup. Ct. 1908.]

Discovery — noncompliance with order to produce — excuse.

4. An honest, unavailing effort to produce the books and papers, and secure the attendance as witnesses before a commission of the officers, agents, directors, and employees called for by an order made conformably to Arkansas anti-trust act of January 23, 1905, § 8, in a proceeding against a foreign corporation for violating that act, will prevent the striking out of defendant's answer and the entering of a default judgment against it, which are authorized by § 9 of that act when defendant fails to obey the order.

[For other cases, see Discovery and Inspection, II. in Digest Sup. Ct. 1908.]

Constitutional law — impairing contract obligations.

5. No contract rights of domestic corporations are impaired by the provisions of Ark. act January 23, 1905, § 1, imposing a penalty on corporations doing business in the state while members of a trust or combination to control prices, where the state Constitution reserves to the legislature the power to repeal, alter, or amend corporate charters, provided no injustice be done to the incorporators.

[For other cases, see Constitutional Law, 1386-1412, in Digest Sup. Ct. 1908.]

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Search and seizure — compelling production of testimony.

6. An order directing a foreign corporation sued for violating the Arkansas anti-trust act of January 23, 1905, to produce as witnesses before a commission certain named officers, agents, directors, and employees, and to produce any books, papers, or documents in the possession or under the control of such witnesses, relating to the merits of the cause or to any defense therein, does not amount to an unreasonable search and seizure.

[For other cases, see Search and Seizure, 6-14, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — compelling production of testimony.

7. Due process of law is not denied by an order directing the production of books and papers by a foreign corporation sued for violating the Arkansas anti-trust act of January 23, 1905, because such order seeks to elicit proof not only as to the liability of the corporation, but also evidence in its possession relevant to its defense.

[For other cases, see Constitutional Law, IV, b, 8, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — compulsory production of testimony.

8. The remedy given by the Arkansas anti-trust act of January 23, 1905, § 8, to secure the attendance of witnesses before a commission, and the production of books and papers in a proceeding under that act, does not deny the equal protection of the laws because it applies only to books and papers outside the state, or because, properly construed, it may be confined to corporations and joint stock associations, and not extended to individuals.

[For other cases, see Constitutional Law, IV, a, 7, in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — striking out answer — rendering default judgment.

9. Striking from the files the answer of a foreign corporation sued for violating the Arkansas anti-trust act of January 23, 1905, and rendering judgment by default against it, conformably to § 9 of that act, authorizing such action when defendant disobeys an order made in pursuance of § 8, to secure the attendance as witnesses before a commission of certain designated officers, agents, directors, and employees, and the production of books, papers, and documents in their possession or control, does not deny due process of law.

[For other cases, see Constitutional Law, IV, b, 8, in Digest Sup. Ct. 1908.]

[No. 54.]

Argued February 24, 25, 1908. Decided February 23, 1909.

IN ERROR to the Supreme Court of the State of Arkansas to review a judgment which affirmed a judgment of the Pulaski Circuit Court, in favor of the state, in an ac-

tion to recover penalties from a foreign corporation for violating the state anti-trust act. Affirmed.

See same case below, 81 Ark. 519, 100 S. W. 407, 1199.

The facts are stated in the opinion.

Messrs. **W. E. Hemingway** and **John G. Johnson** argued the cause, and, with Messrs. George B. Rose and Ralph Crews, filed a brief for plaintiff in error:

Section 1 of the act in question, as construed by the supreme court of the state of Arkansas, impairs the obligation of the contract between the defendant as a foreign corporation, and the state, whereby the defendant was permitted to do business within the state: and is therefore violative of § 10, article 1 of the Constitution of the United States.

American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; *Hartford F. Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42; 15 Am. & Eng. Enc. Law, 2d ed. p. 1049; *Com. v. New Bedford Bridge*, 2 Gray, 339; *Washington Bridge Co. v. State*, 18 Conn. 53; *Monongahela Nav. Co. v. Coon*, 6 Pa. 379, 47 Am. Dec. 474; *State Tax on Foreign-held Bonds*, 15 Wall. 320, 21 L. ed. 187; *Gordon v. Appeal Tax Ct.* 3 How. 133, 11 L. ed. 529; *Wendover v. Lexington*, 15 B. Mon. 258; *Atty. Gen. v. Bank of Charlotte*, 57 N. C. (4 Jones, Eq. L.) 293; *Miller v. New York*, 15 Wall. 497, 21 L. ed. 104; *Coast-Line R. Co. v. Savannah*, 30 Fed. 646; *New York, L. E. & W. R. Co. v. Pennsylvania*, 153 U. S. 628, 38 L. ed. 846, 14 Sup. Ct. Rep. 952; *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152; *Com. v. Mobile & O. R. Co.* 23 Ky. L. Rep. 784, 54 L.R.A. 916, 64 S. W. 452; *Seaboard Air Line R. Co. v. Railroad Commission*, 153 Fed. 792; *British American Mortg. Co. v. Jones*, 76 S. C. 218, 56 S. E. 983.

Such section legislates relating to transactions occurring beyond the limits of the state of Arkansas, and is therefore extra-territorial, and its enforcement would constitute a taking of the property of defendant without due process of law, and constitute a denial to it of the equal protection of the law, contrary to the terms of the 14th Amendment to the Constitution of the United States.

Casey v. State, 53 Ark. 334, 14 S. W. 90; *Cooley, Const. Lim.* pp. 176, 177; *People ex rel. Akin v. Butler Street Foundry & Iron Co.* 201 Ill. 236, 66 N. E. 349; *Chicago Wall Paper Mills v. General Paper Co.* 78 C. C. A. 607, 147 Fed. 491, 8 A. & E. Ann. Cas. 889; *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 45 L. ed. 619, 21 Sup. Ct. Rep. 423; *Carroll v. Greenwich*

Ins. Co. 199 U. S. 409, 50 L. ed. 249, 26 Sup. Ct. Rep. 66; *Santa Clara County v. Southern P. R. Co.* 118 U. S. 394, 30 L. ed. 118, 6 Sup. Ct. Rep. 1132; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed. 109, 8 Sup. Ct. Rep. 1161; *New York L. Ins. Co. v. Smith* (Tex. Civ. App.) 41 S. W. 687; *Baltimore & O. S. W. R. Co. v. Reed*, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488.

So much of § 8 of the act in question as purports to authorize the court to make an order for the production of witnesses, books, and papers is unconstitutional and void, and did not warrant the making of an order in pursuance of its provisions:

(a) It subjects the defendant to unreasonable search and seizure of its books, papers, and documents, and thereby violates the 4th and 14th Amendments to the Constitution of the United States.

(b) It calls upon the defendant to produce evidence to be used against itself in a penal action, and thereby violates the 5th and 14th Amendments to the Constitution of the United States.

(c) It denies to the defendant the equal protection of the law, and constitutes a taking of its property without due process of law, in violation of the 14th Amendment to the Constitution of the United States.

Boyd v. United States, 116 U. S. 617, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Monongahela Nav. Co. v. United States*, 148 U. S. 325, 37 L. ed. 467, 13 Sup. Ct. Rep. 622; *Interstate Commerce Commission v. Brimson*, 154 U. S. 479, 38 L. ed. 1058, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *Logan v. Pennsylvania R. Co.* 132 Pa. 403, 19 Atl. 137; *Cooley, Const. Lim.* pp. 368, 370, 372; *Lester v. People*, 150 Ill. 408, 41 Am. St. Rep. 375, 23 N. E. 387, 37 N. E. 1004; *Brownell v. National Bank*, 20 Hun, 517; *Com. ex rel. Parker v. Certain Lottery Tickets*, 5 Cush. 369; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Lee v. Angas*, L. R. 2 Eq. 59; *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426; *Tharp v. Page*, 66 Ark. 229, 50 S. W. 454; *State v. Slamon*, 73 Vt. 212, 87 Am. St. Rep. 711, 50 Atl. 1097; *People v. Western Mfrs'. Mut. Ins. Co.* 40 Ill. App. 428; *Boyle v. Smithman*, 146 Pa. 255, 23 Atl. 397; *Gunn v. New York, N. H. & H. R. Co.* 171 Mass. 417, 50 N. E. 1032; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Missouri P. R. Co. v. Mackey*, 127 U. S. 209, 32 L. ed.

109, 8 Sup. Ct. Rep. 1161; Central Grain & Stock Exch. v. Board of Trade, 60 C. C. A. 299, 125 Fed. 468; 3 Wigmore, Ev. § 2259; State ex rel. Atty. Gen. v. Simmons Hardware Co. 109 Mo. 118, 15 L.R.A. 676, 18 S. W. 1125; Cooley, Const. Lim. p. 370; Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Brown v. Walker, 161 U. S. 591, 40 L. ed. 819, 5 Inters. Com. Rep. 369, 16 Sup. Ct. Rep. 644.

(d) When the state goes into the courts for the assertion of its rights, it goes upon an equality with other litigants.

State v. Morgan, 52 Ark. 150, 12 S. W. 243; Brent v. Bank of Washington, 10 Pet. 596, 9 L. ed. 547; The Siren (The Siren v. United States) 7 Wall. 159, 19 L. ed. 132; United States v. Beebe, 4 McCrary, 12, 17 Fed. 41.

So much of § 9 of the act in question as purports to authorize the court to strike from the files the pleadings of the defendant upon its failure to comply with the terms of the order entered pursuant to § 8 is unconstitutional and void, and the judgment so rendered constitutes a taking of the property of the defendant without due process of law, and a denial to it of the equal protection of the laws, in violation of the terms of the 14th Amendment to the Constitution of the United States.

McVeigh v. United States, 11 Wall. 259, 20 L. ed. 80; Windsor v. McVeigh, 93 U. S. 274, 23 L. ed. 914; Hovey v. Elliott, 167 U. S. 444, 42 L. ed. 230, 17 Sup. Ct. Rep. 841; Boyd v. United States, 116 U. S. 617, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Bradstreet v. Neptune Ins. Co. 3 Sumn. 601, Fed. Cas. No. 1,793; Postal Teleg. Cable Co. v. Adams, 155 U. S. 689-698, 39 L. ed. 312-316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Lasere v. Rochereau, 17 Wall. 437, 21 L. ed. 694; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Cooley, Const. Lim. 6th ed. p. 452; Meyers v. Shields, 61 Fed. 718; Burton v. Platter, 4 C. C. A. 95, 10 U. S. App. 657, 53 Fed. 901; Zeigler v. South & North Ala. R. Co. 58 Ala. 594; State ex rel. Blaisdell v. Billings, 55 Minn. 473, 43 Am. St. Rep. 524, 57 N. W. 206, 794; Foley v. Foley, 120 Cal. 33, 65 Am. St. Rep. 147, 52 Pac. 122; Younger v. Superior Ct. 136 Cal. 682, 69 Pac. 485; McClatchy v. Superior Ct. 119 Cal. 413, 39 L.R.A. 691, 51 Pac. 696; Greig v. Ware, 25 Colo. 184, 55 Pac. 163; State ex rel. Gemmell v. Clancy, 24 Mont. 359, 61 Pac. 987; Hebb v. County Ct. 49 W. Va. 53 L. ed.

733, 37 S. E. 678; Underwood v. McVeigh, 23 Gratt. 409; Fairfax v. Alexandria, 28 Gratt. 16; State ex rel. Public School v. New Orleans, 42 La. Ann. 92, 7 So. 674; The Fred M. Lawrence, 36 C. C. A. 631, 94 Fed. 1017; Altschul v. Doyle, 55 Cal. 633; Fayerweather v. Ritch, 88 Fed. 713; Warner v. Godfrey, 186 U. S. 365, 46 L. ed. 1203, 22 Sup. Ct. Rep. 852; Baltimore & O. S. W. R. Co. v. Reed, 158 Ind. 25, 56 L.R.A. 468, 92 Am. St. Rep. 293, 62 N. E. 488; Chapman v. Phoenix Nat. Bank, 85 N. Y. 437; Grinnan v. Edwards, 21 W. Va. 347; Russell v. Grant, 122 Mo. 161, 43 Am. St. Rep. 563, 26 S. W. 958; State v. Port Royal & A. R. Co. 45 S. C. 464, 23 S. E. 380; Dorr v. Rohr, 82 Va. 359, 3 Am. St. Rep. 106; Schiltz v. Roenitz, 86 Wis. 36, 21 L.R.A. 483, 39 Am. St. Rep. 873, 56 N. W. 194; Cairo & F. R. Co. v. Parks, 32 Ark. 131; Hickman v. Kempner, 35 Ark. 505; State v. Newton, 33 Ark. 276; Little Rock & Ft. S. R. Co. v. Payne, 33 Ark. 816, 34 Am. Rep. 55; Smith v. Leach, 44 Ark. 287; Clayton v. Johnson, 36 Ark. 406, 38 Am. Rep. 40.

Messrs. Lewis Rhoton and James H. Stevenson argued the cause, and, with Messrs. F. Guy Fulk, W. F. Kirby, W. L. Terry, and W. M. Lewis, filed a brief for defendant in error:

The act of 1905 is one passed in the exercise of the reserved power of the state to alter, amend, or repeal the laws affecting corporations. The plaintiff in error, by entering the state, assented to this reservation, and, by remaining in the state after the act took effect, assented to be bound by the terms thereof.

Sinking Fund Cases, 99 U. S. 700, 25 L. ed. 496; Miller v. New York, 15 Wall. 498, 21 L. ed. 104; Holyoke Water-Power Co. v. Lyman, 15 Wall. 519, 21 L. ed. 139; Tomlinson v. Jessup, 15 Wall. 459, 21 L. ed. 206; Maine C. R. Co. v. Maine, 96 U. S. 510, 24 L. ed. 840; Shields v. Ohio, 95 U. S. 324, 24 L. ed. 359; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; Woodson v. State, 69 Ark. 521, 65 S. W. 465; St. Louis & S. F. R. Co. v. Gill, 54 Ark. 101, 11 L.R.A. 452, 15 S. W. 18; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; State ex rel. Hadley v. Standard Oil Co. 194 Mo. 124, 91 S. W. 1062; Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 44 L. ed. 657, 20 Sup. Ct. Rep. 518; Keystone Driller Co. v. Superior Ct. 138 Cal. 738, 72 Pac. 398; St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Frawley v. Pennsylvania Casualty Co. 124 Fed. 262; Hartford F. Ins. Co. v. Perkins, 125 Fed. 502.

The power of the state to alter, amend, or repeal charters of domestic corporations is the measure of its power in respect to foreign corporations.

American Smelting & Ref. Co. v. Colorado, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978; *Chicago, R. I. & P. R. Co. v. Ludwig*, 156 Fed. 152.

The supreme court of Arkansas has held that this act is valid under the Constitution of Arkansas.

Hartford F. Ins. Co. v. State, 76 Ark. 303, 89 S. W. 42.

And in *State ex rel. Hadley v. Standard Oil Co.* supra, the supreme court of Missouri, in a case involving the provisions of the Missouri anti-trust law, from which the Arkansas act is mainly derived, construed and upheld the act as one of regulation of corporations.

The highest court of a state is the tribunal of last resort upon all questions of the validity of a state statute, as measured by the state Constitution.

Kirtland v. Hotchkiss, 100 U. S. 491, 25 L. ed. 558; *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 520, 29 L. ed. 463, 465, 6 Sup. Ct. Rep. 110; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 41 L. ed. 369, 17 Sup. Ct. Rep. 56; *French v. Barber Asphalt Paving Co.* 181 U. S. 324, 45 L. ed. 879, 21 Sup. Ct. Rep. 625; *Hibben v. Smith*, 191 U. S. 310, 48 L. ed. 195, 24 Sup. Ct. Rep. 88; *Olsen v. Smith*, 195 U. S. 332, 49 L. ed. 224, 25 Sup. Ct. Rep. 52; *National Cotton Oil Co. v. Texas*, 197 U. S. 130, 131, 49 L. ed. 694, 695, 25 Sup. Ct. Rep. 379; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 43, 44 L. ed. 657, 663, 20 Sup. Ct. Rep. 518; *Hunter v. Pittsburgh*, 207 U. S. 167, 52 L. ed. 154, 28 Sup. Ct. Rep. 40.

And where the highest court of a state declares that a particular statute is designed as one of regulation upon a corporation, that decision is final and conclusive.

Orient Ins. Co. v. Daggs, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281.

The doing of business in Arkansas, and not the formation of the combination, is the gist of the prohibited act.

Hartford F. Ins. Co. v. State, supra.

There is nothing in the general nature of anti-trust legislation which renders it obnoxious to the due process of law clause of the 14th Amendment. Such laws are valid exercises of the police power of the state.

9 Fed. Stat. Anno. 460; *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 49 L. ed. 689, 25 Sup. Ct. Rep. 379; *Smiley v. Kansas*, 196 U. S. 447, 49 L. ed. 546, 25 Sup. Ct. Rep. 289; *State ex rel. Hadley v. Standard Oil Co.* supra.

A state anti-trust law, which contains no discriminating features, or the discriminating features of which are held by the state supreme court to be invalid, is not invalid as depriving any person or corporation of the equal protection of the laws.

National Cotton Oil Co. v. Texas, supra; 9 Fed. Stat. Anno. 598.

Granting that the Arkansas act of 1905, as to natural persons, would be limited by construction to combinations formed in or affecting the state, and invalid as to extra-territorial acts, the supreme court of that state has, none the less, as to corporations, given it a construction which eliminates the objection of extraterritoriality.

Hartford F. Ins. Co. v. State, supra; *Hammond Packing Co. v. State*, 81 Ark. 519, 100 S. W. 407, 1199.

The order of examination and production does not require of plaintiff in error the expenditure of any money in order to comply therewith.

Hammond Packing Co. v. State, 81 Ark. 541, 100 S. W. 407, 1199.

The mere inconvenience, expense, and trouble incident to the performance of certain public duties, such as attendance as witnesses, jurors, etc., are incidental burdens of the social compact; and the trouble and expense of their performance, at the command of the state, and for its benefit, are not within the operation of the 14th Amendment.

Re Consolidated Rendering Co. 80 Vt. 55, 66 Atl. 790, 11 A. & E. Ann. Cas. 1069, affirmed in 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178.

The guaranty of the 4th Amendment against unreasonable searches and seizures does not apply to corporations.

Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; *State ex rel. Curtis v. Brown & S. Mfg. Co.* 18 R. I. 16, 17 L.R.A. 859, 25 Atl. 246.

There has been, in fact, no illegal search or seizure.

Hale v. Henkel, *State ex rel. Hadley v. Standard Oil Co.*, and *Re Consolidated Rendering Co.*,—supra.

Counsel assume that, as to natural persons, the order of examination could not be made. We do not assent to the correctness of this view; but, if it were correct, it would not follow that § 8, as to corporations, would be thereby rendered invalid.

8 Fed. Stat. Anno. 598; *National Cotton Oil Co. v. Texas*, 197 U. S. 133, 49 L. ed. 695, 25 Sup. Ct. Rep. 379.

The act of 1905, even if it be treated as applicable and valid as to corporations alone, is not a discriminatory, but an equalizing, statute. It merely takes away from

corporations some of the advantages they have always had over natural persons as defendants.

Re Consolidated Rendering Co. *supra*.

The essentials of due process of law, in general, are, first, notice, and, second, opportunity to be heard.

As applied to judicial proceedings, due process of law signifies, in addition to notice and opportunity to be heard—

(a) A course of judicial proceedings according to the established law of the jurisdiction; and

(b) A tribunal competent under the organic law of the state to pass upon the subject-matter.

Davidson v. New Orleans, 96 U. S. 108, 24 L. ed. 621; Hagar v. Reclamation Dist. No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; Bank of Columbia v. Okely, 4 Wheat. 244, 4 L. ed. 561; Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Orient Ins. Co. v. Daggs, 172 U. S. 557, 563, 43 L. ed. 552, 554, 19 Sup. Ct. Rep. 281; Happy v. Mosher, 48 N. Y. 313; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; Simon v. Craft, 182 U. S. 436, 45 L. ed. 1170, 21 Sup. Ct. Rep. 836; Holden v. Hardy, 169 U. S. 366, 389, 42 L. ed. 780, 790, 18 Sup. Ct. Rep. 383.

The states may make wide departures from the common-law rules which are the measure of the due process of law guaranteed by the 5th Amendment.

Holden v. Hardy, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383; Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; Collector v. Day (Buffington v. Day) 11 Wall. 124, 20 L. ed. 125; Ex parte Merryman, Taney, 246, Fed. Cas. No. 9,487; United States ex rel. Turner v. Williams, 194 U. S. 295, 48 L. ed. 986, 24 Sup. Ct. Rep. 719; Re Kemmler, 136 U. S. 436, 448, 34 L. ed. 519, 524, 10 Sup. Ct. Rep. 930; French v. Barber Asphalt Paving Co. *supra*.

The states have the right to control the practice and procedure in their own courts, and the 14th Amendment does not deprive them of such power.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Bank of Columbia v. Okely, 4 Wheat. 235, 4 L. ed. 559; Brown v. New Jersey, 175 U. S. 172, 44 L. ed. 119, 20 Sup. Ct. Rep. 77; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620.

In the exercise of their right to control the procedure and practice of their own courts, the states may abolish and abrogate the common-law practice, and provide a new or summary mode of trial, subject only

to the limitation that there must always be some sort of notice and opportunity to be heard.

Brown v. New Jersey, 175 U. S. 172, 175, 44 L. ed. 119, 120, 20 Sup. Ct. Rep. 77; Simon v. Craft, 182 U. S. 436, 437, 45 L. ed. 1170, 1171, 21 Sup. Ct. Rep. 836; Kansas City v. Duncan, 135 Mo. 571, 37 S. W. 513; Holden v. Hardy, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383; Iowa C. R. Co. v. Iowa, *supra*; Missouri v. Lewis (Bowman v. Lewis) 101 U. S. 31, 25 L. ed. 992; Ex parte Reggel, 114 U. S. 642, 651, 29 L. ed. 250, 253, 5 Sup. Ct. Rep. 1148; Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; 9 Fed. Stat. Anno. pp. 291, 292; 8 Cyc. Law & Proc. p. 823.

As to the essentials of that notice and opportunity to be heard, which must not be denied, there is no definite criterion, if a state statute authorizes a certain course of proceeding in the courts of that state, and the law is valid under the state Constitution.

Allen v. Georgia, 166 U. S. 138, 41 L. ed. 949, 17 Sup. Ct. Rep. 525; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435.

So far as concerns the procedure adopted in this case, it was not only in conformity to the act of 1905, but it gave to the appellant the fullest opportunity to be heard and show cause against the granting of the motion for a default judgment.

Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178.

The legislature had the power to change and abrogate the common-law rules of evidence and procedure, without impinging on the due process of law guaranteed by the Constitution.

Illinois C. R. Co. v. Sanford, 75 Miss. 862, 23 So. 355, 942.

Provisions obligating parties to testify or produce evidence, and subjecting them to default or nonsuit on refusal so to do, have been favored and upheld quite generally. Such statutes are highly remedial, and should be liberally construed to advance the due administration of justice.

People ex rel. Morse v. Nussbaum, 55 App. Div. 245, 67 N. Y. Supp. 492; Bas v. Steele, 3 Wash. C. C. 381, Fed. Cas. No. 1,088; Dunham v. Riley, 4 Wash. C. C. 126, Fed. Cas. No. 4,155; Bank of United States v. Kurtz, 2 Cranch, C. C. 342, Fed. Cas. No. 920; Maye v. Carbery, 2 Cranch, C. C. 336, Fed. Cas. No. 9,339; 3 Fed. Anno. 5, note to Rev. Stat. § 724, U. S. Comp. Stat. 1901, p. 583; Victor G. Bloede Co. v. Joseph Bancroft & Sons Co. 98 Fed. 175; Gray v. Schneider, 119 Fed. 474; Henszey v. Langdon-Henszey Coal Min. Co. 80 Fed. 178;

Haskell v. Sullivan, 31 Mo. 435; Snyder v. Raab, 40 Mo. 166; Carr v. Dawes, 46 Mo. App. 351; Royer v. German, 48 Mo. App. 510; Dustin v. Farrelly, 81 Mo. App. 380; Larimore v. Bobb, 114 Mo. 446, 21 S. W. 922; Gaughe v. Laroche, 6 Duer, 685, 14 How. Pr. 451; Shelp v. Morrison, 13 Hun, 110; Richards v. Judd, 15 Abb. Pr. N. S. 184; Whiton v. Wiggin, 34 N. H. 215; Belton v. Smith, 45 Ind. 291; Trippe v. Carr, 80 Ind. 371; Bish v. Beatty, 111 Ind. 403, 12 N. E. 523; Chaffin v. Brownfield, 88 Ind. 307; First Nat. Bank v. Wood, 26 Wis. 500; Eastern R. Co. v. Tuteur, 127 Wis. 382, 105 N. W. 1067; Thompson v. Selden, 20 How. 194, 15 L. ed. 1001.

Another analogous class of statutes, closely resembling the last-mentioned ones, provides in general that either party may, with his pleadings, file interrogatories to the adverse party, which must be answered, under penalty of nonsuit or default.

The statutes are found in many of the states, and have been universally applied and upheld.

6 Enc. Pl. & Pr. p. 25; Young v. McLe-more, 3 Ala. 296; Goodwin v. Harrison, 6 Ala. 438; Reed v. Spayde, 56 Ind. 394; Fels v. Raymond, 139 Mass. 100, 28 N. E. 691; Harding v. Noyes, 125 Mass. 572; Harding v. Morrill, 136 Mass. 291; Sully v. Wilson, 44 Iowa, 394; Teas v. McDonald, 13 Tex. 349, 65 Am. Dec. 65; Lawson v. Black Diamond Coal Min. Co. 44 Wash. 26, 86 Pac. 1120; Georgia Iron & Coal Co. v. Etowah Iron Co. 104 Ga. 395, 30 S. E. 878; American Nat. Bank v. Brunswick Light & Water Co. 100 Ga. 92, 26 S. E. 473. See also 1 Black, Judgm. § 79a; Tobyhanna & L. Lumber Co. v. Home Ins. Co. 167 Pa. 231, 31 Atl. 564; North v. Yorke, 174 Pa. 349, 34 Atl. 620; Honore v. Home Nat. Bank, 80 Ill. 489; Wilder v. Arwedson, 80 Ill. 435; Goldie v. McDonald, 78 Ill. 605; Young v. Browing, 71 Ill. 44; Hunt v. Lucas, 99 Mass. 404; Bayard v. Gillasspy, 1 Miles (Pa.) 256; Bright v. Oakdale Coal & Min. Co. 10 Phila. 609; 6 Enc. Pl. & Pr. pp. 79, 80; Jennings v. Parsons, 71 Conn. 413, 42 Atl. 76; Hurlburt v. Straub, 54 W. Va. 303, 46 S. E. 163; Marstiller v. Ward, 52 W. Va. 74, 43 S. E. 178; Quesenberry v. People's Bldg. Loan, & Sav. Asso. 44 W. Va. 512, 30 S. E. 73.

The reserved visitatorial power of the state is ample warrant for the enactment of a law which requires the corporation to produce its officers, agents, and books on request of the properly designated agency of the state.

Hale v. Henkel and State ex rel. Hadley v. Standard Oil Co. supra.

Mr. Justice White delivered the opinion of the court:

The Hammond Packing Company, an Illinois corporation,—hereafter called the Hammond Company,—seeks to reverse a judgment for \$10,000 as penalties for alleged violations of a state law referred to as the anti-trust act of 1905.

The Hammond Company challenged the authority which the act purported to exert and the forms of procedure which the statute authorized and which were employed to enforce its requirements, because of their alleged repugnancy to the Constitution of the United States, in particulars which were enumerated. The supreme court of Arkansas held that the acts which the Hammond Company was charged with having committed were within the prohibitions of the law of 1905, and that the statute was in no respect repugnant to the Constitution of the United States. These conclusions were sustained by considering prior cognate legislation, and a construction given thereto, as well as by an analysis of the act of 1905, elucidated by a prior decision made concerning the same. Before recurring particularly to the procedure and judgment in this case, we advert *to these subjects,[331 as they are essential to a comprehension of the matters here arising for decision.

The Constitution of Arkansas of 1874 (§ 11, art. 12) authorized foreign corporations to do business in the state, subject to the same regulations and with the same rights as those enjoyed by domestic corporations. Carrying these provisions into effect, the legislature (Kirby's Digest Laws [Ark.] §§ 824 to 827) authorized permits to be issued to foreign corporations, subjecting them to like control and entitling them to the same privileges as domestic corporations on payment of the same fees as were exacted from a domestic corporation, and on compliance with other statutory requirements. In § 16, article 12, of the same Constitution, there was contained a reservation of the power of the legislature to repeal, alter, or amend charters of incorporation, subject, however, to the limitation that thereby "no injustice shall be done to corporators."

The Hammond Company obtained a permit and engaged in business within the state of Arkansas.

In 1899 what was known as the Rector act was enacted for the punishment of pools, trusts, and conspiracies to control prices, etc. Under this law an action was commenced to recover penalties against the Lancashire Fire Insurance Company, a foreign corporation doing business under a permit. The case was in 1899 decided by the supreme court of Arkansas against the

state. 66 Ark. 466, 45 L.R.A. 348, 51 S. W. 633. The court held that it [the statute] "did not intend to prohibit or punish acts done or agreements made in foreign countries by corporations doing business here, when such acts or agreements have reference only to persons, property, or prices in such foreign countries."

In January, 1905, the Rector act was repealed and the statute now in question was enacted. The 1st section of the new law, which is in the margin,† re-enacted the 1st section of the old act with certain additions, which are in italics. Various sections 332]*were added in the new law, of which only §§ 8 and 9 are particularly relevant to this controversy. As we shall hereafter have occasion to specially consider these sections, they are presently put out of view.

The Hartford Fire Insurance Company—a Connecticut corporation—was proceeded against for alleged violations of the act of 1905. The company defended on the ground that it was not a member of or a party to any pool, etc., made in Arkansas, and that it was not a member of any pool, etc., which in any manner affected the premium for insuring property within that state.

In disposing of the case the supreme court of Arkansas (76 Ark. 303, 89 S. W. 2) considered two questions: First, the proper construction of the act; and second, its constitutionality as construed. The first question was thus stated:

"1. Does the act prohibit, under the penalty named therein, a foreign insurance corporation from doing business in Arkansas 333]*while such corporation is a member of a pool, trust or combination to fix insurance rates anywhere, although such pool, trust, or combination is not created or maintained in Arkansas, and does not affect or fix, or attempt to do so, rates of insurance in Arkansas? To state the proposition by illustration: Assume that the appellant is a member of a trust—called a

rating bureau—created and maintained in New York city, to fix [and maintain] insurance rates in New York city and St. Petersburg, but which does not fix or affect rates in Arkansas,—is it guilty of a violation of the act if it transacts an insurance business in Arkansas upon complying with all the statutes of this state, except the one at bar?"

In solving this question the court deemed that the correct meaning of the statute was to be ascertained by its text, as illustrated by the history of the times, indicating the motives which led to the adoption of the act. On this subject it was pointed out that after the decision in the Lancashire Case public agitation concerning the effect of that decision had arisen and had occasioned an introduction in the legislature at different times of a proposed bill, known as the King bill, intended to counteract the effect of the decision in the Lancashire Case, but which bill had failed of passage. The court said:

"In 1904 the dominant political party in this state, through its party platform, demanded of the next general assembly the passage of the King bill, and of the purpose of said bill said: 'Whereby all foreign corporations shall be prevented from doing business in this state, if they are members of any trust, pool, combination, or conspiracy against trade, whether such trust, pool, combination, or conspiracy affects or is intended to affect prices or rates in Arkansas or not.' The general assembly elected in 1904, composed almost entirely of members of the political party whose platform is quoted, with remarkable unanimity and rapidity passed the King bill, which had been rejected by the two preceding general assemblies, and in less than a fortnight of its organization it was approved, and it is the statute now at bar."

*It was decided (Wood and Battle,[334

†Sec. 1. Any corporation organized under the laws of this or any other state or country, and transacting or conducting any kind of business in this state, or any partnership or individual, or other association or persons whatsoever, who are now, or shall hereafter create, enter into, become a member of, or a party to, any pool, trust, agreement, combination, confederation, or understanding, *whether the same is made in this state or elsewhere*, with any other corporation, partnership, individual, or any other person or association of persons, to regulate or fix, *either in this state or elsewhere*, the price of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or price, or premium to be paid for insuring property against loss or damage by fire, lightning, or tornado, or

maintain said price when so regulated or fixed, or *who are now*, or shall hereafter enter into, become a member of, or a party to any pool, agreement, contract, combination, association, or confederation, *whether made in this state or elsewhere*, to fix or limit, *in this state or elsewhere*, the amount or quantity of any article of manufacture, mechanism, merchandise, commodity, convenience, repair, any product of mining, or any article or thing whatsoever, or the price or premium to be paid for insuring property against loss or damage by fire, lightning, storm, cyclone, tornado, or any other kind of policy issued by any corporation, partnership, individual, or association of persons aforesaid, shall be deemed and adjudged guilty of a conspiracy to defraud, and be subject to the penalties as provided by this act.

JJ., dissenting) "that the general assembly intended by this act to subject to the penalty of it any foreign corporation doing business in this state while a member of a trust formed to fix prices anywhere."

The act, as thus interpreted, was sustained upon the theory that "the state has dictated these terms upon which foreign insurance companies can do business in this state," and the state "possesses the right to declare that foreign insurance corporations cannot do business in this state while belonging to a pool, trust, combination, conspiracy, or confederation to fix or affect insurance rates anywhere."

Shortly after the decision in the Hartford Case this action was commenced by the state against the Hammond Company for a forfeiture of its permit to do business in Arkansas and for money penalties. As finally amended the complaint consisted of four paragraphs or counts. As, however, during the progress of the cause, counsel stipulated that, if any relief was awarded against the Hammond Company, it should be confined to the matters charged in the first paragraph of the complaint, and be limited to a money recovery not exceeding \$10,000, and effect was given to the stipulation in the final action of the court, we put all but the first paragraph out of view.

In the first paragraph the existence of the Hammond Company and its carrying on the business of dealing in live stock and the products thereof in Arkansas at a date named was averred. It was then charged that on the date mentioned, and other stated days, the company, in violation of the act of 1905, was a member or party to a pool or trust, agreement, combination, or understanding with corporations and persons, named and unnamed, who were engaged in the same line of business, to regulate the prices of slaughtered live stock, and to maintain such prices as so regulated and fixed. The paragraph concluded with the prayer for "judgment that the right and privilege of said defendant to do business in this state be declared forfeited, and that plaintiff have and recover of said defendant the sum of \$30,000, and all her 335]costs in this suit *expended, together with all the expenses of the attorney general in prosecuting same, as provided in said act, and for all other and proper relief."

On the ground that the complaint was so vague that it was impossible to answer the same, the Hammond Company moved that the state be directed to make the complaint more specific, so as to show when the alleged pool or trust was created, in what respect it constituted a violation of the statute, and where, in the vast area in which it was alleged the business of the company was

carried on, the asserted unlawful agreement was to operate. The motion was denied.

The complaint was demurred to on the ground that it did not allege the formation of any pool or trust in Arkansas, or that it was to affect prices within that state, and therefore, if the facts charged were within the prohibition of the statute, the act was wanting in due process of law, and was repugnant to the 14th Amendment, because it was an attempt by the state to exercise authority beyond its jurisdiction. On the overruling of the demurrer, the first paragraph was answered by a general and specific denial of each and every allegation thereof. Moreover, it was specially asserted that the permit was a contract on the faith of which large sums of money had been expended in purchasing property and in making permanent improvements thereon within the state which would be destroyed by a revocation of the permit, and that the business of the company was largely interstate commerce. Various defenses under the Constitution of the United States were specifically advanced, as follows: First, that to revoke the permit for the causes alleged would impair the obligations of the contract which had resulted from the issue of the permit; and, second, that to grant the relief prayed would violate the equal protection, due process, *ex post facto*, and interstate commerce clauses of the Constitution of the United States.

A request of the Hammond Company that all depositions to be taken outside of the jurisdiction of the court be upon written interrogatories was denied.

The attorney general, availing himself [336 of § 8 of the act, which is in the margin,† moved for the appointment of a commissioner *to take testimony in the city of Chi-[337 cago, and for the production and examination before him of books and papers. The motion stated, first, that sixteen named persons resided in or near Chicago, and were either officers, agents, directors, or employees of the Hammond Company; that it was the desire of the state to take their testimony

†Sec. 8. Whenever any proceeding shall be commenced in any court of competent jurisdiction in this state by the attorney general or prosecuting attorney, against any corporation or corporations, individual or individuals, or association of individuals, or joint stock association or copartnership under the law against the formation and maintenance of pools, trusts of any kind, monopolies or confederations, combinations or organizations in restraint of trade, to dissolve the same or to restrain their formation or maintenance in this state, or recover the penalties in this act provided, then and in such case, if the attorney general or prosecuting attorney desires to take the testi-

on a day named; that all of said witnesses were hostile, and would not make fair answers to written interrogatories; that the facts as to the business methods of the corporation "relevant to the issue in this case and within the knowledge of the said persons aforementioned are such that your relator can have no accurate knowledge of same until opportunity is given him to interrogate the aforesaid persons, who have peculiar and sole knowledge thereof; and that it is impossible for your relator to so frame written interrogatories to said persons as to elicit the facts within their knowledge relevant to the issues in this case." As to the production of books and papers, it was stated that "said persons have in their possession and under their control, and at the Chicago office of the defendant company, numerous books, papers, and documents bearing upon the issues in this cause and relevant to the claim of the plaintiff herein; that the precise description and nature of these is peculiarly within the knowledge of the aforesaid persons; and that it is impossible for your relator to so frame written interrogatories and demands as to require the production of such books, papers, and documents as aforesaid as are relevant to the issues in this cause." In response to this motion the Hammond Company asked that the state be required to "set out specifically what she expects to prove by each witness she desires produced, and also to set out specifically a particular 338]*description of any books she desires produced by any of said witnesses, together

with the name of the witness who is to produce them, and that she be required to specifically state wherein any of said books so named are material to the issues in the case." The attorney general thereupon filed an affidavit, reciting that he was "at this time unable to designate and particularly point out the books, papers, and documents which will be required in evidence on the execution of the commission . . . that the contents and particular description of said books, papers, and documents are matters peculiarly within the knowledge of the defendant and the witnesses whose examination is prayed at said time and place, and that it is impossible and impracticable for me at this time to designate particularly the matters as to which each witness whose testimony is sought to be taken . . . can testify, or to frame interrogatories to such witnesses, or state at this time the substance of his evidence, for the reason that the matters as to which it is sought to examine said witnesses are matters touching the conduct and business of the defendant company and as to which the defendant and said witnesses have peculiar and sole knowledge." The motion to make the request more specific was overruled and an order was entered authorizing the designated commissioner to take the testimony of the witnesses named and to have produced before him by the Hammond Company "any books, papers, and documents in the possession or under the control of either of said persons, relating to the merits of said cause or to any defense therein," ac-

mony of any officer, director, agent, or employee of any corporation or joint stock association proceeded against, or, in case of a copartnership, any of the members of said partnership, or any employee thereof, in any court in which said action may be pending; and the individual or individuals whose testimony is desired are without the jurisdiction of this state, or reside without the state of Arkansas, then in such case the attorney general or prosecuting attorney may file in said court in term time, or with the judge thereof in vacation, a statement, in writing, setting forth the name or names of the persons or individuals whose testimony he desires to take, and the time when and the place where he desires said persons to appear; and thereupon the court or judge thereof shall make an order for the taking of said testimony of such person or persons, and for the production of any books, papers, and documents in his possession or under his control relating to the merits of any suit, or to any defense therein, and shall appoint a commissioner for that purpose, who shall be an officer authorized by law to take depositions in this state, and said commissioner shall issue immediately a notice, in writing, directed to the attorney or attorneys of record in said cause, or agent, or

officer, or other employee, that the testimony of the person named in the application of the attorney general or the prosecuting attorney is desired, and requesting said attorney or attorneys of record, or said officer, agent, or employee, to whom said notice is delivered, and upon whom the same is served, to have said officer, agent, employee, representative of said copartnership, or agent thereof, whose evidence it is desired to take, together with such books, papers, and documents, at the place named in the application of the attorney general or the prosecuting attorney, and at the time fixed in said application, then and there to testify: Provided, however, That such application shall always allow, in fixing said time, the same number of days' travel to reach the designated place in Arkansas that would now be allowed by law in case of taking depositions: Provided, also, In addition to the above-named time, six days shall be allowed for the attorney or attorneys of record, or the agent, officer, or employee on whom notice is served, to notify the person or persons whose testimony is to be taken. Service of said notice, as returned in writing, may be made by anyone authorized by law to serve a subpoena.

accompanied with the proviso "that at such examination the witnesses and books aforesaid shall not be required to be produced at any one time in such numbers as to interfere with the operation of the defendant's business." The order contained specific directions commanding the Hammond Company, through its officers or agents or attorney, to have the witnesses named present for examination, and to produce the books referred to in the order. To the entry of this order exception was duly reserved.

339] *The commissioner notified the Hammond Company to produce the witnesses named and the books and papers referred to at his office in Chicago on a designated day. The Hammond Company, through its attorneys, declined to comply, and stated, in writing that it could not concede the power of the court to make the order which it had made, and that, "on the contrary, it was of the opinion that the request calls upon it [the Hammond Company] to surrender rights in which it is protected by the Constitution of the United States and of the state of Arkansas that are too valuable to be surrendered."

Return, stating the refusal to produce, having been made to the court, the attorney general, under § 9 of the act of 1905, which is in the margin,† moved to strike out all 340] "answers, demurrers, *motions, replies, or other pleadings filed by the defendant in this cause, and render in favor of the state of Arkansas a default judgment in this case for \$10,000 as penalties for the violations of the act of the general assembly of the state of Arkansas, approved January 23, 1905, on the days and dates set forth in the complaint herein, and for all costs in this cause incurred." The Hammond Company, in response to the motion, set up the defense that to deny it the right to defend would

be a condemnation without a hearing, and a consequent denial of due process of law, in conflict with the 14th Amendment. The motion of the attorney general was granted, and a judgment for penalties amounting to \$10,000 was, as before stated, entered, which, on appeal, was affirmed by the supreme court. 81 Ark. 519, 100 S. W. 407, 1199.

On the general question of the meaning of the act of 1905 the court adhered to the interpretation given the act in *Hartford F. Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42, and also to the ruling in that case made concerning its validity, both as regards the Constitution of the state and the United States. After holding that the proceeding was not criminal, but was "purely a statutory action to recover the penalties of the statute for doing business in the state contrary to its terms," the court came to consider the objections urged to the validity of §§ 8 and 9. Passing on the contention that the order made under § 8 for the production of books, papers, and witnesses was so unlimited as to be repugnant to the state and Federal Constitutions, the subject was considered from a twofold aspect; first, the order for the production of the books and papers; and, second, that for the production of witnesses. As to the first, while conceding, for the sake of argument, that it might be that an order on a corporation, whether domestic or foreign, for the production of books and papers, could be framed in so unlimited a manner as to amount to a violation of a provision against unreasonable searches and seizures found in the state Constitution, it was held that that question was irrelevant, and not necessary to be decided. *The conclusion was reached be- 341 cause it was declared that, as the order called also for the production of witnesses, if there was a failure to comply with that portion

†Sec. 9. Whenever the persons mentioned in the preceding sections shall be notified, as above provided, to request any officer, agent, director, or employee to attend before any court or before any person authorized to take the testimony in said proceedings, and the person or persons whose testimony is requested, as above provided, shall fail to appear and testify and produce any books, papers, and documents they may be ordered to produce by the court, or the other officer authorized to take such evidence, then it will be the duty of the court, upon motion of the attorney general or prosecuting attorney, to strike out the answer, motion, reply, demurrer, or other pleading then or thereafter filed in said action or proceeding by the said corporation, joint stock association, or copartnership, whose officer, agent, director, or employee has neglected or failed to attend and testify and produce all books, papers, and documents he or they shall have been ordered to

produce in said action by the court or person authorized to take said testimony, and said court shall proceed to render judgment by default against said corporation, joint stock association, or copartnership: And it is further provided, That, in case any officer, agent, employee, director, or representative of any corporation, joint stock association, or copartnership in such proceeding, as heretofore mentioned, who shall reside or be found within this state, shall be subpoenaed to appear and testify or to produce books, papers, and documents, and shall fail, neglect, or refuse to do so, then the answer, motion, demurrer, or other pleading then and thereafter filed by said corporation, joint stock association, or copartnership in any such proceeding shall, on motion of the attorney general or prosecuting attorney, be stricken out and judgment in said cause rendered against said corporation, joint stock association, or copartnership.

of the order the judgment below was properly rendered. Considering the validity of the order for the production of the witnesses, and the contention that it was so arbitrary and unreasonable as to amount to a denial of due process of law, because it called upon the corporation to produce a number of witnesses simply upon the averment that they had some contract or fiduciary relation with the company, without at all considering its power to produce them, or affording to the corporation any compulsory process for requiring the witnesses to attend if they were unwilling to do so, the court, speaking of the statute, said:

"If these provisions mean that the corporation must be a policeman, and bring into court, on demand, its president, bookkeeper, or doorkeeper *vi et armis*, certainly it would be an unreasonable imposition. An analysis of the provisions, however, will not justify such construction. These sections evidently mean this, and nothing more: that the corporation shall, on demand, request any given officer, agent, or employee to be present at the time named for examination as a witness (and, in case of production of books and papers, that the given officer or agent produce the given books or papers), and, on a failure to comply with these requirements, that it be defaulted. Of course this necessarily contemplates an honest effort to produce the testimony called for. When that is made, then the statute is complied with; when it is not, as in this case, where the defendant corporation refused to obey any part of the order, then the statute is not complied with, and that brings up the gravest question of the case."

In holding that the provisions of § 9, authorizing the striking out of the pleadings of the defendant and rendering judgment against him, as by default, were valid, the court held that the conferring of such a power by the statute, and its exercise as manifested in the case before it, was not **repugnant** to either *the Constitution of the state or that of the United States. In reaching this conclusion the court, in substance, held that the ruling of this court in *Hovey v. Elliott*, 167 U. S. 416, 42 L. ed. 220, 17 Sup. Ct. Rep. 841, must be limited to a case where a court, in virtue alone of its asserted inherent power to punish for contempt, strikes an answer from the files and renders judgment as by default, and therefore did not embrace a case where such authority was exercised by a court in consequence of an express delegation by law of the power so to do. This limitation on the ruling in *Hovey v. Elliott* was deemed to be justified by a reference to and an analysis of the statutory law of the United States, which the court deemed conferred such power

upon the courts of the United States, as well as many state statutes, including those of Arkansas and various state decisions, all of which it was deemed established the existence of the legislative power to authorize a court to punish a defendant by striking his answer from the files, and, over his objection, rendering a judgment against him.

Condensing, though not changing, the substance of the assignments of error, in the light flowing from the review which we have made, we come to dispose of such assignments; not, however, following the precise order in which they are stated in the brief of counsel.

1st. Section 1 of the law of 1905 legislates concerning acts done beyond the limits of the state, and therefore takes property without due process of law, and deprives of the equal protection of the laws, contrary to the 14th Amendment.

But the premise upon which the proposition is based is imaginary, since it assumes that the statute does that which it has been conclusively determined by the court below it does not do. The interpretation which the court below gave to the statute was that it did not purport to forbid or affix penalties to acts done beyond the state, but that it simply forbade a corporation from continuing to do business within the state after it had done, either within or outside of the state, the enumerated acts. If the premise of the asserted proposition *be that even although the statute **ad-** [343] dressed itself exclusively to the doing of business within the state under the circumstances stated, it nevertheless exerted an extraterritorial power, because it restrained the continuance of the business within the state by a corporation which had done the designated acts outside of the state, we think the proposition without merit. As the state possessed the plenary power to exclude a foreign corporation from doing business within its borders, it follows that, if the state exerted such unquestioned power from a consideration of acts done in another jurisdiction, the motive for the exertion of the lawful power did not operate to destroy the right to call the power into play. This being true, it follows that, as the power of the state to prevent a foreign corporation from continuing to do business is but the correlative of its authority to prevent such corporation from coming into the state, unless, by the act of admission, some contract right in favor of the corporation arose, which we shall hereafter consider, it follows that the prohibition against continuing to do business in the state because of acts done beyond the state was none the

less a valid exertion of power as to a subject within the jurisdiction of the state.

In both the refusal to permit the coming into the state and the exclusion therefrom of a corporation previously admitted under the *circumstances stated, while it may be said that the acts done out of the state and their anticipated reflex result may have been the originating cause for the exertion of the lawful authority to refuse permission to come into the state, or to revoke such permission previously given, that fact is immaterial in a judicial inquiry as to the right either to refuse to give or to revoke a permit to do business within the state, since the power, and not the motive, is the test to be resorted to for the purpose of determining the constitutionality of the legislative action.

Although it be conceded that the provisions of the statute cannot, consistently with constitutional limitations, be applied to individuals, such concession would not cause the act to amount to a denial of the equal 344] protection of the laws. The *difference between the extent of the power which the state may exert over the doing of business within the state by an individual and that which it can exercise as to corporations furnishes a distinction authorizing a classification between the two. It is apparent that the court below, both in the Hartford Case and in this, by a construction which is here binding, treated the statute, in so far as its prohibitions were addressed to individuals, as separable from its requirements as to corporations, and, therefore, even though there was a want of constitutional power to include individuals within the prohibitions of the act, that fact does not affect the validity of the law as to corporations.

2d. The act as construed by the court below is repugnant to § 10 of article 1 of the Constitution of the United States, since the necessary effect of that construction is to impair the obligations of the contract which was created in virtue of the Constitution and laws of Arkansas by the permit which was issued.

By the Constitution and laws of the state of Arkansas it is said foreign corporations, when lawfully admitted to do business in the state, were entitled to rights equal to those enjoyed by domestic corporations. Possessing this right of equality, it is argued that a permit to do business could not be revoked for causes not made applicable to domestic corporations without impairing the obligations of the contract which arose from the permit. *American Smelting & Ref. Co. v. Colorado*, 204 U. S. 103, 51 L. ed. 393, 27 Sup. Ct. Rep. 198, 9 A. & E. Ann. Cas. 978. With this proposition in hand,—which is not denied by the state,—the ar-

gument insists that, as the statute does not forbid a domestic corporation from continuing to do business under a charter granted by the state, because it has done the acts specified in the statute, therefore a discrimination results in favor of domestic corporations. But, again, the contention rests upon an erroneous assumption as to the operation of the statute. We say this because, on the face of the statute, its prohibitions are made applicable to domestic and foreign corporations. The insistence that the result of the decision in this case, as well as of that made in the Hartford Case, is to give the statute *a controlling[345 construction, operating to exempt domestic corporations from its provisions, is unfounded. True, that both in the Hartford Case, as in this, the court below, in testing the question of power, considered solely the scope of the legislative authority over foreign corporations. But in so doing the court simply confined itself to the question before it, as in both cases the defendants were foreign corporations doing business under permit. Nothing in the general reasoning advanced by the court as to the power of the state over foreign corporations begets the thought that it was intended to decide that the express words of the statute concerning domestic corporations were meaningless or beyond the authority of the state to enact. While it is true that the reference made in the opinion in the Hartford Case to the platform of the dominant political party, which it was assumed shed light upon the true meaning of the act, indicates that the impelling motive in adopting the act of 1905 was to reach foreign corporations, this does not justify the inference that the act was not intended to govern domestic corporations doing like acts, but, on the contrary, tends to establish the existence in the legislative mind of the purpose not to discriminate in favor of domestic corporations, since the latter were expressly embraced in the statute.

The contention that to apply the law to domestic corporations would, as to such corporations, cause it to be repugnant to the contract clause of the Constitution, is without merit. The chartered right to do a particular business did not operate to deprive the state of its lawful police authority, and therefore the franchise to do the business was inherently qualified by the duty to execute the charter powers conformably to such reasonable police regulations as might thereafter be adopted in the interest of the public welfare. Besides, it is not disputed that the state, under its Constitution, had a reserve power to repeal, alter, and amend charters by it granted, and therefore, even if the impossible as-

sumption was indulged that the grant of the power to do business implied, in the absence of such reservation, the right to carry on the business in violation of a lawfully **346]***regulating statute, the existence of the reserve power leaves no semblance of ground for the proposition. The claim of an ir-repealable contract cannot be predicated upon a contract which is repealable. *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 644, 43 L. ed. 840, 843, 19 Sup. Ct. Rep. 530, 571. And no support for the contrary view arises because the Constitution of Arkansas exacted that the authority to repeal, alter, and amend should be exercised "in such manner, however, that no injustice be done to incorporators." The determination whether the power to repeal, alter, or amend was exerted in such a manner as to be unjust to incorporators was within the province of the state court to finally decide, unless that power was exerted in such an arbitrary manner as, irrespective of the contract clause, to deprive of some other and fundamental right which was within the protection of the Constitution of the United States.

3d. The action of the trial court in making the order to produce, and, on failure to comply therewith, striking the pleadings of the Hammond Company from the files, and rendering a judgment as by default, was void because repugnant to the equal protection and due process clauses of the 14th Amendment.

As the conduct of the trial court on the subjects with which this proposition is concerned conformed to the authority conferred by §§ 8 and 9 of the statute, it follows that the proposition is that those sections are repugnant to the 14th Amendment. The grounds which are made the basis of this proposition are numerous, and are stated in various forms not separated one from the other. We shall disentangle them and treat them separately, and thus consider and dispose of them all.

It is said, conceding that the power which § 8 confers could be exerted under just limitations, yet the order made, which was authorized by the statute, was so unlimited, so arbitrary and unjust, as to cause it to be wanting in due process. This rests upon the assumption that the order to produce the books and papers of the company and the witnesses was imperative, and did not consider the ability of the company to comply, furnished no compulsory process to com- **347]**pel obedience in case a *named witness refused to appear at the request of the company, and therefore left the company helpless and subject to pains and penalties for a failure to do that which it may not have been in its power to do. But again, the **53 L. ed.**

proposition rests upon the assumption that the statute and the order which conformed to it did that which the court below decided it did not do. Conceding, for the sake of the argument, that the broad provisions of § 8 and the general language of the order to produce might, on their face, be amenable to the criticism which the proposition involves, the statement we have previously made demonstrates that the court below, by a construction which is binding here, expressly decided that neither the statute nor the order were subject to the interpretation which the argument attributes to them. Indeed, the court impliedly conceded that if the statute and the order meant that which the argument contends they did mean, both the statute and the order would have been void. But, in intimating to that effect, it was expressly held that all the statute required was a bona fide effort to comply with an order made pursuant to its provisions, and therefore any reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order. As the Hammond Company absolutely declined to obey the order, and stood upon what it deemed to be its lawful rights and privileges, even if that course of conduct was taken because of a contrary conception as to the meaning of the statute, it is not within our province to afford relief because of an error of judgment in this respect. That is to say, we may not hold that the statute and order were arbitrary and unjust in the particulars asserted when it is conclusively determined that they do not have that effect.

It is insisted that the order to produce was so general and indefinite as to amount to an unreasonable search and seizure, and consequently was wanting in due process of law. But, conceding, for the sake of argument only, and not so deciding, that the due process clause of the 14th Amendment embraces in its generic terms a prohibition against unreasonable searches *and[**348** seizures a question hitherto reserved, under circumstances analogous to those here present, in *Consolidated Rendering Co. v. Vermont*, 207 U. S. 451, 42 L. ed. 327, 28 Sup. Ct. Rep. 178, we think the ruling made in that case establishes the unsoundness of the contention. We say this because it was in that case determined, in view of the visitatorial powers of a state over corporations doing business within its borders, and the right of the state to know whether the business of a corporation was being carried on in a lawful manner, that it was competent for the state to compel the production of the books and papers of the corporation in an

investigation to ascertain whether the laws of the state had been complied with. And of course such power embraces the authority to require the giving of testimony by the officers, agents, and other employees of the corporation for like and analogous purposes. It is true that the books and papers to which the order made in the cited case related were those of a foreign corporation doing business in Vermont, and which had been kept in the state, but had been taken therefrom. But we see no reason to hold that this case is not controlled by the principle applied in the Vermont case, because the books of the Hammond Company, which were called for, may not have been at any time kept within the state of Arkansas.

Nor do we think there is merit in the contention that the order to produce was wanting in due process because it was made in a pending suit and sought to elicit proof not only as to the liability of the company, but also the proof in the possession of the company relevant to its defense to the claim which the state asserted. As these subjects were within the scope of the visitatorial power of the state, and concerning which it had the right to be fully informed, the mere incident or purpose for which the lawful power was exerted affords no ground to deny its existence. In *Consolidated Rendering Co. v. Vermont*, the books and papers were required for an investigation before a grand jury concerning supposed misconduct of the corporation. The power to compel the production to ascertain whether wrong had been done, in the nature of things, as the greater 349]includes *the less, is decisive as to the right to exact the production for the purpose of proof in a pending cause. See *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370. If, as was in that case decided, the power of visitation could be exercised, even although it might lead to the production of incriminating evidence, merely because the order to produce in this case called for evidence in the possession of the corporation relevant to its defense did not affect the validity of the order.

The contention that because § 8 applies only to books and papers outside of the state, therefore it denies the equal protection of the laws, is not open, since it has been conclusively settled that, without denying the equal protection of the laws, regulations may be based upon the fact that persons or property dealt with are not within the territorial jurisdiction of the regulating authority. *Central Loan & T. Co. v. Campbell Commission Co.* 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346. Even if, as contended, the remedy given by the act for the production of books and papers and the examination of witnesses is con-

fined to corporations and joint stock associations, and does not extend to individuals, that fact also furnishes no ground for the proposition that a denial of the equal protection of the laws thereby resulted. The wider scope of the power which the state possesses over corporations and joint stock associations in and of itself affords a ground for the classification adopted.

Lastly, with much earnestness and elaboration, it is urged that the action of the court, authorized by § 9, in striking the answer from the files and rendering a judgment as by default, is conclusively demonstrated to have been a denial of due process of law by the ruling in *Hovey v. Elliott*, 167 U. S. 409, 42 L. ed. 215, 17 Sup. Ct. Rep. 841, and the previous cases in this court which were there cited and applied. The ruling in *Hovey v. Elliott* was that, to punish for contempt by striking an answer from the files and condemning, as by default, was a denial of due process of law, and therefore repugnant to the 14th Amendment. There the power to strike out and punish was exerted by the court, in virtue of what it assumed to be its inherent authority, and the occasion *which caused the[350 exercise of the assumed authority was the refusal of the defendant to comply with an order to pay into the registry of the court a sum of money which, it was held, had been illegally withdrawn, and the right to which was at issue in the suit. Merely because the power to strike out an answer and enter a default, which was exerted by the court below in this case, was authorized by the 9th section of the statute, furnishes no ground for taking this case out of the ruling in *Hovey v. Elliott*, if otherwise controlling. The fundamental guaranty of due process is absolute, and not merely relative. The inherent want of power in a court to do what was done in *Hovey v. Elliott* was in that case deduced from no especial infirmity of the judicial power to reach the result, but upon the broad conception that such power could not be called into play by any department of the government without transgressing the constitutional safeguard as to due process, at all times dominant and controlling where the Constitution is applicable. Indeed, in *Hovey v. Elliott*, the impotency of the legislative department to endow the judicial with the capacity to disregard the Constitution was emphasized. But, while this is true, the question yet remains, Is the doctrine of *Hovey v. Elliott* here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. That is to say, we must trace the power to its true source, and if, from do-

ing so, it results that the authority exerted flows from a reservoir of unquestioned power, it must follow that the action below was not unlawful, albeit in some narrower aspect that action might be considered as unlawful. The essential basis for the exercise of power, and not a mere incidental result, arising from its exertion, is the criterion by which its validity is to be measured. *Hovey v. Elliott* involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find 351] its sanction in the undoubted *right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, as the generating source of the power was the right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense. The want of power in the one case and its existence in the other are essential to due process, to preserve in the one and to apply and enforce in the other. In its ultimate conception, therefore, the power exerted below was like the authority to default or to take a bill for confessed because of a failure to answer, based upon a presumption that the material facts alleged or pleaded were admitted by not answering, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law.

As pointed out by the court below, the law of the United States, as well as the laws of many of the states, afford examples of striking out pleadings and adjudging by default for a failure to produce material evidence, the production of which has been lawfully called for. U. S. Rev. Stat. § 724, which was drawn from § 15 of the judiciary act of 1789 [1 Stat. at L. 82, chap. 20, U. S. Comp. Stat. 1901, p. 583], after conferring upon courts of law of the United

States the authority to require parties to produce books and writings in their possession or under their control which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceedings *in chancery, [352 expressly empowers such courts, if a plaintiff fails to comply with the order, to render a judgment of nonsuit, and, if a defendant fails to comply, "the court may, on motion, give judgment against him by default." From the time of this enactment, practically coeval with the Constitution, although controversies have arisen as to its interpretation, no contention, so far as we can discover, has ever been raised questioning the power given to render a judgment by default under the circumstances provided for in the statute. Its validity was taken for granted by the court, speaking through Mr. Chief Justice Taney, in *Thompson v. Selden*, 20 How. 194, 15 L. ed. 1001, and this was also assumed by the court, speaking through Mr. Justice Bradley, in *Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, where the effect of the constitutional guaranties embodied in the 4th and 5th Amendments was elaborately and lucidly expounded. It is unnecessary to cite the many cases in the lower Federal courts which manifest the same result, as they will be found collected in Gould & Tucker's Notes on the Revised Statutes, under § 724, and in the notes to the same section, contained in volume 3, Federal Statutes Annotated.

And, beyond peradventure, the general course of legislation and judicial decision in the several states indicates that it has always been assumed that the power existed to compel the giving of testimony or the production of books and papers by proper regulations prescribed by the legislative authority, and, for a failure to give or produce such evidence, the law might authorize a presumption in a proper case against the party refusing, justifying the rendering of a judgment by default, as if no answer had been filed. While it may be true that, in some of the state statutes passed on the subject, and in decisions applying them, some confusion may appear to exist, resulting from confounding the extent of the authority to punish as for a contempt and the right to engender a presumption relative to proof arising from a failure to give or produce evidence, it is accurate to say that, when viewed comprehensively, the statutes and decisions in effect recognize the difference between the two, and *therefore [353 may be substantially considered as but an exertion by the states of a like power to that which was conferred upon the courts

of the United States by the original judiciary act and by Revised Statutes, § 724.

Without referring in detail to the various statutes, which will be found collected as of the year 1896 in 6 Enc. Pl. & Pr. note 3, pp. 812 et seq., we content ourselves with saying that the laws of Indiana, Iowa, Mississippi, Massachusetts, Missouri, New Hampshire, Texas, and Washington aptly portray the subject. As illustrative, we refer specially to the statute of Missouri, which directs that when a party refuses to produce evidence or fails to attend to testify on a proper order, besides being punished as for a contempt, the court may strike out the answer filed on behalf of the defendant, etc. This distinction is also marked in the Indiana and Washington statutes. Although the statute of Mississippi, which authorizes, in the event of a failure to obey a proper order as to the production of evidence, the striking of an answer from the files and the entry of judgment by default, does not in terms refer the authority thus given to the legislative power to engender a presumption, the true source of the power was clearly pointed out in the concurring opinion of Whitfield, J. (now Chief Justice of the supreme court of Mississippi), in *Illinois C. R. Co. v. Sanford*, 75 Miss. 862, 23 So. 355, 942, and the distinction was made manifest between the power to create a presumption of fact and the want of authority as a mere punishment for contempt to deny a hearing, as ruled in *Hovey v. Elliott*. And the difference between the two is also elucidated in the opinion of the supreme court of the state of Washington in *Lawson v. Black Diamond Coal Min. Co.* 44 Wash. 26, 86 Pac. 1120, which interpreted and enforced a statute of the state of Washington, embraced in § 6013 and immediately antecedent sections of *Balinger's Annotated Codes and Statutes*.

As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the law-
354] making authority *to create a presumption in respect to the want of foundation of an asserted defense against a defendant who suppresses or fails to produce evidence when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation. In so deciding our conclusion is, of course, based upon the legality and sufficiency of the order to produce made under § 8 of the act, and, as our decision on that subject rests upon the extent of the visitatorial power which the state had the right to exercise over a corporation subject to its control,

our ruling as to the legality of the call under § 8 is confined to the case before us.

Affirmed.

The CHIEF JUSTICE and Mr. Justice Peckham dissent.

†GUSTAVE A. JAHN et al.,

v.

STEAMSHIP FOLMINA, William Van Eyken, Claimant.

(See S. C. Reporter's ed. 354-363.)

Evidence — burden of proof — exception in bill of lading.

1. A carrier by water is charged with the burden of proving that damage to a cargo from sea water was occasioned by the perils of the sea within an exception in the bill of lading against dangers and accidents of the seas.

[For other cases, see *Evidence*, 378-385, in *Digest Sup. Ct. 1908.*]

Cases certified — question bringing up whole case.

2. A question presented to the Federal Supreme Court by a certificate from a circuit court of appeals need not be answered where it does not propound a distinct issue of law, but, in effect, calls for a decision of the whole case.

[For other cases, see *Cases Certified*, 43-51, in *Digest Sup. Ct. 1908.*]

[No. 84.]

Argued January 21, 22, 1909. Decided February 23, 1909.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting questions as to whether damage to a cargo from sea water is of itself a sea peril, and whether the carrier is relieved from liability therefor by an exception in the bill of lading. The first question answered in the negative and the second not answered.

The facts are stated in the opinion.

Mr. Frederick M. Brown argued the cause, and, with Messrs. Wallace, Butler, & Brown, filed a brief for Jahn et al:

†This case is reported by the Official Reporter under the title of "The Folmina."

NOTE. — On loss or damage by perils of the sea—see notes to *Southerland-Innes Co. v. Thynas*, 64 C. C. A. 118, and *The Dunbritton*, 19 C. C. A. 465.

As to presumption and burden of proof respecting cause of loss or injury to goods shipped by vessel, and diligence or negligence of carrier—see note to *The Patria*, 68 C. C. A. 398;

On the definiteness of question to be certified—see note to *Waco Water & Light Co. v. Waco*, 31 L.R.A. 392.

The decision of this court in the case of *The G. R. Booth*, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9, is controlling.

See also *The Thrunscoe* [1897] p. 301.

Carriers should not escape liability for cargo damage without establishing clearly and satisfactorily the cause of damage and their right to exoneration.

The Mohler (*The Mollie Mohler v. Home Ins. Co.*) 21 Wall. 230, 233, 22 L. ed. 485, 486; *The Niagara v. Cordes*, 21 How. 7, 25; 16 L. ed. 41-47; *The Caledonia*, 157 U. S. 124, 144, 39 L. ed. 644, 650, 15 Sup. Ct. Rep. 537; *Forward v. Pittard*, 1 T. R. 27; *Riley v. Horne*, 5 Bing. 217; *The Edwin I. Morrison* (*Bradley Fertilizer Co. v. The Edwin I. Morrison*) 153 U. S. 214, 38 L. ed. 693, 14 Sup. Ct. Rep. 823; *The Mascotte*, 48 Fed. 119, 2 C. C. A. 399, 1 U. S. App. 251, 51 Fed. 605; *The Peter der Grosse*, 3 Asp. Mar. L. Cas. 195; *The Martha, Olcott*, 140, Fed. Cas. No. 9,145.

Once the carrier is able to show with the requisite degree of clearness that the damage is of an excepted character, the prevailing rule is that he need go no further to establish affirmatively that he was free from negligence in the premises; the shipper, in this event, having the burden of proving negligence.

Clark v. Barnwell, 12 How. 272, 13 L. ed. 985.

Nevertheless, there is a very respectable body of authority to the effect that even in this case it is contrary to public policy to impose upon the cargo owner a burden of proof which he is, from his inherent position, so ill adapted to bear.

Pittsburgh, C. C. & St. L. R. Co. v. Racer, 5 Ind. App. 209, 31 N. E. 853; *Tardos v. The Toulon*, 14 La. Ann. 432, 74 Am. Dec. 435; *J. Russell Mfg. Co. v. New Haven S. B. Co.* 50 N. Y. 121; *Mitchell v. Carolina C. R. Co.* 124 N. C. 236, 44 L.R.A. 515, 32 S. E. 671; *Pennsylvania R. Co. v. Miller*, 87 Pa. 395; *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55, 17 S. E. 512; *Alabama G. S. R. Co. v. Little*, 71 Ala. 611; *Central R. Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Louisville & N. R. Co. v. Thompson*, 13 Ky. L. Rep. 973; *Mahon v. The Olive Branch*, 18 La. Ann. 107; *Hinton v. Eastern R. Co.* 72 Minn. 339, 75 N. W. 373; *Southern Exp. Co. v. Seide*, 67 Miss. 609, 7 So. 547; *Crow v. Chicago & A. R. Co.* 57 Mo. App. 135; *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Turney v. Wilson*, 7 Yerg. 340, 27 Am. Dec. 515; *Brown v. Adams Exp. Co.* 15 W. Va. 812; *Kirst v. Milwaukee, L. S. & W. R. Co.* 46 Wis. 489, 1 N. W. 89; *Texas & P. R. Co. v. Richmond*, 94 Tex. 571, 63 S. W. 619.

53 L. ed.

Unexplained sea-water damage to cargo is not of itself a sea peril, however seaworthy the vessel may appear.

The Reeside, 2 Sumn. 567, Fed. Cas. No. 11,657; *The Warren Adams*, 20 C. C. A. 486, 38 U. S. App. 356, 74 Fed. 413; *Insurance Co. of N. A. v. Easton & M. Transp. Co.* 97 Fed. 653; *The Henry B. Hyde*, 32 C. C. A. 534, 61 U. S. App. 147, 90 Fed. 114; *The Lennox*, 90 Fed. 308; *The Patria*, 68 C. C. A. 397, 132 Fed. 972; *Richards v. Hansen*, 1 Fed. 54; *Bearse v. Ropes*, 1 Sprague, 331, Fed. Cas. No. 1,192; *The Zone*, 2 Sprague, 19, Fed. Cas. No. 18,220; *The Queen*, 78 Fed. 165; *The Lydian Monarch*, 23 Fed. 298; *The Compta*, 4 Sawy. 375, Fed. Cas. No. 3,069; *The Sloga*, 10 Ben. 315, Fed. Cas. No. 12,955; *The Phœnicia*, 90 Fed. 119, 40 C. C. A. 221, 99 Fed. 1005; *The Presque Isle*, 140 Fed. 205; *Hooper v. Rathbone*, Taney, 519, Fed. Cas. No. 6,676; *The Queen of the Pacific*, 75 Fed. 78.

The English decisions would not relieve the *Folmina* from explaining the entrance of sea water.

The Xantho, L. R. 12 App. Cas. 503; *Hamilton v. Pandorf*, L. R. 12 App. Cas. 518; *Blackburn v. Liverpool, B. & R. Pl. Steam Nav. Co.* [1902] 1 K. B. 290; *The Southgate* [1893] P. 329; *The Cressington* [1901] P. 152; *The Glendarroch* [1894] P. 226.

Absolute seaworthiness is something that all possible care and diligence may sometimes fail to secure; it is something the lack of which the most scrupulous examination may sometimes fail to disclose.

The Edwin I. Morrison (*Bradley Fertilizer Co. v. The Edwin I. Morrison*) 153 U. S. 199, 210, 38 L. ed. 688, 692, 14 Sup. Ct. Rep. 823; *The Carib Prince* (*Wuppermann v. The Carib Prince*) 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753.

The burden of proving seaworthiness is upon the carrier.

The Wildcroft (*W. J. McCahan Sugar Ref. Co. v. The Wildcroft*) 201 U. S. 378, 50 L. ed. 794, 26 Sup. Ct. Rep. 467.

While the discovery of defects may establish unseaworthiness, an unsuccessful attempt to discover defects cannot establish seaworthiness. The latter can only be inferred, for the purpose of judicial decision, from the circumstances of each case.

Steel v. State Line S. S. Co. L. R. 3 App. Cas. 72.

The carrier having the burden of explanation, the legal inference from failure to explain is that the sea water found entrance to the hold of the *Folmina* owing to some cause for which the carrier is legally liable.

Nelson v. Woodruff, 1 Black, 156, 160,

17 L. ed. 97-99; *The Warren Adams*, 20 C. C. A. 486, 38 U. S. App. 356, 74 Fed. 414.

The inference of unseaworthiness as the explanation of the entrance of sea water is not in the least inconsistent with the certificate of the circuit court of appeals, which refers to the *Folmina* as only apparently seaworthy. Even an unseaworthy vessel would be entitled to rely upon the protection of bill of lading exceptions, if it could be shown that there was no causal connection between the cargo damage and the unseaworthiness.

The Caledonia, 157 U. S. 124, 132, 136, 39 L. ed. 644, 646, 648, 15 Sup. Ct. Rep. 537; *Carver, Carr. by Sea*, § 17.

Mr. Frederick M. Brown also filed a separate brief for *Jahn et al*:

The protection of cargo interests against the evasion of liability by carriers is a part of the policy of this country.

a. Attempts to apply foreign law to negligence clauses:

Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 447, 32 L. ed. 788, 794, 9 Sup. Ct. Rep. 469.

b. Cargo owner's risk clause:

Compañía de Navegación v. Brauer, 168 U. S. 104, 123, 42 L. ed. 398, 406, 18 Sup. Ct. Rep. 12.

c. Limit of liability:

The Majestic, 166 U. S. 375, 386, 41 L. ed. 1039, 1043, 17 Sup. Ct. Rep. 597; *Calderon v. Atlas S. S. Co.* 170 U. S. 272, 282, 42 L. ed. 1033, 1036, 18 Sup. Ct. Rep. 588; *The Kensington*, 183 U. S. 263, 274, 46 L. ed. 190, 195, 22 Sup. Ct. Rep. 102.

d. Latest defect clauses:

The Carib Prince (Wupperman v. The Carib Prince) 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753.

e. Carrier's exoneration ineffective where liability asserted through a third party:

Erie R. Co. v. Erie & W. Transp. Co. 204 U. S. 220, 226, 51 L. ed. 450, 453, 27 Sup. Ct. Rep. 246; *The Chattahoochee*, 173 U. S. 540, 549, 43 L. ed. 801, 805, 19 Sup. Ct. Rep. 491.

f. Doubtful cases under the Harter act:

The Delaware, 161 U. S. 459, 470, 40 L. ed. 771, 775, 16 Sup. Ct. Rep. 516; *The Irrawaddy (Flint v. Christall)* 171 U. S. 187, 43 L. ed. 130, 18 Sup. Ct. Rep. 831; *International Nav. Co. v. Farr & B. Mfg. Co.* 181 U. S. 218, 45 L. ed. 830, 21 Sup. Ct. Rep. 591; *Knott v. Botany Worsted Mills*, 179 U. S. 69, 45 L. ed. 90, 21 Sup. Ct. Rep. 30; *The Germanic (Oceanic Steam Nav. Co. v. Aitken)* 196 U. S. 589, 49 L. ed. 610, 25 Sup. Ct. Rep. 317.

Although a carrier cannot avail himself of the Harter act without first showing diligence to make seaworthy, there is no such

condition precedent to invoking the protection of valid exceptions in the bill of lading. He must merely show a loss within the excepted peril, and not due to unseaworthiness.

Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 120 U. S. 166, 30 L. ed. 621, 7 Sup. Ct. Rep. 550; *The Caledonia*, 157 U. S. 124, 132, 136, 39 L. ed. 644, 646, 648, 15 Sup. Ct. Rep. 537.

Even had a state of actual seaworthiness been certified in the present case, this court would have been at liberty to disregard it if the certificate showed that actual seaworthiness was merely the inference of the lower court upon insufficient evidence.

The Edwin I. Morrison (Bradley Fertilizer Co. v. The Edwin I. Morrison) 153 U. S. 199, 207, 215, 216, 38 L. ed. 688, 693, 694, 14 Sup. Ct. Rep. 823; *The Southwark (Martin v. The Southwark)* 191 U. S. 1, 13, 48 L. ed. 65, 71, 24 Sup. Ct. Rep. 1.

The phrase "dangers and accidents of the seas and of navigation" means no more than "perils of the seas."

Carver, Carr. by Sea, § 84; *The G. R. Booth*, 171 U. S. 450, 452, 458, 43 L. ed. 234, 235, 239, 19 Sup. Ct. Rep. 9.

A sea peril is something "peculiar" to the seas; it does not include injury to a vessel by worms.

Garrison v. Memphis Ins. Co. 19 How. 312, 314, 315, 15 L. ed. 656, 657; *Merchants' Trading Co. v. Universal M. Ins. Co.* 2 Asp. Mar. L. Cas. 431, note; *Dudgeon v. Pembroke*, L. R. 9 Q. B. 596; *The Chasca*, L. R. 4 Adm. & Eccl. 446.

A sudden, unexplained disaster to a ship soon after sailing is not ordinarily attributed to a sea peril.

The Southwark (Martin v. The Southwark) 191 U. S. 1, 48 L. ed. 65, 24 Sup. Ct. Rep. 1.

Even were there a presumption of seaworthiness arising from the evidence in other respects (which there is not), the unexplained entrance of sea water into the *Folmina's* hold would rebut it.

Richelieu & O. Nav. Co. v. Boston M. Ins. Co. 136 U. S. 408, 428, 34 L. ed. 398, 405, 10 Sup. Ct. Rep. 934.

Among the grounds (said to be unsubstantial) for requiring a clear and satisfactory explanation of the cause of damage are the decisions of this court in:

Howland v. Greenway, 22 How. 491, 502, 16 L. ed. 391, 394; *The Edwin I. Morrison (Bradley Fertilizer Co. v. The Edwin I. Morrison)* 153 U. S. 199, 210, 211, 38 L. ed. 688, 692, 14 Sup. Ct. Rep. 823; *The Majestic*, 166 U. S. 375, 386, 41 L. ed. 1039, 1043, 17 Sup. Ct. Rep. 597; *The Southwark (Martin v. The Southwark)* 191 U. S. 1, 15, 16, 48 L. ed. 65, 72, 24 Sup. Ct. Rep. 1. See

also *The Reccside*, 2 Sumn. 575, Fed. Cas. No. 11,657.

Mr. J. Parker Kirlin argued the cause, and, with Messrs. John M. Woolsey and Charles R. Hickox, filed a brief for the *Folmina*:

The exception in the bill is not "of sea perils," but is of "dangers and accidents of the seas and of navigation." The latter exception is much broader in form, and apparently is broader in scope than the former.

"Peril;" "accident." Century Dict.

If, by some accident, the ship is not kept tight, and the water comes in and damages the cargo, that is damage by an accident or peril of the seas.

Blackburn v. Liverpool, B. & R. P. Steam Nav. Co. [1902] 1 K. B. 295.

Whatever mischief is occasioned to the cargo by the shipping of sea water is a loss occasioned by the perils of the seas.

Montoya v. London Assur. Co. 6 Exch. 451.

A damage to cargo by sea water, occurring in a seaworthy ship, without the fault of the officers or crew, and not arising from ordinary wear and tear, is "of an extraordinary nature," and within the exception.

Pandorf v. Hamilton, L. R. 16 Q. B. Div. 635, L. R. 12 App. Cas. 523; *Davidson v. Burnand*, L. R. 4 C. P. 122.

The exception "dangers and accidents of the seas and of navigation" is a much broader exception, and covers many contingencies which would not be covered by the phrase, "act of God."

Clark v. Barnwell, 12 How. 272, 13 L. ed. 935; *The Viscount*, 11 Fed. 169; *The Majestic*, 166 U. S. 375, 386, 41 L. ed. 1039, 1904, 17 Sup. Ct. Rep. 597.

The decisions have gone far beyond holding that it is necessary that there should be a severe storm or other extraordinary accident to constitute a danger or accident of the seas.

Garrigues v. Cox, 1 Binn. 598, 2 Am. Dec. 493; *Patrick v. Hallett*, 1 Johns. 241; *Starbuck v. Phenix Ins. Co.* 47 App. Div. 621, 62 N. Y. Supp. 264, affirmed in 166 N. Y. 593, 59 N. E. 1130; *Potter v. Suffolk Ins. Co.* 2 Sumn. 197, Fed. Cas. No. 11,339; *Bullard v. Roger Williams Ins. Co.* 1 Curt. C. C. 148, Fed. Cas. No. 2,122; *Hooper v. Rathbone*, Taney, 519, Fed. Cas. No. 6,676.

The meaning of the words "a loss by a danger or accident of the seas or of navigation," or "by a peril of the sea," is the same in a bill of lading as in a policy of insurance on goods. The carrier's negligence, or the unseaworthiness of his ship, may exclude the operation of the exception, 53 L. ed.

while negligence contributing to the loss would not be a defense to an underwriter; but this result does not flow from any different meaning of the same words occurring in two maritime instruments.

The G. R. Booth, 171 U. S. 450, 459, 43 L. ed. 234, 19 Sup. Ct. Rep. 9.

In the present case the loss would be an accident of the seas or of navigation, whether the words appear in a policy or in a bill of lading.

Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co. 120 U. S. 166, 30 L. ed. 621, 7 Sup. Ct. Rep. 550; *The Xantho*, L. R. 12 App. Cas. 503; *Pandorf v. Hamilton*, L. R. 16 Q. B. Div. 633, L. R. 12 App. Cas. 518; *Blackburn v. Liverpool, B. & R. P. Steam Nav. Co.* [1902] 1 K. B. 290; *The Southgate* [1893] P. 329; *The Cressington* [1891] P. 152; *The Glendarroch* [1894] P. 226; *The Exe*, 6 C. C. A. 410, 14 U. S. App. 626, 57 Fed. 399; *The Castleventry*, 69 Fed. 475, note; *Davidson v. Burnand*, supra; *Thames & M. Marine Ins. Co. v. Hamilton*, L. R. 12 App. Cas. 492; *The Ontario*, 37 Fed. 225; *The G. R. Booth*, supra.

Mr. Justice White delivered the opinion of the court:

Upon the hearing of an appeal from a decree of the district court, eastern district of New York, dismissing a libel, the circuit court of appeals for the second circuit certified to this court for decision, pursuant to § 6 of the judiciary act of 1891 [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549], the following questions:

1. Whether damage to the cargo of an apparently seaworthy ship, through the unexplained admission of sea water, in the absence of any proof of fault on the part of the officers or crew of the ship, is of itself a sea peril within the meaning of an exception in a bill of lading exempting the carrier from "the act of God . . . loss or damage from . . . explosion, heat, or fire on board . . . risk of craft or hulk or transshipment, and all and every the dangers and accidents of the seas, rivers, and canals and of navigation of whatever nature or kind."

2. Whether the ship is relieved from liability in consequence of said exception?

The facts upon which the questions arose were thus stated in the certificate:

The steamship *Folmina* sailed from Kobe, Japan, for New York with a large shipment of rice on board in No. 3 hold, under a bill of lading which contained the exception set out in the first of the foregoing questions, and also a provision that the ship "is not liable for sweat, rust, decay, vermin, rain, or spray."

*The rice was in good order when [360

put on board, but, when discharged in New York, a large part of it stowed on the starboard side of the hold was found damaged. The area of injury was downward from the first six tiers of bags to the bottom of the hold, which was dry, forward from about the after end of the hatchway nearly to the bulkhead, and inboard about three or four bags. The damage was caused by water and consequent heat.

A majority of the court are satisfied that the damage was caused by sea water, and that it was not shown that the vessel encountered sufficient stress of weather to warrant the inference that it came in because of the action of external causes. There was no evidence tending to show any negligence, fault, or error on the part of the ship's officers or crew; the cargo was well stowed and ventilated.

The *Folmina* was a steel steamship of the highest class in Lloyd's register. Before starting for Japan she was in dry dock at New York and was there surveyed by Lloyd's surveyor. Some time before she had been in dry dock at Cardiff, where some repairs were made to the rudder, rudder quadrant, and a ventilator. The master testified to the general good condition of the steamer at the time she sailed from Kobe.

During and after the delivery of the cargo the main deck, the between deck, the pipes leading to or connected with No. 3 hold, and the shell plating in the wing of No. 3 hold were carefully examined by the officers of the ship, by surveyors representing the libellants and their underwriters, and it was afterwards examined by competent and experienced surveyors representing both parties. The decks, hull, side plating, and rivets of the ship were found to be sound, intact, and free from leaks. No evidence (other than the mere circumstance that the damage was by sea water, if that be considered evidence) was found that there had been leaks in part of the frame, structure, side plating, riveting, pipes, or appurtenances of the ship, through which water might have reached that part of No. 3 hold where the damage was done. No adequate [361] means of access of sea *water were found, nor any defect in the steamer, which then appeared to be seaworthy.

The answer to be given to the first question will be fixed by determining upon whom rests the burden of proof to show the cause of the damage, when goods which have been received by a carrier in good order are by him delivered in a damaged condition.

As said in *Liverpool & G. W. S. S. Co. v. Phenix Ins. Co.* 129 U. S. 397, 437, 32 L. ed. 788, 790, 9 Sup. Ct. Rep. 469, 470:

"By the settled law, in the absence of some valid agreement to the contrary, the

owner of a general ship, carrying goods for hire, whether employed in internal, in coasting, or in foreign commerce, is a common carrier, with the liability of an insurer against all losses, except only such two irresistible causes as the act of God and public enemies. *Molloy, De Jure Maritimo*, bk. 2, chap. 2, § 2; *Bacon, Abr. "Carrier."* A; *Barclay v. Cuculla y Gana*, 3 Dougl. K. B. 389; 2 Kent, Com. 598, 599; *Story, Bailm.* § 501; *The Niagara v. Cordes*, 21 How. 7, 23, 16 L. ed. 41, 46; *The Lady Pike (Germania Ins. Co. v. The Lady Pike)* 21 Wall. 1, 14, 22 L. ed. 499, 503."

And as observed in the same case:

"Special contracts between the carrier and the customer, the terms of which are just and reasonable, and not contrary to public policy, are upheld; such as those exempting the carrier from responsibility for losses happening from accident, or from dangers of navigation that no human skill or diligence can guard against."

It was long since settled in *Clark v. Barnwell*, 12 How. 272, 13 L. ed. 985, that where goods are received in good order on board of a vessel under a bill of lading agreeing to deliver them, at the termination of the voyage, in like good order and condition, and the goods are damaged on the voyage, in a proceeding to recover for the breach of the contract of affreightment, after the amount of damage has been established, the burden lies upon the carrier to show that it was occasioned by one of the perils for which he was not responsible. But, as illustrated in the case of *The G. R. Booth*, 171 U. S. 450, 43 L. ed. 234, 19 Sup. Ct. Rep. 9, proof merely of damage to cargo by sea water does not necessarily tend to establish that such damage *was caused [362] by a peril or danger of the seas. In that case the facts were that the explosion of a case of detonators, which were part of a cargo, burst open the side of the ship below the water line, and the sea water, rapidly flowing in through the opening made by the explosion, injured the plaintiff's sugar. It was held that although the explosion and the inflow of the water were concurrent causes of the damage, yet "the explosion, and not the sea water, was the proximate cause of damage, and that this damage was not occasioned by the perils of the sea within the exceptions in the bill of lading." As well observed by counsel in the argument at bar, the efficient cause of the damage sustained by the rice on board the *Folmina* must be sought in those conditions or events which caused or permitted the entrance of sea water. It cannot in reason be said that sea water was the efficient, the proximate cause of the cargo damage, because no other cause for that damage has been disclosed.

As there must have been an efficient cause permitting the sea water to enter, so long as that cause remains undisclosed it cannot be said that the damage has been shown to have resulted from causes within the scope of a sea peril. Of course, where goods are delivered in a damaged condition plainly caused by breakage, rust, or decay, their condition brings them within an exception exempting from that character of loss, as the very fact of the nature of the injury shows the damage to be *prima facie* within the exception, and hence the burden is upon the shipper to establish that the goods are removed from its operation because of the negligence of the carrier. But, in a case like the one before us, where showing an injury by sea water does not, in and of itself, operate to bring the damage within the exception against dangers and accidents of the sea, it follows that it is the duty of the carrier to sustain the burden of proof by showing a connection between damage by the sea water and the exception against sea perils. For the distinction between the two, see *The Henry B. Hyde*, 32 C. C. A. 534, 61 U. S. App. 147, 90 Fed. 114, 116; *The Lennox*, 90 Fed. 308, 309; *The Patria*, 68 C. C. A. 397, 132 Fed. 971, 972.

363] *The inability of the court below to determine the cause of the entrance of the sea water would imply that the evidence did not disclose in any manner how the sea water came into the ship. In other words, while there was a certainty from the proof of a damage by sea water, there was a failure of the proof to determine whether the presence of the sea water in the ship was occasioned by an accident of the sea, by negligence, or by any other cause. Manifestly, however, the presence of the sea water must have resulted from some cause, and it would be mere conjecture to assume simply from the fact that damage was done by sea water that therefore it was occasioned by a peril of the sea. As the burden of showing that the damage arose from one of the excepted causes was upon the carrier, and the evidence, although establishing the damage, left its efficient cause wholly unascertained, it follows that the doubt as to the cause of the entrance of the sea water must be resolved against the carrier. *The Edwin I. Morrison*, (*Bradley Fertilizer Co. v. The Edwin I. Morrison*) 153 U. S. 199, 212, 38 L. ed. 688, 692, 14 Sup. Ct. Rep. 823. And see further the following cases, applying the principle just stated, and holding that because the damage to cargo was shown to have been occasioned by sea water, without any satisfactory proof as to the cause of its presence, in view of the burden resting upon the carrier, conjecture would not be permitted to take the place of proof: *The Sloga*,

53 L. ed.

10 Ben. 315, Fed. Cas. No. 12,955; *The Compta*, 4 Sawy. 375, Fed. Cas. No. 3,069; *Bearse v. Ropes*, 1 Sprague, 331, Fed. Cas. No. 1,192; *The Zonc*, 2 Sprague, 19, Fed. Cas. No. 18,220; *The Svend*, 1 Fed. 54; *The Centennial*, 7 Fed. 601; *The Lydian Monarch*, 23 Fed. 298; *The Queen*, 78 Fed. 155, 165, 168, affirmed in 36 C. C. A. 135, 94 Fed. 180, 196; *The Phœnicia*, 90 Fed. 116, 119, 40 C. C. A. 221, 99 Fed. 1005; *Insurance Co. of N. A. v. Easton & M. Transp. Co.* 97 Fed. 653; *The Presque Isle*, 140 Fed. 202, 205.

So far as the second question is concerned, it does not propound a distinct issue of law, but, in effect, calls for a decision of the whole case, and therefore need not be answered. *Chicago, B. & Q. R. Co. v. Williams*, 205 U. S. 444, 452, 51 L. ed. 875, 878, 27 Sup. Ct. Rep. 559, and cases cited.

The first question is answered "No," and the second is not answered.

* D. G. FRITZLEN, Edna P. Fritzlen, [364
and W. H. Weldon, Plffs. in Err.,
v.

BOATMEN'S BANK.

(See S. C. Reporter's ed. 364-374.)

Removal of causes — effect of remanding — second application to remove.

1. An order remanding a cause to the state court whence it was removed does not control the right to make a second application for removal if it results from the subsequent pleadings or the conduct of the parties that the cause becomes a removable one. [For other cases, see *Removal of Causes*, XI. in *Digest Sup. Ct. 1908.*]

Removal of causes — effect of remanding — second application to remove.

2. Changes in the pleadings in an action to foreclose a mortgage after the cause has been remanded to the state court whence it had been removed, which show the untruth of the averment in the petition of the junior character of another mortgage held by a foreign corporation which was made a party defendant, and the existence of a separable controversy between such corporation and the other parties, who are all citizens of the

NOTE. — As to removal of causes in cases of separable controversy—see notes to *Miller v. Clifford*, 5 L.R.A.(N.S.) 50; *Robbins v. Ellenbogen*, 18 C. C. A. 86; *Meeke v. Valletown Mineral Co.* 35 C. C. A. 155; *Sloane v. Anderson*, 29 L. ed. U. S. 899; *Merchants' Cotton Press & Storage Co. v. Insurance Co. of N. A.* 38 L. ed. U. S. 195; *Butler v. National Home*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

On fraudulent joinder to prevent removal of cause—see note to *Offner v. Chicago & E. R. Co.* 78 C. C. A. 362.

state, are sufficient to justify the granting of a second application for removal.

[For other cases, see Removal of Causes, XI. in Digest Sup. Ct. 1908.]

Removal of causes — separable controversy.

3. A separable controversy exists, removable from a state court to a Federal court by a foreign corporation, joined as a party defendant to a suit to foreclose a mortgage, where both mortgagor and mortgagee, who are citizens of the state, unite in attacking the validity of a prior mortgage in favor of such corporation on the ground that it was doing business without complying with the state laws, and that the note secured thereby embraced charges exacted because of an illegal combination in restraint of trade.

[For other cases, see Removal of Causes, 109-132, in Digest Sup. Ct. 1908.]

Removal of causes — time for filing petition.

4. A petition to remove a cause from a state to a Federal court is in time when filed as soon as the petitioner learns of the filing, without notice, of additional pleadings in the state court, the effect of which is to disclose a removable controversy.

[For other cases, see Removal of Causes, VII. a, in Digest Sup. Ct. 1908.]

[No. 99.]

Argued January 28, 29, 1909. Decided February 23, 1909.

IN ERROR to the Supreme Court of the State of Kansas to review a judgment which reversed a judgment of the District Court of Clark County, in that state, in an action to foreclose a mortgage, rendered after denying an application to remove the cause to a Federal court. Affirmed.

See same case below, 75 Kan. 479, 89 Pac. 915.

The facts are stated in the opinion.

Mr. D. R. Hite argued the cause, and, with Messrs. H. J. Bone and F. C. Price, filed a brief for plaintiffs in error:

The jurisdiction of this court is almost too clear to require argument.

Nutt v. Knut, 200 U. S. 12-19, 50 L. ed. 348-352, 26 Sup. Ct. Rep. 216; Illinois C. R. Co. v. McKendree, 203 U. S. 514-525, 51 L. ed. 298-303, 27 Sup. Ct. Rep. 153; Rec- tor v. City Deposit Bank, 200 U. S. 405-412, 50 L. ed. 527-529, 26 Sup. Ct. Rep. 289; Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238.

When the bank asked for "judgment and that it may go hence without day, with its costs," it asked for such judgment as would be consistent with the ease made by its answer; and when Fritzlen answered this pleading he intended to contest the right of the bank to have such a "judgment" against him.

Moore v. Ogden, 35 Ohio St. 430; Enc. Pl. & Pr. pp. 776, 810; Foote v. Sprague, 13 Kan. 155; Hiatt v. Parker, 29 Kan. 765.

It is the settled rule in chancery that adverse interests of codefendants, necessary parties to the suit, may be passed upon and determined; and that, if a necessary party has an opportunity to be heard and an opportunity to assert his rights, and fails to assert them, he is concluded by the decree, whether the pleading of a codefendant affecting his interests is in the form of a cross petition, or otherwise.

Hapgood v. Ellis, 11 Neb. 131, 7 N. W. 845; Corcoran v. Chesapeake & O. Canal Co. 94 U. S. 741, 24 L. ed. 190; Waldo v. Waldo, 52 Mich. 91, 17 N. W. 709; National Marine Bank v. Heller, 94 Md. 213, 50 Atl. 523; Louis v. Brown Twp. 109 U. S. 167, 27 L. ed. 893, 3 Sup. Ct. Rep. 92.

The matters alleged in Fritzlen's answer did concern the subject of the action, and were responsive to the allegations in the bank's answer.

State v. Wilson, 73 Kan. 343, 117 Am. St. Rep. 479, 80 Pac. 639, 84 Pac. 737; Scantlin v. Allison, 12 Kan. 85; Gardner v. Risher, 35 Kan. 93, 10 Pac. 584; Clement v. Field, 147 U. S. 467, 37 L. ed. 244, 13 Sup. Ct. Rep. 358.

Where a nonresident defendant insists upon a right of removal on the ground that a resident defendant has been joined for the fraudulent purpose of preventing removal of the cause to a Federal court, the allegations in the petition for removal, taken in connection with the record as it then exists, must clearly disclose sufficient facts to enable the Federal court, on demurrer, to conclude, as a matter of law, that there has been such joinder for such fraudulent purposes.

Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 202, 24 L. ed. 658.

Fraud is a conclusion of law from facts stated; and it is a well-settled rule of pleading that facts, and not legal conclusions, are to be applied. Mere general assertions of fraud or the fraudulent conduct of a party, without the facts, do not constitute statements upon which the court can pronounce judgment.

9 Enc. Pl. & Pr. pp. 687, 688; Fogg v. Blair, 139 U. S. 118-127, 35 L. ed. 104-107, 11 Sup. Ct. Rep. 476; Van Weel v. Winston, 115 U. S. 228, 237, 29 L. ed. 384, 6 Sup. Ct. Rep. 22; Ambler v. Choteau, 107 U. S. 586-591, 27 L. ed. 322-324, 1 Sup. Ct. Rep. 556.

We must deal with a situation where a nonresident charges fraudulent joinder in his petition for removal, but admits that the plaintiff has a good cause of action against the resident defendant.

Deere v. Chicago, M. & St. P. R. Co. 85 Fed. 876.

Federal jurisdiction cannot be affected by the motive of a party who brings a suit in a United States court.

Lehigh Min. & Mfg. Co. v. Kelly, 160 U. S. 327, 40 L. ed. 444, 16 Sup. Ct. Rep. 307; M'Donald v. Smalley, 1 Pet. 620-624, 7 L. ed. 287-289; Smith v. Kernochen, 7 How. 216, 12 L. ed. 673.

Even if Fritzlen's answer be considered as a cross bill, still it could not have the effect of changing the case made by Weldon's original petition. A cross bill is a mere auxiliary suit and a dependency of the original.

Cross v. De Valle, 1 Wall. 5, 17 L. ed. 515; Ex parte South & North Ala. R. Co. 95 U. S. 221-225, 24 L. ed. 355-357; Maish v. Bird, 48 Fed. 607; Ayers v. Chicago, 101 U. S. 184, 25 L. ed. 838; Donohoe v. Mariposa Co. 5 Sawy. 163, Fed. Cas. No. 3,989.

If Fritzlen's answer be considered as setting up a counterclaim, then it could not survive a removal of the cause to the Federal court.

Brande v. Gilchrist, 18 Fed. 465.

Final orders remanding causes are conclusive.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

Mr. James S. Botsford argued the cause, and, with Messrs. Buckner F. Deatherage and Odus G. Young, filed a brief for defendant in error:

The bank was improperly and illegally made a party to this suit, if it be considered a suit to foreclose junior mortgages.

Boatmen's Bank v. Fritzlen, 68 C. C. A. 297, 135 Fed. 659.

The rules as to parties in suits in equity have always been different from the rules as to parties in law actions and the rule of this court long since made as to removals in suits in equity, unlike its rule as to removals in law actions, requires the Federal court, on the hearing of a motion to remand in this class of cases, to disregard the action of the pleader and his arrangement of the parties, and to examine and scrutinize the entire record in the case in connection with the removal petition, with the view of determining not only what is the true and real controversy or controversies in the case, but the relations of the several parties thereto, and whether the controversy or controversies in the case are between citizens of different states.

Removal Cases, 100 U. S. 457, 25 L. ed. 593; Pacific R. Co. v. Ketchum, 101 U. S. 289, 25 L. ed. 932; Harter Twp. v. Kernochan, 103 U. S. 562, 26 L. ed. 411; Evers v. Watson, 156 U. S. 527, 39 L. ed. 520, 15 53 L. ed.

Sup. Ct. Rep. 430; Dawson v. Columbia Ave. Sav. Fund Title & T. Co. 197 U. S. 178, 49 L. ed. 713, 25 Sup. Ct. Rep. 420.

Whether the order to remand on the bank's first petition was rightly or wrongly made, still the case was thereafter removable on the second petition and bond, if the changes made after the remand made it a removable case.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; Cuyler v. Smith, 78 Ga. 662, 3 S. E. 408; Huskins v. Cincinnati, N. O. & T. P. R. Co. 3 L.R.A. 545, 37 Fed. 504; Evans v. Dillingham, 43 Fed. 177; Yarde v. Baltimore & O. R. Co. 57 Fed. 915; Cookerly v. Great Northern R. Co. 70 Fed. 277; Bailey v. Mosher, 95 Fed. 223; Fogarty v. Southern P. Co. 121 Fed. 941; Black's Dillon, Removal of Causes, §§ 151-163; Dudley v. Illinois C. R. Co. 29 Ky. L. Rep. 1029, 13 L.R.A.(N.S.) 1186, 96 S. W. 835; Underwood v. Illinois C. R. Co. 31 Ky. L. Rep. 595, 103 S. W. 322; Clinger v. Chesapeake & O. R. Co. 33 Ky. L. Rep. 86, 15 L.R.A.(N.S.) 998, 109 S. W. 315.

The removal on the second removal petition was not only proper because of Fritzlen's two new causes of action for damages set up in his answer, but also because of his cause of action to adjudge the bank's mortgages void, the full nature of which, as a removable controversy, was purposely concealed until after the remand, and not disclosed until the filing of Fritzlen's answer and Weldon's reply.

Dudley v. Illinois C. R. Co.; Underwood v. Illinois C. R. Co.; and Clinger v. Chesapeake & O. R. Co.,—supra.

Since, in this case, the substantive ground of diversity of citizenship existed, the question of time of presenting the second removal petition, or of the particular court to which the removal should go, were mere model or formal matters, which defendant in error might waive.

Re Moore, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706; Ex parte Nebraska, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581.

The writ of error herein should be dismissed for want of jurisdiction.

Cooley, Const. Lim. 7th ed. p. 31; Gordon v. Caldeleugh, 3 Cranch, 268, 2 L. ed. 436; McDonogh v. Millaudon, 3 How. 693, 11 L. ed. 787; Fulton v. M'Affee, 16 Pet. 149, 10 L. ed. 918; Burke v. Gaines, 19 How. 388, 15 L. ed. 655; Hale v. Gaines, 22 How. 144, 16 L. ed. 264; Reddall v. Bryan, 24 How. 420, 16 L. ed. 740; Roosevelt v. Meyer, 1 Wall. 512, 17 L. ed. 500; Ryan v. Thomas, 4 Wall. 603, 18 L. ed. 460; Winona & St. P. R. Co. v. Plainview, 143 U. S. 390, 391, 36 L. ed. 199, 200, 12 Sup. Ct. Rep. 530;

Schuyler Nat. Bank v. Bollong, 150 U. S. 85, 88, 37 L. ed. 1008, 1009, 14 Sup. Ct. Rep. 24; California Powder Works v. Davis, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Palmer v. Hussey, 119 U. S. 96, 98, 30 L. ed. 362, 363, 7 Sup. Ct. Rep. 158; McCormick v. Market Nat. Bank, 165 U. S. 546, 41 L. ed. 820, 17 Sup. Ct. Rep. 433; Conde v. York, 168 U. S. 650, 42 L. ed. 613, 18 Sup. Ct. Rep. 234; Jersey City & B. R. Co. v. Morgan, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276; 2 Desty, Fed. Proc. 9th ed. p. 766, § 223; 4 Fed. Stat. Anno. pp. 467-481; Linton v. Stanton, 12 How. 423, 13 L. ed. 1050; Manning v. French, 133 U. S. 186, 33 L. ed. 582, 10 Sup. Ct. Rep. 258; Giles v. Little, 134 U. S. 645, 33 L. ed. 1062, 10 Sup. Ct. Rep. 623; Missouri ex rel. Carey v. Andriano, 138 U. S. 496, 34 L. ed. 1012, 11 Sup. Ct. Rep. 385; McNulta v. Lochridge, 141 U. S. 327, 35 L. ed. 796, 12 Sup. Ct. Rep. 11; Ludeling v. Chaffe, 143 U. S. 301, 36 L. ed. 313, 12 Sup. Ct. Rep. 439; Strader v. Baldwin, 9 How. 261, 13 L. ed. 130; Texas & P. R. Co. v. Johnson, 151 U. S. 81, 38 L. ed. 81, 14 Sup. Ct. Rep. 250; De Lamar's Nevada Gold Min. Co. v. Nesbitt, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; Thayer, Fed. Jur. §§ 54, 55, pp. 40, 41; Baker v. Baldwin, 187 U. S. 61, 47 L. ed. 75, 23 Sup. Ct. Rep. 19.

Mr. Justice White delivered the opinion of the court:

On the 23d of July, 1903, in a court of the state of Kansas, William H. Weldon, a 365]citizen of that state, sued *D. G. Fritzlen and his wife, Edna, also such citizens, and the Boatmen's Bank, a corporation organized under the laws, and a citizen of, Missouri. The cause of action against the Fritzlens was a note for \$3,750, dated July 2, 1903, maturing in ten days, alleged to be secured by mortgages covering described real estate and certain live stock. The bank was made a defendant upon the averment that it claimed to have a mortgage on the real estate and personal property which secured the note sued on, and this alleged mortgage was asserted to be illegal and void, and, in any event, to be "junior and subordinate to the right, title, interest, and lien of this plaintiff." Judgment for the amount of the note, with interest, was prayed, as also that the mortgage securing the same be decreed to be a first and prior lien over all others on the property; that so much of the property as was neces-

sary be sold to satisfy the judgment; and that "the pretended claim, lien, and interest of the said defendant the Boatmen's Bank be declared to be illegal and void." Summons by publication was made, calling upon the bank to answer before September 4, 1903. On July 30 Weldon applied for a temporary injunction, preventing the defendants, pending the suit, from removing any of the property beyond the jurisdiction of the court, and a restraining order was allowed. On August 13, 1903, the bank demurred to the petition, because facts adequate to establish that the mortgage by it held was invalid were not averred, and because two distinct causes of action were unlawfully joined,—the one to enforce the alleged mortgage against the Fritzlens, and the other assailing the rights of the bank. On the day the demurrer was filed, the bank, giving the necessary bond, asked removal of the cause to the circuit court of the United States for the district of Kansas, on the ground that the controversy as to the validity of its mortgage was separable from the controversy concerning the enforcement of the alleged mortgage against the Fritzlens, and, additionally, because of local prejudice. On September 14 the circuit court of the United States, presided over by Lochren, J., overruled motions to remand made *by Fritzlen and Weldon, the court[366 basing its action upon the separable nature of the controversies, and not considering the ground of local prejudice, and on that day the court dissolved the restraining order previously allowed by the state court. A copy of the order refusing to remand was filed in the state court. On the 9th of October, 1903, in the United States district court for the district of Kansas, the bank brought an action of replevin for the possession of the personal property embraced in its mortgage, and the marshal, under a writ of replevin, took and delivered the property to the bank. More than six months after the order refusing to remand, the circuit court of the United States for the district of Kansas, presided over by Pollock, J., granted a motion of Weldon to remand the cause to the state court. In making this order the court considered that the prior refusal to remand was not binding upon it, because it deemed the question of jurisdiction to be always open, and it was its plain duty to decline to take jurisdiction over a cause if the power to entertain it did not obtain. 128 Fed. 608.

Thereupon the bank, in the state court, on May 14, 1904, withdrew its demurrer and answered. Besides denying the averments of Weldon's petition, it was alleged that the bank was the holder for value of

a note of Fritzlen for \$32,920.15, dated November 30, 1901, and secured by mortgage on the personal and real property referred to in the petition of Weldon, the mortgage having been recorded on December 6, 1901. It was averred that the lien of the bank was paramount to any lien resulting from the Weldon mortgage. The prayer was only this: "Wherefore, having fully answered, said Boatmen's Bank prays judgment, and that it may go hence without day," and with costs in its favor. About ten days after, the Fritzlens applied to the state court for an order directing the bank to restore to them the personal property taken under the writ of replevin. The motion stated the prior issue of a restraining order; recited the facts as to the refusal to remand by Lochren, J., the bringing of the 367]replevin suit, and the subsequent *remanding of the cause under the order of Pollock, J. It was recited that the replevin suit had been dismissed for want of jurisdiction by the circuit court of the United States. Upon this motion, on the same day, the court directed the return of the property, or, if sold, the deposit of the proceeds in a designated bank. As the effect of this order and the subsequent procedure concerning it is not relevant to the question which we are called upon to decide, it is not necessary to further refer in detail to the subject. Suffice it to say that the bank thereafter moved to set aside the order on the ground, among others, that the restraining order had been set aside by the circuit court of the United States while the case was there pending, and that, although the replevin suit had been dismissed for want of jurisdiction, the question of the rightfulness of the dismissal was pending before the circuit court of appeals for the eighth circuit.

On the 26th day of May, 1904, Fritzlen answered the petition of Weldon by admitting the debt and mortgage, but charging that all the interest claimed was not due. The answer then proceeded to set out matters which were alleged to be Fritzlen's "cause of action against his codefendant, the Boatmen's Bank." The matters alleged on this subject were substantially as follows:

First. It was charged that the note which was held by the Boatmen's Bank embraced the sum of a previous note or notes given by Fritzlen to the firm of Elmore & Cooper, and an association known as the Elmore & Cooper Live Stock Commission Company, a Missouri corporation. These previous notes, it was charged, were secured by a chattel mortgage, but were not negotiable, and had been assigned to the Boatmen's Bank, and were subject to any equity existing in favor of Fritzlen. The notes, it was alleged, were

made up in considerable part of charges or commissions which had been exacted by Elmore & Cooper or the commission company for commissions relating to the sale and handling of live stock for Fritzlen at the Kansas City stock yards. These commissions, it was alleged, had been *exact-[368 ed because of an illegal combination in restraint of trade, in violation of the laws of the state of Kansas controlling the method of doing business at the Kansas City stock yards, to which Elmore & Cooper and the commission company were parties, and hence Fritzlen was entitled to recover the sum thereof. The amount of the commissions thus referred to exceeded \$3,000.

Second. That prior to the time when the bank had acquired the note or notes from Elmore & Cooper or the commission company, and subsequent thereto up to the time when the bank obtained the note described in its answer, it was a Missouri corporation, and had not complied with the laws of Kansas authorizing foreign corporations to do business in that state. It was charged that the dealings concerning the assignment of the notes from Elmore & Cooper and the commission company, as well as the dealings which led up to the giving of the note upon which the bank relied, as well as other transactions, constituted a doing of business in Kansas by the bank in violation of law, and therefore the note was void.

Third. That prior to the giving of the note which the bank held, negotiations had supervened between the bank and Fritzlen, having reference to the liability of the latter for the note or notes which the bank had acquired from Elmore & Cooper and the commission company. That, as a result of these negotiations, it had been contracted between the bank and Fritzlen that the bank would make to Fritzlen additional advances of money to enable him to carry on the business of his stock farm in Kansas, and would furnish to Fritzlen the food required to feed his stock on his ranch during the winter of 1902-1903, and that as a result of these understandings it was agreed between them that Fritzlen give a new note to the bank for the amount of its previous claims and advances, which should be secured by a chattel mortgage as well as one upon real estate, and that the note held by the bank was given as the result of this agreement. It was then charged that, although the bank had repeatedly been called upon to comply *with its contract to furnish[369 the food for the cattle, it had failed to do so, and, as a result of a sudden and rigorous blizzard in the winter of 1903, over 500 head of the cattle perished by starvation, and the remainder were reduced in value, result-

ing in a loss of at least \$20,000. The sum of this loss was asserted to be due by the bank to Fritzlen.

Fourth. Further, it was charged that although, after the bringing of the suit by Weldon, a restraining order had been by him obtained, forbidding the removal of the cattle which were covered by the chattel mortgage, the bank had illegally taken possession of and removed cattle to the value of \$25,000, and was liable to Fritzlen to return the same or to pay their value. The answer concluded by a prayer that an account be taken by the court of the debt due by Fritzlen to the plaintiff, Weldon, so as to fix the sum of the interest due thereon; that the note held by the bank, and the chattel mortgage securing the same, be decreed to be null and void; that an account be stated between the bank and Fritzlen without reference to the amount of the note held by the bank, so as to exclude illegal charges previously made by Elmore & Cooper and the commission company, and that the bank, in the accounting, be charged with the loss occasioned by the death or injury of cattle, caused by its failure to supply food under its contract. It was additionally prayed that it be decreed that the real estate mortgage held by the bank had been completely paid, and consequently that all liens arising therefrom be decreed to be extinguished, and, unless the bank returned the cattle illegally taken, there also be a recovery for the full value thereof.

On the same day—May the 26th—Weldon, the plaintiff, filed his reply to the answer of the Boatmen's Bank. By such answer Weldon, in effect, set up, as against the bank, the same causes of action advanced by Fritzlen in his answer concerning the illegality of the note held by the bank, because it had engaged in business as a foreign corporation in the state of Kansas without complying with the state law, and 370]because *there had entered into the sum of the note held by the bank illegal charges previously made by Elmore & Cooper and the Elmore & Cooper Commission Company.

On June 10, 1904, the bank made its second application to remove the case, based upon the ground that the effect of the replies of Fritzlen and of Weldon was to make manifest that there was a separable controversy as to the validity of the mortgage of the bank, between Weldon and Fritzlen on the one side and the bank on the other, which was cognizable in the United States court, and, moreover, that it plainly resulted from the pleadings, since the entry of the order to remand, made by Pollock, J., that Weldon had unnecessarily made the bank a party to his suit to foreclose against Fritzlen as the result of a conspiracy between

Fritzlen and himself, for the purpose of preventing the issue as to the validity of the mortgage of the bank being tried in the courts of the United States. It was recited that the answers of Fritzlen and Weldon had been filed without notice, and the motion to remove was made at once on learning of such filing.

The court, although it found that the bond for removal was sufficient, declined to order the removal, to which the bank accepted. It is unnecessary to detail the further proceedings in the trial court. It is adequate to say that the issues between the parties were tried in part by a jury and in part by the court, and resulted in a judgment allowing in part the claim of Fritzlen against the bank, and the remainder of the claim of the bank against Fritzlen, and, while giving a judgment in favor of Weldon against Fritzlen, rejected the claim of Weldon as to the entire illegality of the mortgage to the bank.

The case was removed to the supreme court of Kansas by proceedings in error prosecuted by the various parties. Pending its determination—taking judicial notice of our own records—it is to be observed that the cause was decided which was pending in the circuit court of appeals for the eighth circuit, resulting from the writ of error prosecuted from that court, to the judgment of the circuit court for the district of Kansas, *dismissing, for want of jurisdiction, [371 the replevin action referred to in the previous statement. The court, while treating the order for remanding the cause, made by Pollock, J., as not subject to be reviewed, nevertheless held that the effect of that order was not necessarily controlling as to the jurisdiction of the court below in the replevin action brought whilst the Weldon suit was pending in the circuit court of the United States in consequence of the refusal of Lochren, J., to remand. Coming to consider, as an independent question, whether the subject-matter of the replevin suit was beyond the jurisdiction of the circuit court for the district of Kansas, it was held that the suit was clearly within the jurisdiction of the court, because the Weldon suit presented a separable controversy between Weldon and Fritzlen, on the one side, and the bank on the other, as to the validity of the mortgage of the bank, and that although the remanding order of Pollock, J., could not be reversed, nevertheless its effect, while operative, and not open to attack, did not necessarily oust the circuit court of jurisdiction over the replevin action, brought when the Weldon suit was pending in the circuit court. The judgment dismissing the replevin suit for want of jurisdiction was reversed and the case remanded for further

proceedings. 68 C. C. A. 288, 135 Fed. 650. A petition praying a writ of certiorari to review this judgment was by this court denied. 198 U. S. 586, 49 L. ed. 1174, 25 Sup. Ct. Rep. 803.

The case pending on error in the supreme court of Kansas was thereafter decided. That court, without questioning the order remanding the cause, made by Pollock, J., as controlling in the condition of the pleadings at the time that order was made, held that, by the effect of the pleadings filed after the return of the cause in consequence of the order remanding, the record presented a separable controversy, with Weldon and Fritzlen on the one side and the bank on the other, which justified the second application to remove, and therefore that application had been wrongfully refused. It, in addition, held that the evolution of the pleadings in the state court after the order to remand was adequate to establish prima facie that *Weldon, in suing to enforce his mortgage, had joined the bank, although it was not a necessary party to that proceeding, because of a collusive conspiracy between himself and Fritzlen to enable the latter to contest with the bank the validity of its mortgage, and prevent that controversy from being cognizable in the Federal courts, which would have been otherwise the case. 75 Kan. 479, 89 Pac. 915. This writ of error was then prosecuted.

A motion to dismiss was postponed to the hearing on the merits. The assertion that we have power to review is based upon the proposition that the necessary effect of the judgment of the court below was to refuse to give effect to the order of the Federal court remanding the cause, which it is insisted was final and the law of the case in all subsequent proceedings, and not susceptible of being reviewed in any forum, citing *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389. But it is not open to controversy that if, after an order to remand has been made, it results from the subsequent pleadings or conduct of the parties to the cause, that the cause is removable, on the development of such situation a second application to remove may be made, and the right to do so because of the changed aspect is not controlled by the previous order remanding the cause. *Powers v. Chesapeake & O. R. Co.* 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264. See also *Weeker v. National Enameling & Stamping Co.* 204 U. S. 177, 51 L. ed. 433, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757. It follows, therefore, that the contention that the necessary effect of the judgment below was to refuse to give effect to the previous remanding order is without foundation. It is said, however, that as the power to entertain a

subsequent motion to remove depended upon a change in the condition of the record, that the result of the judgment below was to deny all effect to the prior order remanding the cause, as there had been no such change in the record as to justify the granting of the second order to remove. To sustain this proposition it is insisted that substantially the only change that resulted from the pleadings filed after the remanding of the cause was that brought about by the filing of the answer of Fritzlen, and the defenses set up in that answer against the mortgage held by the bank, which, it is argued, in the nature of things could not operate to affect the removability of the suit between Weldon and Fritzlen. But the premise upon which the proposition rests is without foundation in fact. As we have seen the petition of Weldon impleading Fritzlen and the bank, while it assailed the bank's mortgage in express terms, alleged that that mortgage, if it existed was junior in rank to the mortgage of Weldon. And the serious consequences which that averment had upon the order to remand the case is indicated in the opinion of Pollock, J., sustaining the motion to remand. The necessary effect of the answer of the bank, filed after the remanding, and of the answer by Fritzlen, as well as of the answer filed by Weldon, expressly joining Fritzlen in his attack upon the mortgage of the bank, was to make clear the untruth of the averment of the junior character of the mortgage held by the bank, and to establish, therefore, the fact that the bank was not an indispensable or necessary party to the suit of Weldon for the foreclosure of the mortgage against Fritzlen.

It follows, therefore, that the contention that the state of the record at the time the second application for removal was made was not materially different from the condition existing when the prior order to remand was allowed, is unwarranted. So far as the separable nature of the controversy is concerned, arising on the record as it existed at the time the second application to remove was made, we might rest content with saying that we think the removal was rightly allowed, for the reasons stated in the opinion of the court below and in that of the circuit court of appeals for the eighth circuit in *Boatmen's Bank v. Fritzlen*, 68 C. C. A. 288, 135 Fed. 650, and the authorities there cited. We observe, however, that, under the case made, as the bank was not an indispensable party to the suit of Weldon to foreclose, the mere fact that the bank was by him joined as a defendant along with Fritzlen cannot be held to operate to prevent the application of the rule of separable controversy, and that, from its application, we

think it quite clear that the validity of the bank's mortgage, assailed as it was under 374]the circumstances *of the case, was a separable controversy, with Weldon and Fritzlen on one side and the bank on the other, and it was therefore rightly the subject of removal. Without stopping to give the reason for our conclusion, we also think it is quite clear, within the ruling in *Powers v. Chesapeake & O. R. Co.* supra, that the second application to remove was made in time.

While the views just expressed might justify granting the motion to dismiss, yet, in consequence of the character of the question (*Swafford v. Templeton*, 185 U. S. 487, 46 L. ed. 1005, 22 Sup. Ct. Rep. 783), instead of dismissing, our decree will be, affirmed.

IN THE MATTER OF THE APPLICATION OF MARY DUNN et al., for a Writ of Mandamus against the Honorable Edward R. Meek, District Judge, etc.

(See S. C. Reporter's ed. 374-389.)

Removal of causes — case involving Federal question — joint action.

1. An action brought against a corporation created by an act of Congress, and against two of its employees, to establish a joint liability for negligence, is, as to the individual defendants, as well as to the corporation, a suit arising under the Federal Constitution or laws, within the meaning of the removal provisions of the act of August 13, 1888 (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), and is therefore removable to a Federal circuit court on petition of all the defendants.

[For other cases, see *Removal of Causes*, 216a-221, in Digest Sup. Ct. 1908.]

Evidence — judicial notice — Federal incorporation.

2. A Federal court will judicially notice

NOTE. — On removal of causes where Federal Constitution, statute, or treaty comes in question—see notes to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656; *Ferguson v. Ross*, 3 L.R.A. 322; *Austin v. Gagan*, 5 L.R.A. 476; *Butler v. National Home*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528.

On suits removable by foreign corporation—see notes to *Whelan v. New York, L. E. & W. R. Co.* 1 L.R.A. 65, and *Brodhead v. Shoemaker*, 11 L.R.A. 568.

On the right of removal to a Federal court of a joint action against a resident employee of a foreign railroad corporation and the corporation itself—see note to *Illinois C. R. Co. v. Houchins*, 1 L.R.A. (N.S.) 375.

As to what Federal district is the proper one for suit—see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

that a corporate defendant was incorporated by an act of Congress, even without any averment of the fact in the petition.

[Judicial Notice, see *Evidence*, I. in Digest Sup. Ct. 1908.]

Federal courts — districts — corporate defendant.

3. A corporation created by an act of Congress which, having designated Dallas, Texas, where its senior vice president lives, as its general office, maintains an office in Dallas county, and has all the acts of its board of directors taken in New York city affirmed by a meeting of the board at Dallas before they are considered effective, is suable in the northern district of Texas, under the act of March 11, 1902 (32 Stat. at L. 68, chap. 183, U. S. Comp. Stat. Supp. 1907, p. 163), and Tex. Civ. Stat. arts. 1222, 1223, as being a resident of, and doing business in, that district, and having an agent there upon whom service can properly be made.

[For other cases, see *Courts*, V. c. 7, in Digest Sup. Ct. 1908.]

Federal courts — district — bringing in nonresidents.

4. The provision for service of nonresidents of the district with duplicate writs, which is made by the act of March 11, 1902, dividing Texas into four judicial districts, is not limited to local actions of the class described in the act of March 3, 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508), § 8, providing for bringing in nonresidents in suits commenced to enforce any legal or equitable lien or claim to, or to remove any encumbrance or cloud upon, real or personal property in the district where such suit is brought.

[For other cases, see *Courts*, 956-959, in Digest Sup. Ct. 1908.]

[No. 10, Original.]

Argued January 11, 1909. Decided February 23, 1909.

ORIGINAL application for a rule to show cause why mandamus should not issue to the district judge of the United States for the Northern District of Texas, commanding him and the Circuit Court for that district to remand a cause to the District Court of Dallas County, Texas, and to desist from exercising any further jurisdiction in the cause except the entering of an order remanding it to the state court. Rule discharged and proceedings for mandamus dismissed.

Statement by Mr. Justice Peckham:

This is an original application to this court for a rule, directed to the district judge of the United States for the northern district of Texas, directing him, and also the circuit court of the United States for that district, to show cause why a mandamus should not issue, commanding that judge and that court, and each of them, to

remand a certain action at law to the district court of Dallas county, Texas, and to desist from exercising any further jurisdiction in the action, except the entering of the order remanding it to the state court. Upon such application a rule was made by this court that the judge and the court should show cause, in accordance therewith.

Upon service of the rule being made, a return has been duly filed by the district judge, acting for himself and as judge of the circuit court.

In the papers used upon the application for the writ and in the return of the district judge made thereto the following facts are set forth:

An action was brought in the state court in the county of Dallas and state of Texas on the 1st day of August, 1907, against the Texas & Pacific Railway Company and two individuals, C. W. Slayter and Carl Rasmussen, who were, respectively, engineer and fireman on the Texas & Pacific Railway, to recover damages for the negligent killing of J. J. Dunn, the husband of one of the plaintiffs and the father of others. The action was brought against the company and the individual defendants jointly, and the petition in the state court alleged that plaintiffs resided in Dallas county, Texas, of which county the plaintiffs were inhabitants and residents, and that *the defendant the Texas & Pacific Railway Company was a corporation duly incorporated, with an office and local agent in Dallas county, Texas; that the defendant Slayter was a resident and citizen and inhabitant of Harrison county, in said state, and that the defendant Rasmussen was also a resident, citizen, and inhabitant of Harrison county, in the said state. The petition then alleged that Dunn was killed directly and proximately through the negligence of the defendants, who were guilty of negligence in permitting and causing the engine and train to run into, against, and over the said Dunn, and injuring him so that he was instantly killed. The petition then averred certain particular acts of negligence on the part of the defendants and sought to recover from them on account of such negligent killing the sum of \$85,000. All of the defendants were duly served with process, and within the time required by law they all joined in a petition to the state court to remove the cause to the circuit court of the United States for the northern district of Texas (which included Dallas county), and presented bonds for such removal. The ground for the removal was alleged to be that the Texas & Pacific Railway Company was a corporation organized and existing under the laws of the United States by virtue of

"An Act to Incorporate the Texas & Pacific Railroad Company, and to Aid in the Construction of Its Road, and for Other Purposes," approved March 3, 1871 [16 Stat. at L. 573, chap. 122], and acts amendatory thereof and supplemental thereto, by one of which the name and style of the company was changed to the Texas & Pacific Railway Company. The petition alleged that the matter in dispute in the case exceeds, exclusive of interest and costs, the sum of \$2,000, and that the suit arose under the laws of the United States, and more especially under the law of the United States constituting the charter of the defendant and under which it was incorporated; that, under the laws of the United States, the circuit court of the United States for the northern district of Texas had original jurisdiction of the suit. To the granting of this application the plaintiffs objected, among other things, upon the ground that *the plaintiffs had not the right, at the[377] time of the commencement of the suit, to bring it in the circuit court of the United States for the northern district of Texas against either of the defendants Slayter and Rasmussen, and that it appears, from the plaintiffs' petition in the case, that it is not removable to the circuit court of the United States for the northern district of Texas at the instance of either of the individual defendants, nor at the instance of the railway company; and that it also appears from the defendants' own petition for the removal that the case is not removable to the circuit court of the United States for the northern district of Texas at the instance of either the defendants Slayter or Rasmussen, or even at the instance of the defendant railway company, or of all of them together.

The state court, while holding that the petition to remove to a Federal court was in all respects regular, and that it was filed in due time, and that a good and sufficient bond had been filed, held that the petition did not show proper grounds for removal of the suit, and the application for removal was denied.

Thereupon the defendants in the suit in the state court, on January 13, 1908, filed in the office of the clerk of the circuit court of the United States for the northern district of Texas, at Dallas, Texas, a copy of the record in that suit. Before any other proceedings were had in the case in the circuit court of the United States, and on the 20th of January, 1908, the plaintiffs filed in that court a motion to remand the case. While expressly denying that the circuit court had jurisdiction of the case, the plaintiffs moved the court to remand it, for the reason that the suit did not properly involve a dis-

pute or controversy properly within the jurisdiction of the court, because, as was said, it did not appear from the record or from the defendants' petition to remove the cause, that any of the defendants were inhabitants of the northern district of Texas, and that there was no denial by the defendants of plaintiffs' allegation that the individual defendants, Slayter and Rasmussen, were inhabitants of Harrison county, Texas, which 378] county is in eastern district *of Texas. It was also averred that it appeared upon the face of the record that there was no separable controversy as to either or any of the defendants. The plaintiffs further averred that the railway company had its principal office in the city of New York, in the southern district of New York and state of New York, of which district it was an inhabitant, and that it was not an inhabitant of the northern district of Texas, and could not be sued by the plaintiff in that district by reason of its being a Federal corporation; hence it had not the right to remove the cause to the Federal court.

The defendants answered the petition to remand, and averred that the railway company was a resident of and had its domicile in the northern district of Texas, and that the individual defendants were jointly sued with the railway company, a resident of the district of Dallas. That no claim of separable controversy or diverse citizenship was made, but the application to remove was based upon the existence of a Federal question as to all of the defendants. That, although the plaintiffs' petition in the case simply alleged that the railway company was a corporation duly incorporated, yet defendants alleged that it had an office and local agent in Dallas county, Texas, and it was urged that the court would take judicial notice of the Federal character of the defendant, notwithstanding the plaintiffs had neglected to allege it; and that the record showed a general liability charged by the plaintiffs as against all the defendants, and that the Federal question as to all of such defendants was thereby raised.

The motion made by the plaintiffs to remand the cause came on to be heard by the district judge holding the circuit court, and was overruled and denied.

No further proceedings have been had in the case in the circuit court of the United States, and the case also stands upon the docket of the state court, subject to call and disposition.

Upon application, the circuit court issued an injunction restraining the plaintiffs from continuing any proceedings in the state court in the action.

379] *A motion was made to dissolve the injunction, which was denied. Madisonville 560

Traction Co. v. St. Bernard Min. Co. 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251.

The plaintiffs insist that mandamus is the only adequate remedy under the facts stated, by which they can obtain relief and proceed with the trial of their cause in the state court.

Mr. C. W. Starling argued the cause, and, with Messrs. Carden, Starling, & Carden, filed a brief for petitioners:

Where only one of two defendants, if sued alone, has a right, because of a Federal question affecting it, to remove a case, there being another or other defendants who, if sued alone, had no right of removal, such right does not exist because all the defendants join in the application to remove.

A suit against an employee of a Federal corporation, arising by reason of his conduct while in the line of duty, is not one arising under the Constitution and laws of the United States unless it appears from plaintiff's petition that the conduct in question is of such a character that it is in some manner defined or affected by Federal law.

A suit against a Federal corporation and an individual employee, instituted in good faith, arising by reason of their alleged joint negligence, is not removable to the Federal court on account of the Federal character of such corporation.

Texas & P. R. Co. v. Huber, 100 Tex. 1, 92 S. W. 833; Eastin v. Texas & P. R. Co. 99 Tex. 654, 92 S. W. 838. See also Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854; Strawbridge v. Curtiss, 3 Cranch, 267, 2 L. ed. 435; Smith v. Lyon, 133 U. S. 315, 33 L. ed. 635, 10 Sup. Ct. Rep. 303; Alabama, G. S. R. Co. v. Thompson, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; Hooe v. Jamieson, 166 U. S. 395, 41 L. ed. 1049, 17 Sup. Ct. Rep. 596; Miller v. Clifford, 5 L.R.A. (N.S.) 49, 67 C. C. A. 52, 133 Fed. 880; Mutual L. Ins. Co. v. Champlin, 22 Blatchf. 334, 21 Fed. 85; Garner v. Second Nat. Bank, 66 Fed. 369; Boston Safe Deposit & T. Co. v. Mackay, 70 Fed. 801; Blake v. McKim, 103 U. S. 336, 26 L. ed. 563; Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 239, 44 L. ed. 1052, 20 Sup. Ct. Rep. 867; Hanrick v. Hanrick, 153 U. S. 192, 38 L. ed. 685, 14 Sup. Ct. Rep. 835; Torrence v. Shedd, 144 U. S. 527, 36 L. ed. 528, 12 Sup. Ct. Rep. 726; Whitcomb v. Smithson, 175 U. S. 635, 44 L. ed. 303, 20 Sup. Ct. Rep. 248.

The petition for removal in this case does

not tender the issue of a fraudulent joinder of the engineer and fireman.

Offner v. Chicago & E. R. Co. 78 C. C. A. 359, 148 Fed. 201.

A petition for removal must allege and it must be proved that defendants were wrongfully made joint parties for the purpose of preventing removal.

Louisville & N. R. Co. v. Wangelin, 132 U. S. 599, 33 L. ed. 474, 10 Sup. Ct. Rep. 203; *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 216, 50 L. ed. 446, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147.

If the Texas & Pacific Railway Company is an inhabitant of the southern district of New York, suit against it cannot, except by its consent, be maintained in the circuit court for the northern district of Texas, provided jurisdiction is dependent solely upon a Federal question, and therefore such company, as defendant, cannot remove a case from the state court to such circuit court, over the objection of the plaintiffs.

Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Re Keasbey & M. Co.* 160 U. S. 229, 40 L. ed. 405, 16 Sup. Ct. Rep. 273; *Wolff v. Choctaw, O. & G. R. Co.* 133 Fed. 601; *Sunderland Bros. v. Chicago, R. I. & P. R. Co.* 158 Fed. 878.

The Texas & Pacific Railway Company is an inhabitant of the southern district of New York, and not of the northern district of Texas.

Galveston, H. & S. A. R. Co. v. Gonzales, 151 U. S. 507, 38 L. ed. 252, 14 Sup. Ct. Rep. 401; *Orange Nat. Bank v. Traver*, 7 Sawy. 210, 7 Fed. 149; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *St. Louis & S. F. R. Co. v. James*, 161 U. S. 562, 40 L. ed. 808, 16 Sup. Ct. Rep. 621; *Patch v. Wabash R. Co.* 207 U. S. 277, 52 L. ed. 204, 28 Sup. Ct. Rep. 80; *Memphis & C. R. Co. v. Alabama*, 107 U. S. 581, 27 L. ed. 518, 31 Sup. Ct. Rep. 432.

Inasmuch as the individual defendants are shown by the record to be inhabitants of the eastern district of Texas, plaintiffs could not have sued them jointly with the railway company in the northern district of Texas, and therefore they did not have the right to remove or to join in the petition to remove the cause to the circuit court for the northern district of Texas.

Greeley v. Lowe, 155 U. S. 72, 39 L. ed. 74, 15 Sup. Ct. Rep. 24; *Ex parte Wisner*; *Re Keasbey & M. Co.*; *Wolff v. Choctaw, O. & G. R. Co.*; and *Sunderland Bros. v. Chicago, R. I. & P. R. Co.*,—supra.

A clear distinction exists between the party and the cause; the party may originate

under a law with which the cause has no connection.

Osborn v. Bank of United States, 9 Wheat. 827, 6 L. ed. 225.

It is settled that, in actions *ex delicto*, where the defendants are sued jointly, if the proof warrants it, a recovery may be had against a single defendant.

Atlantic & P. R. Co. v. Laird, 164 U. S. 399, 41 L. ed. 487, 17 Sup. Ct. Rep. 120.

If the circuit courts have jurisdiction of suits of this character, and such jurisdiction once rightfully attaches, then it remains not only in the circuit court, but in the circuit court of appeals and the Supreme Court of the United States until final disposition.

Kirby v. American Soda Fountain Co. 194 U. S. 141, 48 L. ed. 911, 24 Sup. Ct. Rep. 619; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112, 48 L. ed. 896, 24 Sup. Ct. Rep. 586.

Mr. Rush Taggart argued the cause, and, with Messrs. John F. Dillon and W. L. Hall, filed a brief for respondents:

The jurisdiction of the circuit courts is complete over suits against corporations created by act of Congress, where the requisite amount is involved, without reference to citizenship, because of the subject-matter of the litigation.

Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829, 12 Sup. Ct. Rep. 905; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113; *Oregon Short Line & U. N. R. Co. v. Skottowe*, 162 U. S. 490, 40 L. ed. 1048, 16 Sup. Ct. Rep. 869; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707; *Smith v. Union P. R. Co.* 2 Dill. 278, Fed. Cas. No. 13,121; *Bank of United States v. Deveaux*, 5 Cranch, 61, 3 L. ed. 38; *Bank of United States v. Martin*, 5 Pet. 479, 8 L. ed. 198; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Turton v. Union P. R. Co.* 3 Dill. 366, Fed. Cas. No. 14,273.

The action does not cease to be a civil suit arising under the laws of the United States because of the joinder of citizens of Texas as defendants.

Fisk v. Union P. R. Co. 8 Blatchf. 243, Fed. Cas. No. 4,828; *Landers v. Felton*, 73 Fed. 311; *Lund v. Chicago, R. I. & P. R. Co.* 78 Fed. 385; *Martin v. St. Louis Southwestern R. Co.* 134 Fed. 134.

The contention that the suit could not originally have been maintained against the Texas & Pacific Railway in the northern district of Texas and against Slayter and Rasmussen is not well founded.

Lafayette Ins. Co. v. French, 18 How.

404, 15 L. ed. 451; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *Re Hohorst*, 150 U. S. 653, 37 L. ed. 1211, 14 Sup. Ct. Rep. 221.

383] *Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

It is agreed by all that there is in this case no separable controversy, and the important question is whether, upon the facts stated, a removal can be ordered, notwithstanding the individual defendants were made parties to the suit, and were not residents or inhabitants of the northern district of Texas when sued.

The question arises under the act of Congress of 1888, relative to the removal of cases from state to Federal courts. 25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508. This act, as its title shows, was passed for the purpose of correcting the enrolment of the act approved March 3, 1887 (24 Stat. at L. 552, chap. 373), which amended the act approved March 3, 1875 (18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508). The first clause of the first section of the act of 1888 gave to the circuit courts of the United States "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority."

The second clause of that section of the act provided "that any suit of a civil nature, at law or in equity, arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district."

If the question were as to the right to remove a case to the Federal court where the sole defendant was a corporation created by an act of Congress, there can be no dispute as to the right of such a defendant to claim the removal. As the corporation

384] *derives all its rights from the law of Congress, a suit brought against it on account of its action arises under the

Constitution or laws of the United States. *Osborn v. Bank of United States*, 9 Wheat. 738, 817, 828, 6 L. ed. 204, 223, 225; *Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113. See also act of incorporation of the Texas & Pacific Railroad Company, 16 Stat. at L. 573, chap. 122, giving the right to the corporation (p. 574, § 1) to sue and be sued in all the courts of law and equity within the United States.

The right to remove, under the statute, depends upon whether the suit could originally have been brought in the circuit court of the United States. *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 245, 49 L. ed. 462, 464, 25 Sup. Ct. Rep. 251; *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58, 4 A. & E. Ann. Cas. 451.

The question, then, is whether the United States circuit court for the proper district (northern district of Texas) would have had jurisdiction of a suit commenced in that district by the plaintiffs against the railway company and the two individual defendants. A suit against the company would, as we have seen, be one arising under the Constitution or laws of the United States, and as the individual defendants resided in the state of Texas (the same state as the plaintiffs) the ground of jurisdiction of the Federal court as to them must be that, by joining all as defendants in a joint action for the same wrong done by all of them, the plaintiffs thereby made the suit against the individual defendants also one which arises under the Constitution or laws of the United States.

The plaintiffs themselves have made the act of which they complain a joint one, and, being one which arises under the Constitution and laws of the United States as to one of the defendants, it becomes so as to all, because it is joint. The Federal character permeates the whole case, including the individual defendants as well as the corporation. The case which plaintiffs make in their petition in the suit must determine the character of the cause of action. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 216, 50 L. ed. 441, 446, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147. The acts of the individual *defendants were not neces- [385

sarily, in and of themselves, inherently of a Federal nature. In *Landers v. Felton*, 73 Fed. 311, the question arose whether an action brought against the receiver of a United States court, and others who were citizens of the same state as that of the plaintiff, to establish a joint liability of all the defendants, was a suit arising under the laws or Constitution of the United States. The court held that

it was, saying: "No separate liability could be asserted against the receiver . . . except by virtue of the same laws. Therefore the joint liability of the defendants with the receiver arises under the laws and Constitution of the United States. If the plaintiff wishes to sue the other defendants without joining the receiver, he had his election to do so, because the liability of joint tortfeasors is also several. He might, therefore, have maintained his action against the resident defendants in a state court, without any possibility of removal to a Federal court. He elected, however, to join the resident defendants with a person against whom he could establish no liability, in the capacity in which he sues him, except by virtue of the laws of the United States. Therefore the joint cause of action which he asserts against all the defendants must find its sanction in the Federal statutes. Hence, the cause of action is removable. The state court was in error in denying the petition of the receiver, and the motion to remand is overruled."

In *Lund v. Chicago, R. I. & P. R. Co.* 78 Fed. 385, a suit was brought in the state court against that company, together with the Union Pacific Railroad Company and its receivers. One was a state, and the other a United States, corporation. The Union Pacific, by its receivers, filed a petition for removal of the cause, and a motion to remand was made, and it was urged that the cause was not removable because the state corporation was joined with the Union Pacific, and that, as to the state corporation, no Federal law was involved, and it could not remove the cause to the Federal court. The court held the defense was not well taken; that the statute organizing the **386***Union Pacific Railway necessarily involved a Federal law, and, as it was a joint cause of action, it was clear that the whole case arose under the Federal law; that while a suit against the Rock Island company, the state corporation, could have been maintained without reference to the Federal laws, yet, as it was sought to hold the Union Pacific Railway Company and its receivers jointly with the state company, then a new character was given to the action and a new element was introduced; to wit, the laws of the United States; therefore, as it was necessary, in order to maintain the action against the defendants jointly, to invoke the Federal law, the case was one arising under the laws of the United States, and hence the whole case was removable under the statute. In such case it was said the Federal question affects all parties defendant in the suit, entitling it to be removed where all the parties unite in the petition. *Martin v. St. Louis Southwestern R. Co.* 134 **53** L. ed.

Fed. 134, is to the same effect. And see *Fisk v. Union P. R. Co.* 8 Blatchf. 243, Fed. Cas. No. 4,828, per Circuit Justice Nelson and Judge Blatchford, opinion by Justice Nelson, upon question of removal where the case arises out of the Constitution or laws of United States, although some of the defendants could not themselves apply to remove it.

We are aware that a different view has been taken of the rights of defendants situated like those in this case by the supreme court of the state of Texas in *Texas & P. R. Co. v. Huber* (May 2, 1906) 100 Tex. 1, 92 S. W. 832; *Eastin v. Texas & P. R. Co.* (May 2, 1906) 99 Tex. 654, 92 S. W. 838; but, as this is a case where we are called upon to exercise our own judgment, we have come to a different conclusion, notwithstanding our great respect for the decisions of the courts of that state.

Although the plaintiffs, in their original petition in the state court, state that the railway company was a corporation, duly incorporated, with an office and local agent in Dallas county, Texas, the fact that the corporation was incorporated by an act of Congress will be noticed by the court, even without an averment of that fact in the petition. *Texas & P. R. Co. v. Cody*, **387** 166 U. S. 606, 610, 41 L. ed. 1132, 1134, 17 Sup. Ct. Rep. 703; *Texas & P. R. Co. v. Barrett*, 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707.

In *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854, the action was brought by the administrator of William Martin against the Chicago, Rock Island, & Pacific Railroad Company (a state corporation), Clark and others, and the receivers of the Union Pacific Railway Company, in the district court of Clay county, Kansas, to recover damages for the death of decedent. The Union Pacific Railway was a Federal corporation, and its receivers were appointed by the Federal court. Application to remove the cause to the Federal court was made by the receivers of the Union Pacific, which application was not joined in by the state corporation, and the application was denied, because all the defendants were charged with jointly causing the death of plaintiff's intestate, and all did not join in the petition for removal. The case was tried and judgment obtained for the plaintiff in the state court, and was taken on error to the supreme court of Kansas and there affirmed. 59 Kan. 437, 53 Pac. 461. In this court the chief justice, speaking for the court, said: "Assuming that as to the receivers the case may be said to have arisen under the Constitution and laws of the United States, the question is whether it was necessary for the

Chicago, Rock Island, & Pacific Railroad Company, defendant, to join in the application of its codefendants, the receivers of the Union Pacific Railway Company, to effect a removal to the circuit court." Upon consideration of the removal statutes it was held that it was necessary for the state corporation to join in the application. Here all of the defendants have joined, and, as we have seen, they are all, under the circumstances, able to assert and claim the right of removal of the cause to a Federal court. It was held in the Martin Case, *supra*, that there was no separable controversy, and so failure of all the defendants to join could not be excused.

Some further objections are taken to the right of plaintiffs to maintain this suit in the Federal court, and therefore to the right of the defendants to remove from a state **388**]court. The *objection is that the defendants Slayter and Rasmussen were not residents of the northern district of Texas, but, on the contrary, were residents of the eastern district, and consequently could not be sued in the former district; and also that the railway company was not a resident of the state of Texas, but was a resident of the southern district of the state of New York. Upon the latter question the facts on deposition before the United States district judge in Texas showed that the company maintained an office in Dallas county, Texas, and that the senior vice president lived in Dallas, and that for many years the company had designated Dallas as its general office, and that all the acts of the board of directors taken in New York city are subsequently affirmed by the meeting of the board at Dallas before they are considered effective. We are of opinion that the defendant company was liable to suit in the northern district.

By § 10 of the act of Congress entitled "An Act to Divide the State of Texas into Four Judicial Districts," approved March 11, 1902 (32 Stat. at L. 68, chap. 183, U. S. Comp. Stat. Supp. 1907, p. 163), provision is made for the service of process against defendants, and, if there be more than one defendant, and they reside in different divisions of the district or in different districts, the plaintiff can sue in either division or in either district in which one or more of the defendants may reside, sending a duplicate writ or writs to the other defendant or defendants, upon which the clerk shall indorse that the writ thus sent is a copy of a writ sued out of the court of the proper division of said district.

Articles 1222 and 1223 of the Civil Statutes of Texas provide for the service of process in suits against incorporated compa-

nies or foreign public or private corporations.

Under these various statutes the plaintiffs would have had the right to sue the Texas & Pacific Railway Company in the northern district of Texas, because it was a resident of and doing business in that district, and had an agent there upon whom service could properly be made.

The individual defendants, Slayter and Rasmussen, being *residents of the **[389]** eastern district of Texas, could, under § 10 of the act above mentioned, be served with duplicate writs, and so the circuit court would obtain jurisdiction over them also.

We do not think that the 10th section of the act of 1902, *supra*, should be limited so as to apply only to local actions of the class described in § 8 of the act of 1875. 18 Stat. at L. 470, chap. 137, U. S. Comp. Stat. 1901, p. 508. That section relates to suits commenced to enforce any legal or equitable lien or claim to or to remove any encumbrance or cloud upon real or personal property in the district where such suit is brought. The first part of § 10 does not so limit its application, while the latter part makes special provision for suits and actions affecting the title to real estate, which directs that the action must be brought where such real estate is in whole or in part situated.

We are of opinion that the Circuit Court of the United States obtained jurisdiction by the proceedings for the removal of the case to that court, and the rule to show cause is therefore discharged and the proceedings in this court to obtain a mandamus are dismissed.

Mr. Justice Harlan dissented.

PRISCILLA BRADFORD, Appt.,

v.

ROBERT E. MORRISON.

(See S. C. Reporter's ed. 389-397.)

Judgment — lien — unpatented lode mining claim.

1. Unpatented lode mining claims are "real property," and as such are subject to the lien of a judgment recovered against their owner when docketed pursuant to Ariz. Laws 1891, act No. 50, § 4, making a docketed judgment a lien upon the judgment debtor's real property, the term being defined by a territorial statute in force when the judgment in question was rendered and docketed as coextensive with lands, tenements, and hereditaments.

[For other cases, see Judgment, V. c, in Digest Sup. Ct. 1908.]

Judgment — lien — determination.

2. The lien of a judgment upon the judg-

ment debtor's interest in an unpatented lode mining claim is not destroyed by a subsequent conveyance of his interest to a third party.

[For other cases, see Judgment, V. c, in Digest Sup. Ct. 1908.]

[No. 60.]

Argued and submitted January 7, 1909.
Decided February 23, 1909.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Yavapai County, in that territory, quieting title to certain lode mining claims. Affirmed.

See same case below (Ariz.) 86 Pac. 6.

Statement by Mr. Justice Peckham:

This is an appeal from a judgment of the supreme court of the territory of Arizona, affirming a judgment of the district court of Yavapai county, in that territory, quieting the title to several mining claims involved in the action.

The appellant brought the action for such purpose under the provision of a statute permitting it, against Morrison, the appellee, together with Elmer R. McDowell and Thomas D. Bennett. McDowell and Bennett made default, but Morrison, the appellee, as the assignee of Bennett, duly filed his amended answer, which contained a special denial that the appellant was the owner of the property described in her complaint, and he then set up that he was the assignee of one Thomas D. Bennett of a certain judgment, which was recovered in the same court in which this proceeding or action was brought, which judgment was for the sum of \$2,730.25, and was against the two individuals, Tom Taylor and E. G. Wager, which was docketed December 30, 1899. The case was submitted to the trial court on an agreed statement of facts, and the trial resulted in a judgment quieting plaintiff's interest in the undivided three fourths of the claim as against the defendants, and quieting appellee Morrison's title as against plaintiff and the other defendants in the remaining one fourth of such claim.

An appeal taken to the supreme court of the territory resulted in the affirmance of the judgment, and the plaintiff then took an appeal to this court upon a statement of facts found by the supreme court.

From this statement of facts it appears that the mining claims in controversy are unpatented lode claims. The judgment in *Bennett v. Wager* was rendered December 23, 391]1899, *and docketed December 30, 1899. On December 23, the day of the recovery of the judgment, and continuously there-

after until August 27, 1900, the actual co-owners and possessors of the mining claims were one D. C. Wood, the owner of a one-half interest, and E. G. Wager and Reese M. Ling, each a one-quarter interest. It is in regard to Wager's interest in the claims at that time, December 30, 1899, that the controversy has arisen.

On August 27, 1900, Wood, Wager, and Ling, by mining deed, conveyed their interest in the claims to the McCabe Extension Mining & Milling Company, a corporation, and contemporaneously with the delivery of that deed the grantors placed the corporation in the actual and exclusive possession of the claims. The corporation and its assignee, the plaintiff, ever since that time have been in the actual and exclusive possession of the claims, and have performed each and every year since the year 1900 to the date of the findings, which were filed January 23, 1907, annual labor in excess of the amount of \$100 per annum upon each of said claims, and the corporation has, during its possession of the claims, expended more than \$40,000 in improvements in and on the mines.

Neither Wager, Wood, nor Ling has been in possession of the claims since August 27, 1900, when they conveyed them to the corporation.

The appellant claims under conveyance executed pursuant to judicial sales made under writs issued on a judgment obtained against the corporation subsequently to the conveyance made to it, and appellant is in the present actual and exclusive possession of the claims. Under one of these sales a deed was executed and delivered to her on October 26, 1904, which, it is said, related back to November 6, 1902, the date of the filing of the lien of the judgment against the company. On November 29, 1904, an execution was issued on the judgment in *Bennett v. Wager*, and levied upon the interest which Wager had in the claim at the time judgment was recovered against him (December 30, 1899), and the sale was made under *that levy, December 22, 1904, to the[392 appellee Morrison, and a certificate of sale was issued to him for that interest.

Mr. E. M. Sanford argued the cause and filed a brief for appellant:

The peculiar sense in which a word is used to be determined by the context of the statute.

Potter's Dwarrr. Stat. 1st ed. 196-201; Perrine v. Chesapeake & D. Canal Co. 9 How. 190, 13 L. ed. 99.

At common law there is no classification of estates or interests in lands that can be properly applied to the interest which a judgment debtor holds as locator or assignee of the locator, in an unpatented

mining claim. It may be termed a chattel in the sense that it is an asset. As an estate in possession, it is subject to inheritance, and is assignable by the voluntary act of the locator or his assigns. It may be said to be a chattel real, as it is inheritable and assignable by the terms of the grant, and as such would be personal property. The common-law term of easement has often been applied, but that is only similar in that there is a dominant and servient right. It is unlike, in that, at common law, an easement is not assignable or inheritable, yet is the subject of dower under the common law and community interests under the civil law. The two are alike in that an easement may be made, and this grant is made, subject to conditions subsequent.

Barringer & A. Mines & Mining, 54; 10 Am. & Eng. Enc. Law, 2d ed. p. 404, note 1; Salem Capital Flour Mills Co. v. Stayton Water-Ditch & Canal Co. 33 Fed. 154.

The interest of a locator in an unpatented mining claim is not the subject of dower or community interest.

Black v. Elkhorn Min. Co. 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101; McAllister v. Hutchinson, 12 N. M. 111, 75 Pac. 41.

The rights of the locator perhaps are more nearly analogous to a "license" and "bond to convey" than any other terms of the common law. As a licensee he has no interest or property or estate in the land itself, but only in the proceeds, and in such proceeds, not as realty, but as personal property.

Wheeler v. West, 71 Cal. 126, 11 Pac. 873; Cowles v. Kidder, 24 N. H. 364, 57 Am. Dec. 287.

There is no rent reserved. It stands as a permit to mine,—a mere incorporeal hereditament.

13 Am. & Eng. Enc. Law, 539; Lindley, Mines, 860.

As a mining bond to convey, he obtains no estate in the land, or vested right to purchase or to claim a patent.

Benson Min. & Smelting Co. v. Alta Min. & Smelting Co. 145 U. S. 428, 36 L. ed. 762, 12 Sup. Ct. Rep. 877; Black v. Elkhorn Min. Co. supra.

In Black v. Elkhorn Min. Co. supra, no name is given to this statutory granted right, but it is described as: "(1) That no written instrument is necessary to create it. Locating upon the land and continuing yearly to do the work provided for by the statute gives to and continues in the locator the right of possession as stated in statute. . . . The interest in a mining claim is nothing more than a right to the

exclusive possession of the land, based upon conditions subsequent, a failure to fulfil which forfeits the locator's interest in the claim. . . . The rights are personal to the locators, their heirs and assigns."

Congress, at the passage of the mining laws, evidently had in view that the granted rights, in so far as possession and operation is concerned, were chattel interests; and similar rights under the terms "easement" and "license" not being inheritable or assignable at common law, extended the rights to "heirs and assigns."

Belk v. Meagher, 104 U. S. 281, 26 L. ed. 736; Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651; Noyes v. Mantle, 127 U. S. 351, 32 L. ed. 169, 8 Sup. Ct. Rep. 1132.

It was undoubtedly the intention of Congress to make this grant a personal one to the locator, and to his heirs and to his assigns, which could not be divested by an involuntary abandonment. Like homesteads, pre-emptions, and other like government grants, it could not be the subject of involuntary assignment through sales under execution, attachment, or other involuntary lien. If it had been intended otherwise a word of more enlarged meaning would have been used in the place of "assigns," for in this sense it is limited to an assignee in fact, and does not comprehend an assignee by operation of law. It would be regarded as a strange construction of the word to extend it to a sheriff, or the creditors whom he represents by reason of the levy of an attachment.

Burlington Nat. Bank v. Bard, 55 Kan. 773, 42 Pac. 321.

Abandonment is a mixed question of law and fact when it is without a written conveyance, such as giving up the possession without any intention to return. Here the fact of leaving and the fact of intention not to return must be found and determined against the locator, and when so found the law presumes abandonment in law.

Black v. Elkhorn Min. Co. supra; Lindley, Mines, pp. 643, 644.

Abandonment is conclusive where there is a conveyance and surrender of possession to the assignee, as there is included in the conveyance both the leaving and intent.

Black v. Elkhorn Min. Co. supra; Heron v. Eagle Min. Co. 37 Or. 155, 61 Pac. 417; Phoenix Min. & Mill. Co. v. Scott, 20 Wash. 48, 54 Pac. 779; McAllister v. Hutchinson, supra.

The term or tenure of this mining grant terminates on abandonment or forfeiture.

Black v. Elkhorn Min. Co. supra.

Mr. Robert E. Morrison, *in propria persona*, submitted the cause for appellee: Unpatented mining claims are real estate.

Forbes v. Gracey, 94 U. S. 762, 764, 24 L. ed. 313, 314; Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735; McFeters v. Pierson, 15 Colo. 201, 22 Am. St. Rep. 388, 24 Pac. 1076; Hopkins v. Noyes, 4 Mont. 550, 2 Pac. 280; Butte Hardware Co. v. Frank, 25 Mont. 344, 65 Pac. 1; State ex rel. Baker v. Second Judicial Dist. Ct. 24 Mont. 330, 61 Pac. 882.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The appellant asserts that no lien was created against the interest of E. G. Wager (the judgment debtor) in the unpatented claims in controversy by reason of the docketing of that judgment on the 30th of December, 1899. She also asserts that there was an abandonment in fact and in law by Wager of his interest in the mining claims, by reason of the making and delivery of the deed by himself and others, dated August 27, 1900, to the corporation mentioned, and by contemporaneously therewith putting the company in the peaceful and exclusive possession of the claims. She further urges that the levy made under the execution of November 27, 1904, issued upon the judgment in Bennett v. Wager, created no special lien against the property that related back to the docketing of the judgment, and that the sale of Wager's interest in the mining claims under that execution to the appellee vested in him no interest or title prior or paramount to the interest, possession, and title of the appellant, and generally the appellant asserts that the judgment appealed from is contrary to law, in that an unpatented mining claim is not the subject of a judgment lien, and if it were, the lien was destroyed by the judgment debtor's abandonment of the claim on August 27, 1900.

The statute under which the question arises is act No. 50 of the Session Laws of 1891 of the territory of Arizona, page 50, § 4, which reads as follows:

"Every such judgment when so docketed shall, for a period of five years from the date of the rendition thereof, be a lien on the real property in the county where the 394]same is docketed, *except the homestead, of every person against whom such judgment shall be rendered and docketed, and which he may have at any time thereafter within said period of five years."

53 L. ed.

Now, at the time of the docketing of this judgment E. G. Wager, the judgment debtor, was the owner of the undivided one-quarter interest, of record, in the mining claims named in the complaint, and the appellee contends that these unpatented mining claims were real property within the meaning of the above statute, for the purpose of establishing a judgment lien thereon.

The character of the possession of mining claims and the title under which they are held has been frequently adverted to in the decisions of this court, as well as in the many decisions of the courts of what may be termed "mining" states and territories.

By § 2322 of the United States Revised Statutes it was enacted that "the locators of all mining locations heretofore made or which shall hereafter be made on any mineral vein, lode, or lead, situated on the public domain, their heirs and assigns . . . shall have the exclusive right, possession, and enjoyment of all the surface included within the lines of their location, and of all veins, lodes, and ledges throughout their entire depth." U. S. Comp. Stat. 1901, p. 1425.

In Forbes v. Gracey, 94 U. S. 762, 767, 24 L. ed. 313, 314, it is said the claims of this nature "are the subject of bargain and sale, and constitute very largely the wealth of the Pacific Coast states. They are property in the fullest sense of the word, and their ownership, transfer, and use are governed by a well-defined code or codes of law, and are recognized by the states and Federal government. This claim may be sold, transferred, mortgaged, and inherited, without infringing the title of the United States."

In Belk v. Meagher, 104 U. S. 279, 26 L. ed. 735, it was held that actual possession of the claim was not essential to the validity of the title obtained by a valid location, and, until such location was terminated by abandonment or forfeiture, no right or claim to the property could be acquired by an adverse entry thereon with *a view to[395 the relocation thereof. Mr. Chief Justice Waite, in delivering the opinion of the court, referred to the language used in Forbes v. Gracey, supra, and reaffirmed the same.

In Manuel v. Wulff, 152 U. S. 505, 510, 38 L. ed. 532, 14 Sup. Ct. Rep. 651, Mr. Chief Justice Fuller, in delivering the opinion of the court, again repeated the language in Forbes v. Gracey, supra, and again reaffirmed its correctness (at page 510.) To the same effect is Elder v. Horseshoe Min. & Mill. Co. 194 U. S. 248, 48 L. ed. 960, 24 Sup. Ct. Rep. 643; and see Elder v. Wood,

208 U. S. 226, 52 L. ed. 464, 28 Sup. Ct. Rep. 263.

We thus find that the title of a locator to a mining claim is not only property, but it is property which, in addition to being sold, transferred, and mortgaged, is also capable of being inherited, without in any manner infringing the title of the United States.

The legislature of Arizona, by a statute which was in force in December, 1899, defined the meaning to be given the term "real property" in the construction of statutes, as coextensive with lands, tenements, and hereditaments. This statute is said to have been repealed September 1, 1901, before the execution was issued in this case, and was reenacted March 5, 1907. Sess. Laws 1897, chap. 10, p. 8, § 5.

That legislature, also, in the title of the Revised Statutes relating to conveyances, provided that "the term 'land,' as used in this title, is declared to mean and include mines and mining claims;" and the statute relating to fraud and fraudulent conveyances (Arizona Statutes, ¶ 2708) reads: "The term 'real estate,' as used in this title, shall be deemed to include mines and mining claims." By paragraph 2948 of the same statutes it is enacted that "the words 'real property,' whenever used in this title, is taken to include mines." The statute relates to the limitation of actions, and provides for the remedies which may be enforced in mining claims.

It is not contended that these special statutes, except the first, thus referred to, relate to or affect judgment liens on mining property as real property, but they show the general intent of the legislature to include 396]claims of such a nature in *speaking of real estate or real property. But the statute defining the meaning of the term "real property" was in force when the Wager judgment was obtained, and the statute made property that might be inherited, real property, upon which a judgment would be a lien. Taking the decisions of the courts, some of which are above referred to, and considering the general nature and meaning of the legislation of the territory, we conclude that the words "real property" covered mining claims. The lien of the judgment therefore existed when the conveyance by Wager was made in August, 1900, and that conveyance would be subject to that lien.

Of course, if the conditions subsequent, as the doing of the necessary work, were not performed, the title would be subject to forfeiture.

The case of *Black v. Elkhorn Min. Co.* 163 U. S. 445, 41 L. ed. 221, 16 Sup. Ct. Rep. 1101, has been referred to as in some way inconsistent with the decision of the court below in this case. All that was there decided was that the plaintiff, widow of the locator, was not entitled to dower under the statutes of Montana on that subject, with reference to a mining claim under the statutes of the United States.

This court held that, under the Federal statute, no right was granted to the wife of a locator, either present or contingent; and that the government, being the owner of the land, could impose its own terms upon which to grant any right, whether of possession or of purchase. The character of the interest of a locator in a mining claim, as held in the cases above cited, was referred to and was not questioned. The case turned upon the peculiar nature of the widow's claim for dower in such a case, and that such interest did not attach to mining claims. That, as the government still retained the title, the locator did not take such an estate in the claim that dower attached to it.

The judgment under which the appellee claims having become a lien under the Arizona statute upon being docketed in December, 1899, the subsequent conveyance of the interest of the judgment debtor to a third party did not clear the property *from the lien of the judgment, but[397 the same was in force at the time of the issuing of the execution upon it and of the sale under such execution.

The judgment of the Supreme Court of Arizona was right, and is affirmed.

HUGH HARTEN, Plff. in Err.,

v.

ERNST LÖFFLER.

(See S. C. Reporter's ed. 397-405.)

Appeal — amount in dispute.

1. The amount in dispute in a suit to recover damages for the refusal of the vendor to carry out a contract for the sale of real property is sufficient to give the Federal Supreme Court jurisdiction of a writ of error to the court of appeals of the District of Columbia to review a judgment in favor of plaintiff for \$1,250, where the defendant, in his set-off, claims an unpaid balance of \$11,750 of the purchase price, and claims that the amount of the judgment against

him is erroneous, and that a reversal will permit him to claim before the jury on another trial the full amount of his set-off, or, at least, the balance due for the purchase price.

[For other cases, see Appeal and Error, 402-412, in Digest Sup. Ct. 1908.]

Evidence — parol evidence to explain writing.

2. Parol evidence of the existing circumstances at the time the contract for the sale of real property was made is admissible for the purpose of identifying the premises and of removing the ambiguity created by the use of the word "about."

[For other cases, see Evidence, VI. n, in Digest Sup. Ct. 1908.]

Damages — breach of contract of sale.

3. The difference between the purchase price and the market value at the time of executing a contract for the sale of real property is the measure of damages in an action by the vendee against the vendor, founded on the latter's refusal to perform.

[For other cases, see Damages, VI. b, 2, in Digest Sup. Ct. 1908.]

Evidence — relevancy — value.

4. Evidence of the value of the benefit of a liquor license and of the business and good will embraced in a contract for the sale of real property is admissible on the question of damages in an action by the vendee against the vendor, founded on the latter's refusal to perform.

[For other cases, see Evidence, XI. f, in Digest Sup. Ct. 1908.]

Evidence — opinion as to values — assuming facts not in evidence.

5. A witness cannot testify as to values in answer to a question which assumes as a fact what there is no evidence to support.

[For other cases, see Evidence, VII. f, in Digest Sup. Ct. 1908.]

[No. 91.]

Argued and submitted January 26, 1909.
Decided February 23, 1909.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the

NOTE.—As to jurisdiction of United States circuit court as dependent upon amount—see notes to Auer v. Lombard, 19 C. C. A. 75, and Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

On parol evidence to explain writing—see notes to Ferguson v. Rafferty, 6 L.R.A. 33; M'Iver v. Walker, 3 L. ed. U. S. 696; and Atkinson v. Cummins, 13 L. ed. U. S. 223.

On damages for breach of contract to convey real estate—see notes to Beck v. Staats, 16 L.R.A.(N.S.) 768; Hopkins v. Lee, 5 L. ed. U. S. 218; and Telfener v. Russ, 36 L. ed. U. S. 800.

On expert testimony generally—see note to Davis v. United States, 41 L. ed. U. S. 750.

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Supreme Court of the District in favor of plaintiff in an action by the vendee in a contract for the sale of real property to recover damages from the vendor for the latter's refusal to perform. Affirmed.

See same case below, 29 App. D. C. 490.

Statement by Mr. Justice Peckham:

The defendant in error, hereafter called the plaintiff, commenced this action against the plaintiff in error, hereafter called the defendant, in the supreme court of the District of *Columbia to recover damages [398 for the refusal of the defendant to perform a written agreement made between the plaintiff and the defendant and his wife, by which the defendant agreed to convey certain premises on Brightwood avenue, or Seventh street, in the District of Columbia, to the plaintiff for the sum of \$12,000.

The defendant denied the alleged agreement, and also pleaded a set-off to recover \$20,000 damages against the plaintiff for the plaintiff's own failure to perform the agreement set up by defendant.

The plaintiff replied, denying the defendant's averments as to set-off, and the latter joined issue on plaintiff's replication.

A trial was had before a jury, and terminated in a verdict for the plaintiff for \$1,250, with interest on \$250 from April 27, 1905, upon which judgment was entered.

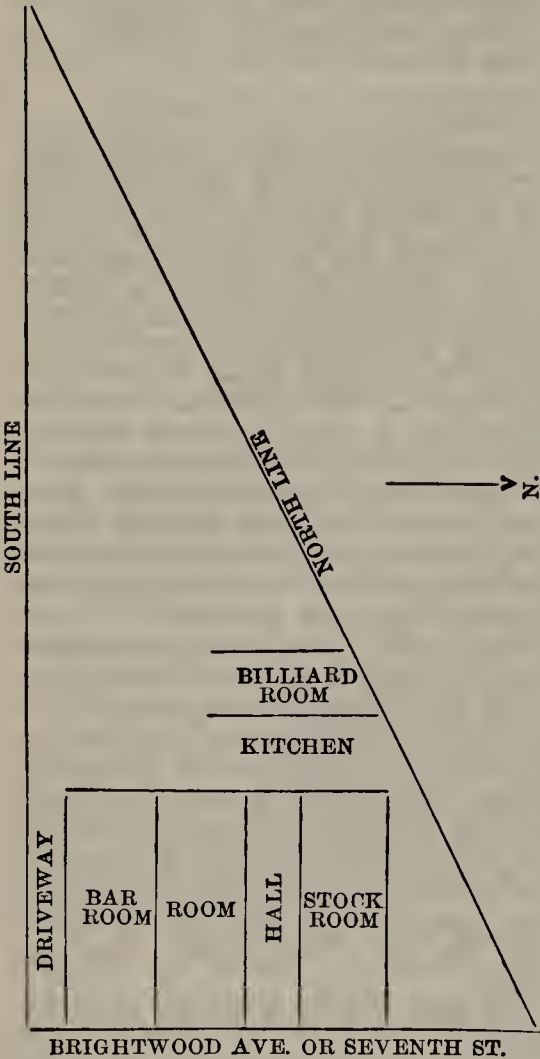
Upon appeal to the court of appeals of the District, that court affirmed the judgment (29 App. D. C. 490), and the defendant sued out a writ of error from this court.

The material facts in the case are as follows:

The defendant, on the 27th of April, 1905, was the owner of a lot or parcel of land on Brightwood avenue, or Seventh street, a half mile north of Brightwood in the District of Columbia. On the date named the parties entered into an agreement, and the defendant and his wife signed the same, as follows:

"For and in consideration of the sum of twelve thousand dollars, two hundred and fifty dollars whereof is hereby acknowledged, I hereby agree to sell to Ernest Löffler the property, good will, license, and fixtures, located on Brightwood avenue near Battle Ground Cemetery, fronting on Brightwood avenue about sixty feet, with a depth of about two hundred feet, title and transfer of license guaranteed or deposit refunded. I agree to use my best efforts to secure the signers for the transfer of said license, and to give said Löffler a clear title to all of above property."

To understand more readily the applica-
399] bility of the evidence *a diagram showing the shape of the lot and the location of the building is given below.



The principal questions on the trial arose in regard to the admission and exclusion of certain evidence by parol and upon exceptions taken to the charge.

The opinion of the court of appeals was
400] delivered by the *late Mr. Justice McComas, who made a synopsis of the facts and evidence, which is herewith inserted:

"The appellant owned a parcel of land on Brightwood avenue, or Seventh street road, a half mile north of Brightwood, in this District. He there kept a saloon and country tavern in a building erected on a lot triangular in shape, fronting 85 feet on Seventh street road. As appears in the diagram the front line and the south line of the triangle formed a rectangle, and the south line was 224 feet long. The hypothenuse, or north line, was 239½ feet long. The improvements fronted on the Seventh street road and comprised a frame building standing 51½ feet along the road. At the

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northeast corner was a small lot of ground with a front of 13½ feet, the house line running back at right angles nearly joined the north line, making this lot a triangle. On the south side was a driveway about 20 feet wide. At the south end of the building was a barroom, and adjoining it on the north was a serving room for guests. A hallway came next on the north, and on the north side of the hall was a store room for liquors, above which, on the second story, was a ball room. The remaining upper rooms of the house were used as living rooms for the family of the appellant. Back of the store room on the ground floor on the north line of the premises was a kitchen, and in the rear of that, on the same north line, was a billiard room for guests. In the rear of these structures, and all adjoining the north line, were various stables, sheds, and outhouses. . . .

"Beginning at the south line of this parcel of land, if one measured 60 feet northward on the front line, the end of the 60-foot line was at a point in the hall doorway near the middle thereof, and only the south 40 feet of the building would be included within the 60 feet, while 11½ feet of the north end of the building and a small triangular lot before described would be excluded. All the premises were occupied and used in their entirety by the appellant. *From the record, it appears the ap-
[401] pellant told Charles D. Hood, a liquor dealer, that he wished to sell his property and business for \$12,000; that he wished to get out of the neighborhood because he could not do business there, and the protests made it difficult to renew his license. Hood communicated this information to the appellee, who sent his agent to purchase the property. This man introduced himself as a real estate agent to the appellant and asked him what he wanted for the place, and the appellant said he would take \$12,000 for the property, fixtures, and everything excepting pool tables and stock. Later this agent called with the appellee, who came as a prospective purchaser, and the appellant, with knowledge of that, conducted the appellee over the premises, showing him over the whole building, upstairs and downstairs and into the kitchen and billiard room.

"Several days later, on April 27, 1905, after the appellee had sold his saloon in Georgetown, he notified the appellant that he would visit him to 'make the deal;' and the two parties and this agent met on the premises the same afternoon. The price asked by the appellant was finally agreed to, and it was agreed that Mr. Richard, a wholesale liquor dealer, a friend of both parties, who had helped the appellee to sell

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his saloon, and had driven out with him, should write the agreement.

"During these negotiations, the appellant did not suggest that he did not intend to sell the whole premises, or that he intended to reserve any portion, but said that the stock of liquors and the pool or billiard tables were not included in the sale. Richard wrote the following paper, which was signed by the appellant and his wife.

[It is the agreement above set forth.]

"Richard testified when he had written as far as 'license and fixtures located on Brightwood avenue near Battle Ground Cemetery,' he turned and asked, 'What is the size of this place?' and there followed a discussion between the two Löfflers, Harten, and himself. One of the party suggested it was about 60 feet, and Harten said, 'That is 402]about right,' and Richard so wrote *it. Nothing was said by Harten or by Löffler to indicate that only a portion of the premises was to be sold, and it was understood that the whole of the premises was covered by the description.

"The appellee testified that in this discussion the appellant stated that the lot had about 60 feet front and about 200 feet in depth; that when Richard was writing the contract 'he asked Mr. Harten how much ground was in this place. We all were guessing, and Mr. Harten said, "Put it down about 60 feet front, and about 200 feet deep;" and Mr. Richard said, "All right, we will put it down that way."' That when the paper had been prepared, Harten called to Mrs. Harten and said to her, 'I want you to sign this contract, I sold the place.' Before the contract was prepared, and while they were discussing the price, the appellant said to the appellee, 'I will sell everything here.'

"Andrew Löffler, the agent, testified that 'when we came down to describe the place, Harten told him it was described in the license. Harten brought the license. The description in the license is "opposite 'Battle Ground Cemetery.'" Richard put that down and said we should describe the property a little plainer; he said, "What is the square number or what is the number of the lot?" Harten said, "There is no number to the lot;" he did not know the number of the square, so he said, "We had better put down the number of feet you have here." Somebody asked me what my idea was, and I said about 60 feet; I looked out of the window to size it up; Mr. Löffler made a guess, and we all made a guess. Harten said, "Put it down about 60 feet;" we estimated about 60 feet front and about 200 feet deep.'

"Peter J. May testified that he met the appellee and his wife at Harten's place on 53 L. ed.

the day after the sale, and Harten stated that Löffler had bought him out; that he had sold the whole place,—everything,—ground and all, and was going out of business; and this witness and Mrs. Löffler were shown through the house by Harten, who then described how she was going to fix up the "house, and Harten conducted them[403 into many rooms, including the liquor store room and the ball room above it. Later, the appellee asked the appellant to indorse the license paper and sign the application for its transfer. The appellee or his agent or attorney frequently repeated this request. Harten always refused to sign, at one time saying he did not want family trouble. Finally, when urged by the appellee and his attorney, and being charged with attempting to back out of his agreement, the appellant replied, 'I won't sign a damn thing.'

"Subsequently the appellee tendered to the appellant the purchase money and a deed of the premises, and, without reading it, the appellant refused to sign, and immediately after offered to the agent, Löffler, \$100 'to get me out of this.'

Mr. Lorenzo A. Bailey argued the cause and filed a brief for plaintiff in error:

The word "about" (adverb) means nearly, approximately, with close correspondence in quality, manner, degree, quantity, number, etc.

Webster's International Dict.

In many cases the use of this word in conveyances or contracts for land has rendered such contracts and conveyances unenforceable for want of certainty.

Finelite v. Sinnott, 25 Jones & S. 57, 5 N. Y. Supp. 440; Shipp v. Miller, 2 Wheat. 316, 326, 4 L. ed. 248, 251; Johnson v. Pannel, 2 Wheat. 206, 211, 4 L. ed. 221, 222; Bodley v. Taylor, 5 Cranch, 191, 225, 3 L. ed. 75, 85.

In the case at bar the word "about" is used in the general or descriptive call, and under the foregoing decisions the word may be rejected, or else it must be taken as rendering the agreement too uncertain for enforcement, as in the cases of Baltimore Permanent Bldg. & L. Soc. v. Smith, 54 Md. 187, 39 Am. Rep. 374; Thomas v. Turvey, 1 Harr. & G. 435; Dorsey v. Wayman, 6 Gill, 59; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418.

Löffler must be held by the agreement as it is written, not only by the force of the doctrine of mutuality, but also by the principles declared in the following decisions:

Baltimore Permanent Bldg. & L. Soc. v. Smith, 54 Md. 204, 39 Am. Rep. 374; Thomas v. Perry, Pet. C. C. 49, Fed. Cas. No. 13,908; Stevens v. McKnight, 40 Ohio

St. 341. See also *Albro v. Gowland*, 98 App. Div. 474, 90 N. Y. Supp. 796; *Lipscomb v. Watrous*, 3 App. D. C. 7.

A vendee of land when it is sold in gross or with the description "more or less" or "about," does not thereby *ipso facto* take all the risk of quantity, but the use of these or similar words in designating quantity, although they may show a sale in gross, and not by the acre, covers only a reasonable excess or deficiency.

Belknap v. Sealey, 14 N. Y. 158, 67 Am. Dec. 120; *Harrell v. Hill*, 19 Ark. 110, 68 Am. Dec. 202; *Drake v. Eubanks*, 61 Ark. 120; *Stebbins v. Eddy*, 4 Mason, 414, Fed. Cas. No. 13,342; *Couse v. Boyles*, 4 N. J. Eq. 216, 38 Am. Dec. 514; *Pratt v. Bowman*, 37 W. Va. 720, 17 S. E. 210; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W. 614; *Newton v. Tolles*, 66 N. H. 136, 9 L.R.A. 50, 49 Am. St. Rep. 593, 19 Atl. 1092.

The word "about" gives a margin for a moderate excess in, or diminution of, the quantity mentioned, and imports that the actual quantity is a near approximation to that mentioned.

Baltimore Permanent Bldg. & L. Soc. v. Smith, supra; *Sample v. Pickard*, 74 Mich. 416, 42 N. W. 54; *Stevens v. McKnight*, supra; *Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 462, 34 N. E. 579.

An agreement, to be within the statute of frauds, cannot be partly in writing and partly in parol.

Moale v. Buchanan, 11 Gill & J. 314.

The original statute of frauds, 29 Car. II., chap. 3, was enacted for the declared purpose of the prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury.

Alexander, British Stat. 508.

The common-law rule for excluding oral evidence as to written contracts rests upon the presumption that the parties waived all stipulations not put in the writing. But, under the statute of frauds, the oral evidence is rejected because it is in the policy of the law to regard it as untrustworthy *per se*.

1 Reed, Stat. Fr. §§ 12, 15.

The difference between the two rules is shown by the case of a written contract on its face manifestly incomplete. If the subject-matter of the contract is within the statute of frauds, no oral evidence can be received to supply the defects of the writing; whereas the common-law rule is no bar to such admission.

1 Reed, Stat. Fr. § 12; *Moale v. Buchanan*, supra; *Osborn v. Phelps*, 19 Conn. 63; 48 Am. Dec. 133; *Glass v. Hulbert and Baltimore Permanent Bldg & L. Soc. v. Smith*, supra; *Taney v. Bachtell*, 9 Gill, 205; 572

Thomas v. Turvey, supra; *Dorsey v. Wayman*, 6 Gill, 66; *Powers v. Rude*, 14 Okla. 381, 79 Pac. 94; *Williams v. Morris*, 95 U. S. 444, 24 L. ed. 360; *Parkhurst v. Van-Cortlandt*, 1 Johns. Ch. 279.

The question in the construction of written instruments is not what was the intention of the parties, but what is the meaning of the words they have employed. Oral evidence cannot be resorted to for the purpose of contradicting or varying the language actually employed.

Cameron v. Sexton, 110 Ill. App. 386.

If there be room for construction, it must be favorable to the defendant.

Noonan v. Bradley, 9 Wall. 394, 19 L. ed. 757; *Allen-West Commission Co. v. People's Bank*, 74 Ark. 41, 84 S. W. 1041; *Leslie v. Bell*, 73 Ark. 338, 84 S. W. 493.

Whether *ambiguitas patens* or *ambiguitas latens*, it is clearly one of those cases which can be helped only by election, and not by averment.

1 Best, Ev. Morgan's ed. § 226, pp. 425, 426.

Parol evidence to identify the property described in a contract is inadmissible if inconsistent with what appears in the writing.

Guilmartin v. Wood, 76 Ala. 209; *Hutton v. Arnett*, 51 Ill. 201; *Lawrence v. Comstock*, 124 Mich. 123, 82 N. W. 808; *Carmichael v. Foley*, 1 How. (Miss.) 591; *New Hampshire Cattle Co. v. Bilby*, 37 Mo. App. 47; *Peaslee v. Gee*, 19 N. H. 278; *Johnson v. Pierce*, 16 Ohio St. 477; *McAfferty v. Conover*, 7 Ohio St. 103, 70 Am. Dec. 57; *Messer v. Rhodes*, 3 Brewst. (Pa.) 188; *Coombs v. Patterson*, 19 R. I. 27, 31 Atl. 429; *Curtis v. Brown County*, 22 Wis. 169; *Morton v. Clark*, 181 Mass. 135, 63 N. E. 409; *Morowsky v. Rohrig*, 4 Misc. 167, 23 N. Y. Supp. 882; 17 Cyc. Law & Proc. pp. 734, 748.

Parol evidence of extrinsic circumstances is received not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed. The duty of the court is to declare the meaning of what is written, and not of what was intended to be written; keeping in view the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument.

17 Cyc. Law & Proc. pp. 673-675; *Doe ex dem. Hughes v. Wilkinson*, 35 Ala. 462.

Even in equity, in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the statute of frauds.

Atty. Gen. v. Sitwell, 1 Younge & C.

Exch. 582; *Osborn v. Phelps*, 19 Conn. 73, 48 Am. Dec. 133.

Mr. Leon Tobriner submitted the cause for defendant in error:

The sense in which the parties used the word "about" is to be ascertained in the light of the circumstances surrounding the parties when the agreement was made.

Pine River Logging & Improv. Co. v. United States, 186 U. S. 279, 288, 46 L. ed. 1164, 1169, 22 Sup. Ct. Rep. 920; *Von Lingen v. Davidson*, 1 Fed. 186, 5 Hughes, 221, 4 Fed. 350; *Lowber v. Bangs*, 2 Wall. 737, 17 L. ed. 769; *Indianapolis Cabinet Co. v. Herrman*, 7 Ind. App. 467, 34 N. E. 579.

Parol evidence is admissible in aid of a written contract, for the purpose of applying it to its subject-matter, or to explain its terms, or the intention of the parties, if of doubtful import.

Mead v. Parker, 115 Mass. 413, 15 Am. Rep. 110; *Fry*, Spec. Perf. 3d. ed. § 325, p. 157; *Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Slater v. Smith*, 117 Mass. 98; *Farmer v. Batts*, 83 N. C. 387; *Waldron v. Jacob, Jr.* Rep. 5 Eq. 131; *Fulton v. Robinson*, 55 Tex. 404; *Bradley v. Washington, A. & G. Steam Packet Co.* 13 Pet. 89, 97, 99, 10 L. ed. 72, 76, 77; *Whelan v. McCullough*, 4 App. D. C. 63; *Okie v. Person*, 23 App. D. C. 182; *Reed v. Locks & Canals*, 8 How. 274, 12 L. ed. 1077; 17 Cyc. Law & Proc. pp. 668-675, 682; *Warfield v. Booth*, 33 Md. 63; *Atkinson v. Cummins*, 9 How. 479, 486, 13 L. ed. 223, 227.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The defendant in error objects that this court is without jurisdiction on the ground of the amount in controversy not being sufficient. Taking the pleadings, the evidence given, and the verdict of the jury, it would seem that the amount in dispute is sufficient to give this court jurisdiction. In his set-off the defendant claims the unpaid balance of the purchase price for the property agreed upon, which unpaid balance amounted to \$11,750, and he claims that sum now, and he also claims that the amount of the judgment against him of \$1,250 is erroneous, and that a reversal of this judgment will permit him to claim before a jury, on another trial, the full amount of his set-off, or at least the balance due for the purchase price. We think the court had jurisdiction. *Block v. Darling*, 140 U. S. 234, 35 L. ed. 476, 11 Sup. Ct. Rep. 832; *Buckstaff v. Russell & Co.* 151 U. S. 626, 38 L. ed. 292, 14 Sup. Ct. Rep. 448.

404] *The objection made by the defendant in error is that the evidence is not sufficient to support the judgment. **53 L. ed.**

ant to the oral evidence goes to its being contradictory to or inconsistent with the written agreement. The defendant maintains that the admission of such evidence was contrary to the rule on that subject. We agree with the court of appeals that the evidence was properly admitted. The tendency and purpose of the whole evidence were simply to show the circumstances existing at the time when the contract in question was executed and to identify the premises, and to give point and meaning to the word "about" as contained in the contract. "About" is a relative and frequently ambiguous term, and its precise meaning is affected by circumstances existing when the word is used in a contract, and known to and recognized by the parties. The evidence was not inconsistent with, nor did it contradict, the written contract; but, when a diagram of the premises is shown, it plainly appears that the word "about," with reference to the width of the premises on Brightwood avenue, left an ambiguity in the contract which it was perfectly proper to explain by oral evidence. The oral evidence identified the premises and gave point and certainty to the meaning of the word. In *Lowber v. Bangs*, 2 Wall. 728, 737, 17 L. ed. 768, 769, it was said that contracts, where their meaning is not clear, are to be construed in the light of the circumstances surrounding the parties when they were made, and the practical interpretation which they, by their conduct, have given to the provisions in controversy. Taking these existing circumstances and that interpretation into consideration, it is seen that the identification of the premises is made clear by the oral evidence, and it is also plain that the word "about" must extend the 60 feet limit to the north end of the premises. It never could have been the idea of either party that the building should be cut in two, and certainly no language was used which set forth such unusual meaning. Cases are almost innumerable upon the subject of oral evidence in connection with written instruments, but we are satisfied the rule was not infringed by the introduction of such evidence in this case. The opinion of the court of appeals is satisfactory and nothing more need be added upon the subject.

Fault is found with the admission of evidence in regard to the measure of damages. The rule was correctly stated by the trial court to be the difference between the purchase price and the market value at the time of the contract of sale. In the opinion of the court of appeals it was stated that, as the contract of purchase intended not only the real estate, but also the benefit of the license, the business, and the good will, it

was proper to give evidence of the value of each of them, and this was the purpose of certain evidence, which was properly admitted.

The exclusion of the evidence of the witness Montague, when called by the defendant with reference to the value of the property, was not error, because there was absolutely no evidence whatever to support the hypothesis stated in the question. The question assumed as a fact that the business amounted to \$150 or \$200 a week, and that the realty was worth only \$4,000 with the improvements, the land and buildings on it, and then the question was put, "What would be a fair price to pay for that land with the improvements and fixtures, and the liquor license and good will of the business, but not including any of the stock in trade?" The question assumed the value of the greater portion of the property sold.

We have carefully looked through the record, and find that the other exceptions taken by the plaintiff in error upon the trial are plainly unimportant and immaterial.

The judgment must be affirmed.

406]*NORTH SHORE BOOM & DRIVING COMPANY, Plff. in Err.,

v.

NICOMEN BOOM COMPANY.

(See S. C. Reporter's ed. 406-413.)

Error to state court — Federal question — right to construct log boom in stream.

Whether or not the construction of a log boom in a navigable stream lying entirely within the state is authorized by the state statutes is not a Federal question which will sustain a writ of error from the Supreme Court of the United States to a state court.

[For other cases, see Appeal and Error, 2026-2032, in Digest Sup. Ct. 1908.]

[No. 107.]

Argued January 29, February 1, 1909.
Decided February 23, 1909.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

IN ERROR to the Supreme Court of the State of Washington to review a judgment which, reversing a judgment of the Superior Court of Pacific County, in that state, in an action to enjoin the construction of a log boom in a navigable stream, remanded the cause with directions to grant the injunction. Dismissed for want of jurisdiction.

See same case below, 40 Wash. 315, 82 Pac. 412.

Statement by Mr. Justice Peckham:

The Nicomen Boom Company, hereinafter called the plaintiff, commenced an action against the North Shore Boom & Driving Company, hereinafter called the defendant, in the superior court of the state of Washington, Pacific county, to enjoin the defendant from building a boom in the North river (a river wholly within the boundary of the state of Washington), within the locality designated in the plaintiff's plat and survey for its boom.

The action was founded upon the allegations that the plaintiff was the first to file its plat, and that it commenced to build its boom under the statutes of the state of Washington, and *that the defendant[407 was threatening to build its boom within the locality marked out and designated by the plaintiff in its plat or survey filed with the secretary of state, although its boom had not actually been completed the whole distance indicated in such plat or survey.

The defendant denied the various allegations of the plaintiff, and the parties went to trial, which resulted in a judgment for the defendant, dismissing the plaintiff's complaint. The plaintiff appealed to the supreme court of the state, where the judgment was reversed and the cause remanded to the superior court, with directions to enter judgment enjoining the defendant from building the boom within the location marked on the plat or survey for the plaintiff's boom. See the opinion of the state court, 40 Wash. 315, 82 Pac. 412, showing plainly and in full the grounds of the decision.

The defendant has sued out a writ of error from this court and brings the judgment here for review.

Messrs. Charles E. Miller and John M. Thurston argued the cause, and, with Messrs. W. H. Abel, James B. Howe, and Samuel H. Piles, filed a brief for plaintiff in error:

There could be no lawful occupancy of the navigable waters of the United States without permission from the Secretary of War, and hence, any dispute between oppos-

ing parties as to such right of occupancy is necessarily a Federal question.

United States v. Bellingham Bay Boom Co. 176 U. S. 218, 44 L. ed. 442, 20 Sup. Ct. Rep. 343; *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472.

The Washington supreme court held that the filing of a boom plat was analogous to the filing of a plat for right of way by a railroad corporation, which would hold the location until actual abandonment, and that therefore the defendant in error had the state assent, and that plaintiff in error could not have such assent. This was the sole question in the case, as decided by the supreme court of the state of Washington, and from its very nature could only be a Federal question.

Blythe v. Hinckley, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Douglas v. Wallace*, 161 U. S. 346, 40 L. ed. 727, 16 Sup. Ct. Rep. 485.

Jurisdiction is apparent on the record.

Armstrong v. Athens County, 16 Pet. 281, 10 L. ed. 965; *Moore v. Mississippi*, 21 Wall. 638, 22 L. ed. 653; *Murray v. Charleston*, 96 U. S. 442, 24 L. ed. 761; *Crossley v. New Orleans*, 108 U. S. 105, 27 L. ed. 667, 2 Sup. Ct. Rep. 300; *Weatherby v. Bowie*, 131 U. S. ccxv. and 25 L. ed. 606; *Kaukauna Water Power Co. v. Green Bay & M. Canal Co.* 142 U. S. 269, 35 L. ed. 1009, 12 Sup. Ct. Rep. 173; *Gulf & S. I. R. Co. v. Hewes*, 183 U. S. 69, 46 L. ed. 88, 22 Sup. Ct. Rep. 26; *Anderson v. Carkins*, 135 U. S. 483, 34 L. ed. 272, 10 Sup. Ct. Rep. 905; *Powell v. Brunswick County*, 150 U. S. 433, 37 L. ed. 1134, 14 Sup. Ct. Rep. 166; *McCullough v. Virginia*, 172 U. S. 118, 43 L. ed. 388, 19 Sup. Ct. Rep. 134; *Wedding v. Meyler*, 192 U. S. 573, 48 L. ed. 570, 66 L.R.A. 833, 24 Sup. Ct. Rep. 322; *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198; *Mitchell v. Clark*, 110 U. S. 646, 28 L. ed. 283, 4 Sup. Ct. Rep. 170, 312; *Boyd v. Nebraska*, 143 U. S. 180, 36 L. ed. 116, 12 Sup. Ct. Rep. 375; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 555, 31 L. ed. 204, 8 Sup. Ct. Rep. 217; *Erie R. Co. v. Purdy*, 185 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; *Snell v. Chicago*, 152 U. S. 191, 38 L. ed. 408, 14 Sup. Ct. Rep. 489; *Winter v. Montgomery*, 156 U. S. 385, 39 L. ed. 460, 15 Sup. Ct. Rep. 649; *Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner*, 139 U. S. 295, 35 L. ed. 194, 11 Sup. Ct. Rep. 528; *Cook County v. Calumet & C. Canal & Dock Co.* 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; *Chicago, B. & Q. R. Co. v. Chicago*, 53 L. ed.

166 U. S. 228, 41 L. ed. 982, 17 Sup. Ct. Rep. 581.

Mr. James G. Wilson argued the cause, and, with Messrs. W. W. Cotton and Welsh & Welsh, filed a brief for defendant in error:

No Federal question was decided by the supreme court of the state of Washington.

Rutland R. Co. v. Central Vermont R. Co. 159 U. S. 638, 40 L. ed. 288, 16 Sup. Ct. Rep. 113; *Eustis v. Bolles*, 150 U. S. 366, 37 L. ed. 1112, 14 Sup. Ct. Rep. 131; *California Powder Works v. Davis*, 151 U. S. 393, 38 L. ed. 207, 14 Sup. Ct. Rep. 350; *Taylor, Jurisdiction*, §§ 238-240; *Giles v. Teasley*, 193 U. S. 160, 48 L. ed. 658, 24 Sup. Ct. Rep. 359; *Sawyer v. Piper*, 189 U. S. 156, 47 L. ed. 758, 23 Sup. Ct. Rep. 633; *Harrison v. Morton*, 171 U. S. 46, 43 L. ed. 66, 18 Sup. Ct. Rep. 742; *Allen v. Arguimbau*, 198 U. S. 154, 49 L. ed. 993, 25 Sup. Ct. Rep. 622; *Chapin v. Fye*, 179 U. S. 128, 45 L. ed. 120, 21 Sup. Ct. Rep. 71; *Corkran Oil & Development Co. v. Arnaudet*, 199 U. S. 193, 50 L. ed. 149, 26 Sup. Ct. Rep. 41; *Fullerton v. Texas*, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Dower v. Richards*, 151 U. S. 666, 38 L. ed. 308, 14 Sup. Ct. Rep. 452; *Egan v. Hart*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *McMillen v. Ferrum Min. Co.* 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533.

The mere fact that the controversy arose out of a location in a navigable water of the United States would not necessarily raise a Federal question within § 709 of the Revised Statutes.

Egan v. Hart, supra; *McMillen v. Ferrum Min. Co.* 197 U. S. 347, 49 L. ed. 784, 25 Sup. Ct. Rep. 533; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 643, 44 L. ed. 305, 20 Sup. Ct. Rep. 245.

In order to give this court jurisdiction, the question of the right or title claimed by the plaintiff in error under a United States statute must have been specially set up, and the attention of the state courts specifically directed to the same in such a manner that the state court, at the time it passed upon the question, must have known that the plaintiff in error was intending to rely and was relying upon some right or title under a United States statute.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Hulbert v. Chicago*, 202 U. S. 279, 50 L. ed. 1028, 26 Sup. Ct. Rep. 617; *Marvin v. Trout*, 199 U. S. 212, 223, 50 L. ed. 157, 161, 26 Sup. Ct. Rep. 31; *Os-*

borne v. Clark, 204 U. S. 567, 51 L. ed. 624, 27 Sup. Ct. Rep. 319; Erie R. Co. v. Purdy, 185 U. S. 151, 46 L. ed. 849, 22 Sup. Ct. Rep. 605.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

This is a contest between two boom companies incorporated under the laws of the state of Washington, authorizing the organization of corporations of this kind.

In April, 1900, the plaintiff, after its organization, filed in the office of the secretary of state of Washington its plat or survey, showing so much of the shore lines and waters of the North river and lands contiguous thereto as it proposed to appropriate under the laws of the state. Before beginning its boom it submitted to the Secretary of War of the United States the plan of its proposed improvement and a plat of the territory to be occupied thereby, and was granted permission by the War Department to construct a boom within the limits of the river covered by the plat. The plaintiff proceeded to erect its boom along the left side of the river, but stopped short of the upper end of the territory covered by its plat of location. The boom was substantially constructed at a cost of about \$16,000, and has been operated from the time of its erection as originally constructed; and plaintiff has always expected to extend the boom within the limits of the plat of location as the demands of business might require. Some days before the commencement of the actual work of extending the plaintiff's boom, the defendant commenced to construct its boom within the limits of the original plat of the plaintiff.

411] *The defendant was organized in 1903, and filed its plat and survey in the office of the secretary of state of the state of Washington, and it alleges that, before commencing to construct its boom, it secured from the War Department of the United States permission to construct the boom within its location. The boom of the defendant, if constructed according to its plans, would cause logs coming down the river, intended to reach the plaintiff's boom, to enter the main boom of the defendant. The booms as proposed by the plaintiff and defendant cannot both be constructed. If the boom of the plaintiff should be extended up the river, within the limits of its plat and survey, the passage between its line of dolphins and the dolphins of the defendant on the other side of the stream would be so narrow as to block navigation. Moreover, it would be impracticable to operate both booms under such circumstances. If the defendant is permitted to operate its boom as

intended, the boom of the plaintiff will receive only such timber from up the river as may escape from the boom of the defendant, and such as may be transmitted through that boom to the plaintiff. These facts are practically undisputed and are found in the record and findings of the court.

The Federal government has taken no part in the dispute between the two corporations. The laws of the state provide for proceedings to build booms, and the defendant contends that it complied with those statutes, and had also obtained from the chief clerk of the War Department a written statement, dated March 23, 1903, stating that the War Department would not interpose any objection to the construction and maintenance of the boom in the manner proposed by the defendant, so long as it did not unreasonably interfere with navigation.

Several laws have been passed by Congress, contained in the river and harbor appropriation acts, prohibiting obstructions in the waters of the United States, and also providing for getting the consent of the government, through the Secretary of War, to the building of booms, bridges, etc. See *act of 1890, 26 Stat. at L. 454, chap. [412 907, §§ 7, 10. Also act of March 3, 1899, 30 Stat. at L. 1151, chap. 425, § 10, U. S. Comp. Stat. 1901, p. 3541.

The state court did not find it necessary to decide the question whether the defendant had complied with the Federal statute in regard to the building of its boom, but held that it had not complied with the statutes of the state of Washington in regard to the building of such proposed boom, and it therefore had no right to build it, and it enjoined the defendant from so doing, and directed judgment to be entered to that effect.

Before discussing the merits of the case, the defendant in error made a motion to dismiss the writ of error for the want of jurisdiction, there being, as it asserts, no Federal question reviewable under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575).

The river in question is a navigable stream, entirely within the state of Washington, and, in the absence of any statute by Congress, a state has plenary power in regard to such waters. Obstructions in those waters may be offenses against the laws of the state, but constitute no offense against the United States in the absence of a statute. *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811. The question whether the acts complained of, such as obstructions, etc., in the river, are lawful or unlawful under the state law, is, as was said in the above cited case (page 9), a state question, not a Fed-

eral one. Where there is a Federal law which it is claimed also applies to the subject and requires the consent of the Federal government, then there is a concurrent or joint jurisdiction of the state and national governments over the erection of a structure which obstructs navigation. *Cummings v. Chicago*, 188 U. S. 410, 47 L. ed. 525, 23 Sup. Ct. Rep. 472; *Montgomery v. Portland*, 190 U. S. 89, 47 L. ed. 965, 23 Sup. Ct. Rep. 735.

It is contended, however, on the part of the counsel for the defendant, that whether the assent of the state has been given to the erection of the structure is, in and of itself, a Federal question, and he cites *United States v. Bellingham Bay Boom Co.* 176 U. S. 211, 218, 44 L. ed. 437, 442, 20 Sup. Ct. Rep. 343, as authority for the proposition. That case was commenced in the circuit court of the United States for the state of Washington, northern division, and 413] was *brought by the United States under the direction of the Attorney General, pursuant to the provisions of § 10 of the river and harbor bill of 1890 (26 Stat. at L. supra). It was brought to enforce the right of the government to prevent the erection of a structure that obstructed the navigation of the river. It was held in that case that the words in the 10th section, "not affirmatively authorized by law," referred to the state as well as to the Federal law, and that the question then arose as to whether the structure was permitted by that [state] law, and as the law of Congress provided that it might be permitted if affirmatively authorized by a state law, the question whether it was so authorized became, in effect, a question whether the Federal law did or did not permit it. If it were authorized by the state law, then the Federal law provided that it might continue; and whether it was or not became a Federal question.

This is not such a case, and it is not brought by the government under the section above mentioned, but the suit concerns private parties only, and the statute does not, in the section applicable, refer to any state law, as in the case cited. Section 7, river and harbor act of 1890, 26 Stat. at L. 454, chapter 907. And § 10 of chapter 425 of the Laws of 1899, 30 Stat. at L. 1151, supra, alters the 10th section of the statute of 1890 by providing "that the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited." It leaves out the words "not affirmatively authorized by law," and substitutes "not affirmatively authorized by Congress." There is, therefore, no reference to state action or state law. Obstruc-

tion not affirmatively authorized by Congress is prohibited, but the case of the state assent remains with the state for its sole adjudication.

The construction of the boom of defendant in this case, the state court has decided, was not authorized by the state. Whether it was or not is not a Federal question. The writ of error is therefore dismissed.

*RAILROAD COMMISSION OF LOUISIANA, Appt.,
v.
CUMBERLAND TELEPHONE & TELEGRAPH COMPANY.

(See S. C. Reporter's ed. 414-428.)

Evidence — presumptions — correctness of state regulation of rates.

1. The presumption in favor of the correctness of telephone rates established by a state commission obtains, although the data upon which the commission acted may have been insufficient, so long as the rates adopted were not based entirely upon arbitrary conjecture.

[For other cases, see Evidence, 552, 553, in Digest Sup. Ct. 1908.]

Evidence — burden of proof — suit to enjoin enforcement of telephone rates.

2. The burden of showing what part, if any, of the depreciation fund accumulated by a telephone company from its receipts, was added to the capital, upon which dividends are to be paid, rests upon the company seeking to enjoin, as confiscatory and unreasonable, the enforcement of rates established by a state commission.

[For other cases, see Evidence, II. f, in Digest Sup. Ct. 1908.]

Telephones — state regulation of rates.

3. No part of the depreciation fund accumulated by a telephone company from its receipts can be added to the capital, upon which the company is entitled to a fair return from rates established by a state commission.

[For other cases, see Telephones, in Digest Sup. Ct. 1908.]

Appeal — judgment — remanding for new trial.

4. A bill seeking to enjoin, as confiscatory and unreasonable, the enforcement of telephone rates established by a state commission, will not be dismissed, even without prejudice, on reversing the decree below, granting an injunction, because of complainant's failure to show the disposition of its so-called depreciation fund, but the cause will be remanded for a new trial, where the inquiry has been founded upon

NOTE. — On legislative power to regulate telephone rates—see notes to *Chesapeake & P. Teleph. Co. v. Manning*, 46 L. ed. U. S. 1144, and *Winchester & L. Turnp. Road Co. v. Croxton*, 33 L.R.A. 181.

the actual effect of rates higher than those in question, and hence it is not merely conjecture as to what will be the result of lower rates.

[For other cases, see Appeal and Error, 5261-5268, 5481-5493, in Digest Sup. Ct. 1908.]

[No. 182.]

Argued October 20, 21, 1908. Decided February 23, 1909.

APPEAL from the Circuit Court of the United States for the Eastern District of Louisiana to review a decree enjoining the enforcement of telephone rates established by a state commission. Reversed and remanded for a new trial.

See same case below, 156 Fed. 823.

Statement by Mr. Justice Peckham:

This case comes here upon appeal by the railroad commission, which was defendant below, from a decree of the circuit court of the United States for the eastern district of Louisiana, enjoining the enforcement of certain rates prescribed by the *railroad commission of that state, for use by the appellee, telephone company therein. The appellant was created under article 283 of the Constitution of the state of Louisiana; and article 284 of that Constitution authorizes it to adopt just and reasonable rates, charges, and regulations governing and regulating, among other corporations, those operating the telephone within the state. The commission has the power to examine and compel the attendance of and to swear witnesses, and compel the production of books and papers, to take testimony under commission, and to punish for contempt, as fully as provided by law for the district courts.

Article 285 of the Constitution provides that if any corporation subject to the commission is dissatisfied with its decision fixing or adopting any rate, the corporation thus dissatisfied may file a petition, setting forth the cause of its objection, in a court of competent jurisdiction at the domicile of the commission, against said commission as defendant, and either party to such action may appeal the case to the supreme court of the state without regard to the amount involved.

By article 286 it is provided, among other things, that "whenever any rate, order, charge, rule, or regulation of the commission is contested in court, as provided for in article 285 of this Constitution, no fine or penalty for disobedience thereto, or disregard thereof shall be incurred until after said contestation shall have been finally decided by the courts, and then only for acts subsequently committed."

Under these provisions of the Constitution the railroad commission had been created and was in operation, and on or about August 6, 1906, it established and promulgated certain rates for the complainant to charge for its services within the state of Louisiana, to take effect September 1, 1906. The complainant, immediately after the promulgation of the order, and before the time when it was to take effect, applied to the commission for a rehearing before it, which was granted, but no evidence was taken on such rehearing, and the commission subsequently *reaffirmed the order, and directed that it should take effect on the 20th of October, 1906. Thereupon the complainant commenced this suit for the purpose of enjoining the enforcement of the rates established by the order, which is designated as order No. 552.

In the bill filed by the complainant it was alleged that the complainant was a corporation organized and existing under the laws of the state of Kentucky and a citizen and resident of that state, and that the railroad commission of Louisiana was a corporation organized and existing under the laws of the state of Louisiana, and was a resident of that state and of the district in which suit was brought; viz., in the eastern district of Louisiana, Baton Rouge division.

It was also alleged that prior to August 6, 1906, the complainant had in force and effect a tariff of rates between points in the state of Louisiana, which had been promulgated and put into effect by the railroad commission of that state; that such rates were entirely fair and reasonable in so far as the public is or was concerned, as under them subscribers were and are able to use said service at a price which did not and does not afford complainant a fair, just, and reasonable compensation for its services.

It was also averred that while such rates were in force the commission, without making any investigation, and without any evidence in regard to any of the facts necessary to reach a determination, and without any effort to obtain evidence in that direction, made and promulgated, on the 6th of August, 1906, the order known as order No. 552, by which order it greatly reduced the rates in existence up to that time, and the former rates were thereby changed to the rates specified in the order, which order was to become effective after the 1st of September, 1906.

The complainant further averred that it had asked for a rehearing, which the commission granted, and thereafter, being still without evidence or investigation justifying the same, the commission reaffirmed the order No. 552, and declared that *the[417

same should become effective within ten days from the date of the second order, which was dated October 10, 1906.

It was also further averred that the rates which preceded the rates provided for in order No. 552 were reasonable, just, and fair to the public, and not in any wise excessive, and under them complainant received for its services only a fair and reasonable return for the services rendered; that, under the tariff of rates promulgated and sought to be enforced by the commission under order No. 552, complainant would be required to render the services therein described at an unreasonable, unjust, and unremunerative rate, which would not afford to it a reasonable return for the services rendered, and that it would thereby be deprived of its property without due process of law; that said proposed tariff was unjust, unreasonable in itself, and was not justified by any conditions, either concerning the services in question or by the financial or physical condition of complainant's property or affairs; that the orders of the commission complained of were unjust, unfair, and unreasonable and unwarranted, not only with regard to the tariff as a whole, but with regard to each particular rate charged by said tariff; and that the tariff of rates, as a whole and in detail, constituted, for the reasons already set forth, a taking of complainant's property without due process of law and without compensation being previously made, contrary to and in violation of § 1, article 14, of the Amendments of the Constitution of the United States and in violation of certain (named) articles of the Constitution of the state of Louisiana of the year 1898.

For answer the defendant denied that there was no inquiry or proper investigation of the subject-matter prior to the promulgation of order No. 552 of the date of October 10, 1906; it also denied that the rates established were unjust, unreasonable, or improper, or that they would result in the taking of complainant's property without due process of law. Testimony was taken by depositions, and upon the trial the court directed a final decree, enjoining the commission from putting the rates in force as provided for in order No. 552, and re-418]straining the commission *from instituting any suit against the complainant for the recovery of any penalty by reason of complainant's failure to put into effect the rates in the order of the commission; and it was further adjudged that the tariff of rates specified in the order should be canceled and declared to be null and void and of no effect. An injunction was issued pursuant to the decree. See opinion of circuit court, 156 Fed. 823.

53 L. ed.

Mr. E. Howard McCalch, Jr., argued the cause, and, with Mr. Walter Guion, filed a brief for appellant:

The presumption is that the rates fixed by the commission are reasonable.

Minneapolis & St. L. R. Co. v. Minnesota, 186 U. S. 257-264, 46 L. ed. 1151-1156, 22 Sup. Ct. Rep. 900; Dow v. Beidleman, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; Chicago, M. & St. P. R. Co. v. Tompkins, 176 U. S. 167, 172, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; San Diego Land & Town Co. v. National City, 174 U. S. 753, 755, 43 L. ed. 1159, 1160, 19 Sup. Ct. Rep. 804.

The proceedings in rate fixing are not necessarily judicial, and all the essentials to the validity of judicial proceedings cannot be implied or required, so long as no constitutional right has been invaded.

San Diego Land & Town Co. v. Jasper, 189 U. S. 439, 446, 47 L. ed. 892, 896, 23 Sup. Ct. Rep. 571; Morgan's L. & T. R. & S. S. Co. v. Railroad Commission, 109 La. 263, 33 So. 214.

What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.

Smyth v. Ames, 169 U. S. 466, 547, 42 L. ed. 819, 849, 18 Sup. Ct. Rep. 418; San Diego Land & Town Co. v. National City, 174 U. S. 739, 755, 756, 43 L. ed. 1154, 1160, 1161, 19 Sup. Ct. Rep. 804.

Mr. William L. Granbery argued the cause, and, with Messrs. Denegre & Blair, filed a brief for appellee:

Appellant, in this case, has no authority or power to prevent appellee charging any price it desires for its service, so long as it is not clear that such charges are unreasonable and amount to extortion.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 409, 38 L. ed. 1027, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

Appellee's charges are reasonable and the reduction made by appellant is unreasonable.

Canada Southern R. Co. v. International Bridge Co. L. R. 8 App. Cas. 723; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Cotting v. Kansas City Stock Yards Co. (Cotting v. Godard) 183 U. S. 97, 46 L. ed. 104, 22 Sup. Ct. Rep. 30; Louisville, E. & St. L. R. Co. v. Wilson, 119 Ind. 358, 4 L.R.A. 244, 21 N. E. 341.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The complainant herein is a citizen of the state of Kentucky, while the defendant is a citizen of the state of Louisiana, and a case of diverse citizenship therefore appears

on the record. The complainant is transacting its business in several states, in a territory which is said to be 400 miles wide and 1,000 miles long, beginning in Indiana and Illinois and extending through the states of Kentucky, Tennessee, Mississippi, and Louisiana to the Gulf of Mexico. Its capital, from the time of its organization to May, 1898, was \$1,695,700. This capital was thereafter increased from time to time until February 1, 1907, from and after which it was \$20,174,350, represented by stock issued from time to time, to that amount. This includes the amount invested in Louisiana. The evidence in the case shows that the company's affairs had been economically administered, and that its business had been conducted in the state of Louisiana, ever since its entrance into that state, with great care and economy; that the stock had not been watered; that its capital was contributed in cash, and every economy possible had been practised. Adverse criticism was 419] indulged in in the circuit court in regard to the price paid by the complainant for the property of the Great Southern Telephone & Telegraph Company, the price being, as alleged, too high; but the evidence is strongly to the contrary. And, again, the business that complainant is carrying on, the evidence shows, is regarded as hazardous by those familiar with its character, and as being still in an experimental stage with regard to the proper methods of operating, and also as to appliances and other things necessary to the conduct of its business. The property is subject to great and rapid deterioration from exposure to the weather and other causes. The profits in this kind of business are shown to be almost universally low. The complainant's charges for rates in Louisiana before the promulgation of the order No. 552 were also shown to be as low as those of any of the companies in the country, and lower than most of them. Out of more than a dozen companies, which substantially cover the whole country, there is one which declares dividends of 7 per cent, others 6 per cent, 5 per cent, and 4 per cent, and some nothing, and some are bankrupt. The dividends of complainant have not been declared on any artificial capitalization or watered stock. Complainant has declared dividends as the result of its business through all the states, for the last few years, of 7 per cent. While it is contended by the commission that, from the returns made by the complainant to it, the complainant has realized upon its investment in Louisiana from 10 to 15, and even 20 per cent, yet, on the other hand, the complainant asserts that the returns on its investment in Louisiana have been less than 6 per cent during most of the time the com-

plainant has been in the state, and ending June 30, 1907. It is asserted that complainant had expended in Louisiana up to June 30, 1906, \$4,711,000 in the purchase and construction of exchanges and toll lines, which amount was still further increased by June 30, 1907, to \$5,394,154.43, and it is upon these totals that the percentage of net income to investment is made up.

The president of the company testified that, unless things *changed, and it[420 was permitted to charge the rates which had been charged prior to the adoption of these rates which are now in question, it would be unable to continue to pay 7 per cent, and that the company would necessarily retrograde; and that, while the company had paid 7 per cent to its stockholders for the past few years, it could not continue so to do if the rates in question were adopted. That it did not, in fact, receive anything like 7 per cent upon its investment in Louisiana, and that the average market for money in that state on good securities, and much more certain than telephone stock, was at least 7 per cent, and that there was no inducement to investors in the state of Louisiana, or in the New Orleans money market, to invest in stock in such a company as that of the complainant, where there was more risk and probably less return than in other investments which could be had in that city and state. This evidence was not, in terms, contradicted, though other contentions are made by the appellants. The differences between the parties as to the rate of the return upon the investment in Louisiana arise from the different data taken by them upon which to calculate the return, and will be referred to later. The single question before us is as to the character of the rates provided in order No. 552, whether such rates are confiscatory, or, if there is any difference, whether the rates are only unreasonable, unjust, and inadequate, although not confiscatory, and therefore not in violation of the Federal Constitution. The question under articles 284 and 285 of the Constitution of Louisiana, supra, even of the unreasonableness of the rates, may be inquired into by a Federal court, by reason of the diverse citizenship of the parties to this suit, and the complainant is not confined to a state court upon this question. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 391, 38 L. ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047. The complainant comes into court on both grounds, asserting that the rates are so low as to take its property in violation of the 14th Amendment to the Federal Constitution, and also that the rates are so low as to be unreasonable and unjust under the above cited articles of the Constitution of Louisiana.

421] *Like any other case, the onus rests upon this complainant to prove the existence of the fact it alleges; viz., that the rates are so low as to be confiscatory, or at least unreasonable and unjust. The court below held that the rates actually established by the commission were void, because, as was stated by the court, those rates were not established upon investigation into the question of their sufficiency, but by a merely arbitrary conjecture by the commission, not based on investigation or the exercise of judgment and discretion, and the order promulgating the establishment of the rates was, therefore, illegal and void, and hence there was no presumption of the correctness of the rates, such as generally obtains in relation to rates adopted by the legislature or a commission appointed by it. See *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 173, 44 L. ed. 417, 420, 20 Sup. Ct. Rep. 336; *Ex parte Young*, 209 U. S. 123, 165, 52 L. ed. 714, 731, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

We are of opinion that the court below erred in its conclusion that there was no presumption in favor of the validity of the rates promulgated by the order No. 552. We think the evidence shows that these rates were really not adopted by arbitrary conjecture, nor does it show that they were based on no investigation or without the exercise of judgment or discretion.

It seems there had been complaints as to the tariff of rates under which the complainant was operating before the order No. 552 was made, and the commission had investigated these complaints so far as to make a careful examination of the returns of complainant, made to the commission. These returns showed generally the character and operation of the business of complainant, its income, operating expenses, and investments in Louisiana. The commission, after examining them, issued the order to show cause why its rates should not be decreased; the commission, on the final hearing on the return of the order to show cause, took into consideration both the statement presented by the complainant on the return of that order and also the statements or returns previously filed by the company. The secretary to the commission stated that the items in these returns which had most weight in causing the com-
422] mission to reach a conclusion that the rates then charged were unreasonable were the earnings and operating expenses and net earnings, as shown by these reports made to the commission. These reports were annual, and were under oath. It appeared from the evidence of the secretary that he was aware of the fact that the taxing au-

thorities adopted a basis of valuation on telephone property which was not its full market value; that property of this nature, like all other property, was not assessed in Louisiana at its actual value, but for an appreciably less amount, and the valuation, as returned to and filed with the commission by the complainant, followed the valuation placed upon its property by the taxing authorities, and that the witness therefore knew that the valuation in these reports of the complainant's property in the state of Louisiana was not its real value. He also said that in fixing a schedule of rates the commission did not adopt that valuation as a basis. The witness further stated that the commission, in acting upon the question, was of opinion that the proof showed that the company was making what the commission considered were unreasonable earnings, and that was shown by the annual reports made by it for the years 1904, 1905, and 1906, and the statement filed by the counsel for the company on his return to the order to show cause. No proof was offered to the commission in the presence of anyone representing the complainant other than the statement of receipts and disbursements contained in the reports mentioned.

Now it may be true that these returns did not contain all the data upon which a very close and accurate judgment could be based as to the rates that ought to be charged by complainant, under all the circumstances. This is only saying the order may have been erroneous or based upon insufficient evidence, which is no more than saying that, upon the investigation, the commission may have come to a mistaken conclusion by reason of erroneous inferences from the evidence furnished by complainant's own returns; but that is far from showing that the commission had, by a merely arbitrary order, promulgated certain rates without making the slightest effort to obtain any knowledge what-
423] ever upon the subject. It did not lose jurisdiction by reason of the mistakes it may have made, and, as a result, the rates adopted were not merely arbitrary conjectures, but based on reasons which, while they may have been insufficient, cannot be described as resulting in a decision wholly without evidence to support it. The rates, therefore, promulgated, must be regarded as prima facie fair and valid, or, in other words, the onus was upon the complainant to show that they were what it asserts, confiscatory or unreasonable. The court below did state in its opinion that the evidence established that the complainant had not then earned under the tariff in order No. 488 (which existed prior to No. 552, and the rates un-

der which were higher than those under order No. 552), as much as 7 per cent on its Louisiana business, and it held that a profit of 7 per cent on the Louisiana business would be only a fair return on a business of this character, and therefore any reduction of existing rates would be unreasonable and unjust. If the conclusion of the insufficiency of the prior rates were justified, it would probably be an answer to the claim of the commission that the reduced rates provided for in order 552 were sufficient.

There are one or two facts, however, now to be taken into consideration before the correctness of that conclusion can be affirmed. In the course of the trial various questions were argued as to the manner of conducting such a business as this, with regard to extensions, earnings, and disbursements, as well as questions of depreciation of plant and how to treat the amount collected therefor, and other questions of that nature. Exactly how the money which resulted from the rates in actual operation was used was not, in all cases, shown in detail, either from the books or by oral testimony. Something was left in doubt and to conjecture. In the course of the opinion of the circuit court the following was said: "It is urged by the commission that, included in the Louisiana investment of complainant, is a sum earned from Louisiana business, set aside in the reserve fund and then used in extending the system in 424]*Louisiana, and now treated as a part of the Louisiana investment of the stockholders. This may be so to some extent,—it is certainly possible. But it is impossible for me to determine, from the figures in the record, to what extent, if at all, it is a fact. Counsel for defendant have not themselves undertaken to indicate what, even in round figures, they consider is the sum thus earned in the business and reinvested in the business, without having been distributed to the shareholders in dividends. It will be time to consider the legal results from such a state of facts when it shall have been shown to exist in a definite sum, and not in a purely conjectural amount." And again: "Counsel for the commission argued that the complainant's property in Louisiana was not all paid for with complainant's capital, but was partly paid for out of a surplus or reserve, or depreciation fund, which was accumulated by complainant from the receipts of its Louisiana business, and was then reinvested, not in repairs or maintenance, but in extensions and additions to the property. This may be a fact, but it is not shown to be a fact. The commission has power, if it wishes to do so, to direct the books of complainant to be so kept as to show such use of

receipts. In the present state of the books this seems to be impossible. And the floating debt of the complainant would seem to be much greater than any sum which could possibly have been used from the reserve, or surplus, or depreciation fund for extensions and additions, after paying for maintenance and repairs." [156 Fed. 831, 832.]

If the onus rested upon the commission to show these facts, it is evident that the obligation has not been fulfilled; but it is just here that the difficulty lies. It was obligatory upon the complainant to show that no part of the money raised to pay for depreciation was added to capital, upon which a return was to be made to stockholders in the way of dividends for the future. It cannot be left to conjecture, but the burden rests with the complainant to show it. It certainly was not proper for the complainant to take the money, or any portion of it, which it received as a result of the rates under which it was *operating, and so[425 to use it, or any part of it, as to permit the company to add it to its capital account, upon which it was paying dividends to shareholders. If that were allowable, it would be collecting money to pay for depreciation of the property, and, having collected it, to use it in another way, upon which the complainant would obtain a return and distribute it to its stockholders. That it was right to raise more money to pay for depreciation than was actually disbursed for the particular year there can be no doubt, for a reserve is necessary in any business of this kind, and so it might accumulate; but to raise more than money enough for the purpose, and place the balance to the credit of capital upon which to pay dividends, cannot be proper treatment. The court below said it was impossible to find out from the books how much of this had been done, and it treated the fact as one to be explained by the commission, and not by the complainant. In other words, while this fact was a material one, the onus was placed upon the commission, and not the complainant, to show it. We think, on the contrary, that the obligation was upon the complainant. Now, although the books, it is said, do not show how much money collected for depreciation has been, in fact, used to increase the capital of the complainant, upon which dividends were paid to stockholders, yet still, even if the books do not show accurately, or even at all, what disposition was made of these moneys, at any rate the officers of the complainant must be able to make up some reasonable approximation of the amount, even if it be impossible to state it with entire accuracy; and this duty rests with the complainant, in order that it may discharge the duty devolving upon it to prove that the

rates were not unreasonably high under order No. 488, or, in other words, that they were unreasonably low under order No. 552. It may be that the sum, if any, thus used, was not enough to affect the claim that the rates under discussion were unreasonably low. The evidence is insufficient to show clearly that which complainant is under obligations to show. *Knoxville v. Knoxville Water Co.* 212 U. S. 1, ante, 371, 29 Sup. Ct. Rep. 148; *Willcox v. Consolidated Gas Co.* 212 U. S. 19, ante, 382, 29 Sup. Ct. Rep. 426]192. We *are not considering a case where there are surplus earnings after providing for a depreciation fund, and the surplus is invested in extensions and additions. We can deal with such a case when it arises.

The evidence in this case applied generally to the actual operation of complainant's business under rates in existence prior to those contained in order No. 552, and higher than those contained in that order, and the evidence, as contended, showed that even under those rates the profits were not unreasonably high. It is not such a case, therefore, as looks only to the possible effects of the future enforcement of the rates claimed to be too low. If higher rates have been in operation, and the result has shown that they were only reasonable and fair rates, it would, in such a business as this, follow, with considerable certainty, that, with lower rates, the profits would be decreased and become unreasonably low. We say this because the evidence shows that, in the case of telephone companies, the general result of a reduction of rates in some other kinds of business does not always follow,—namely, that there would be an increased demand, which could be supplied at a proportionately less cost than the original business. Such, it is admitted, would be the case generally in regard to water companies, gas companies, railroad companies, and perhaps some others, where the rate is a reasonable one. For example, it is said that it would cost no more, or certainly scarcely an appreciable amount more, to haul a train of two cars, both filled, than it would to haul the same train with both cars half filled; and if the reduction in rates should result in filling the cars where previously they had not been half filled, there might be an increased carriage at a cost very little more than before, and probably an increased profit. So, in the case of a water company, the reduced rate might result in furnishing more water to consumers already existing, and the increased cost of furnishing the same would be infinitesimal, where there was a supply sufficiently large to fill the demand. So, also, in furnishing gas at reduced rates, the reduction in the rate would very probably result in increased

*consumption, not only in increased[427 demands from more consumers, but also an increased consumption by consumers already existing, and the increased cost of furnishing the gas would be nothing like in proportion to the increase in consumption. In these cases increased profits might be the result of decreased rates. But with telephone companies, as shown by the testimony of the president of the complainant, the reduction in toll rates does not bring an increased demand, except upon the condition of corresponding increase in expenses. As an illustration the witness took a telegraph company, which, as he said, "employs one wire, and can send several messages at the same time over that one wire; it employs its own operators to send the message, who consult each other's time and convenience in the handling of it, while the telephone company has to employ two wires, the sender of the message is his own operator, and the telephone operator simply fashions up the facilities for him, and the customer sends his own message, and becomes, therefore, his own operator; hence his convenience and time must be consulted; we have to be ready, in other words, with the operators and the appliances to suit the convenience of the customer, whereas in the telegraph business it is just the other way: the customer brings in his message, and when it suits the convenience of the company to employ its operators and its apparatus to send it, they send the message." The witness then gave further illustration in proof of his contention that the reduction of rates in the telephone business does not increase the business without corresponding increase in the expense.

We do not think this case is one where the bill should be dismissed, even without prejudice, for the reasons that we have stated, that the inquiry has been founded upon the actual effect of rates higher than those permitted under order No. 552, and therefore that it is not merely conjecture as to what the result of such lower rates would be, the tendency of the evidence being to the effect that the higher rates are still reasonable, and that the lower rates would be unreasonably low, but the burden, as *we[428 have said, rests with the complainant to prove its case, and it has not performed its obligation when this fact as to the disposition of the so-called depreciation fund is left so wholly in doubt. What is the amount reserved for payments for depreciation? What, if any of it, has been carried into capital? How much of the floating debt would carry interest which might be charged as against the amount of the depreciation fund actually used for extensions and additions and charged to capital? All these

are questions not answered by the evidence in the case, and which should be made as clear as possible before an attempt ought to be made to answer the question as to rates. The whole case should, therefore, be opened, so that both sides can, on a new trial, bring out all the material facts upon which a decision can finally be based.

We, therefore, reverse the decree and direct a new trial.

Reversed.

Mr. Justice White, not having heard the argument, did not take part in the decision of the case.

SALLIE J. McDANIEL, Nannie A. Hoshall,
and Mary E. Jackson, Appts.,

v.

GEORGE M. TRAYLOR, John F. Stratton,
John F. Smith, et al.

(See S. C. Reporter's ed. 428-434.)

Courts — amount in dispute.

1. The value of the matter in dispute in a suit to set aside judgments of a probate court establishing claims against the estate of an intestate, which are a lien on his real property inherited by complainants, on the ground that they were fraudulently obtained by defendants, acting in concert, is the aggregate amount of the claims whose allowance was procured in furtherance of the unlawful combination.

[For other cases, see Courts, 908-911, in Digest Sup. Ct. 1908.]

Evidence — presumption — relationship of attorney and client.

2. An attorney for one of the claimants against a decedent's estate and for the administrator as well will not be presumed to have been acting for all the claimants in advising the administrator to allow all the claims, so as to make the aggregate amount of the claims allowed the amount in dispute in a suit to set aside judgments of the probate court establishing claims against the estate which are a lien on the real property inherited by complainants, on the ground that such judgments were fraudulently obtained by defendants, acting in concert, although he is also the attorney for several of the claimants in such suit.

[Presumptions as to persons, see Evidence, II. e, in Digest Sup. Ct. 1908.]

[No. 70.]

Submitted January 12, 1909. Decided February 23, 1909.

NOTE.—As to jurisdiction of United States circuit court as dependent upon amount—see notes to Auer v. Lombard, 19 C. C. A. 75, and Tennent-Stribling Shoe Co. v. Roper, 36 C. C. A. 459.

APPEAL from the Circuit Court of the United States for the Eastern District of Arkansas to review a judgment dismissing, for want of jurisdiction, the bill in a suit to set aside, as fraudulently obtained, judgments of a probate court establishing claims against the estate of a decedent which are a lien upon real property inherited by complainants. Affirmed.

The facts are stated in the opinion.

Mr. G. B. Webster submitted the cause for appellants. Mr. J. R. Beasley was on the brief:

In procuring the administrator to allow as expenses of administration what were not valid claims of any nature, Williams was acting for all whose claims were so allowed. If he was, then his act was their joint act, because done in their business and for their benefit.

African Methodist Bethel Church v. Carmack, 2 Md. Ch. 143; Chambers v. Hodges, 23 Tex. 104; Indianapolis, P. & C. R. Co. v. Tyng, 63 N. Y. 653; Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673; Craig v. Ward, 3 Keyes, 387.

The law only requires the highest quality of proof possible. Where the fact to be proved rests in the knowledge of the other party, and he stands silent when evidence is given of other facts from which the ultimate fact to be proved may reasonably be inferred, it is to be considered as sufficiently proved.

Greenl. Ev. 16th ed. § 79; 1 Starkie, Ev. 54; Lehman v. Knapp, 48 La. Ann. 1148, 20 So. 674; Com. v. Webster, 5 Cush. 316, 52 Am. Dec. 711; Heath v. Water, 40 Mich. 457; Connecticut Mut. L. Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; Mabary v. McClurg, 74 Mo. 575; Runkle v. Burnham, 153 U. S. 225, 38 L. ed. 697, 14 Sup. Ct. Rep. 837; Choctaw & M. R. Co. v. Newton, 71 C. C. A. 655, 140 Fed. 238; Gulf, C. & S. F. R. Co. v. Ellis, 4 C. C. A. 454, 10 U. S. App. 640, 54 Fed. 481; Pacific Coast S. S. Co. v. Bancroft-Whitney Co. 36 C. C. A. 135, 94 Fed. 180; Kirby v. Tallmadge, 160 U. S. 379, 40 L. ed. 463, 16 Sup. Ct. Rep. 349.

This court will look to all of the facts in determining the question of jurisdiction, the lack of which should appear with full certainty before a denial of jurisdiction will be affirmed.

Wetmore v. Rymer, 169 U. S. 115, 42 L. ed. 682, 18 Sup. Ct. Rep. 293; Put-in-Bay Waterworks Light & R. Co. v. Ryan, 181 U. S. 431, 45 L. ed. 937, 21 Sup. Ct. Rep. 709; William H. Perry Co. v. Klosters Aktie Bolag, 82 C. C. A. 321, 152 Fed. 967; McCarthy v. American Thread Co. 143 Fed. 680,

It is seldom that a fraud or conspiracy to cheat can be proved in any other way than by circumstantial evidence, as knaves have usually sufficient cunning to have no witnesses present who can testify to their fraudulent contrivance.

Thompson v. Bowie, 4 Wall. 473, 18 L. ed. 426.

The rule that fraud is never presumed merely declares a principle of administration that the burden of proof as to the existence of a fact is upon the party alleging it.

16 Cyc. Law & Proc. p. 1082.

But where one who has the burden of proof shows a state of facts raising a presumption in his favor he establishes a *prima facie* case, and the burden, that is to say the duty, of producing sufficient facts to satisfy the court or jury, shifts to the other party.

16 Cyc. Law & Proc. pp. 933, 934.

In this connection regard must be had to the distinction between the different meanings of the phrase "burden of proof." In one case it imports the necessity of establishing certain facts as the prerequisite of the law's action; and it is in this sense that it is used in general statements, common among both the text writers and the judicial authors, to the effect that the burden of proof never shifts. In another sense it denotes that obligation which rests upon a litigant to show facts sufficient to satisfy the mind of the trier of facts, or, in other words, to create a *prima facie* case, and this is the sense in which the term is here used.

Carver v. Carver, 97 Ind. 510; 16 Cyc. Law & Proc. p. 926.

In a case of this nature the value of the property upon which the invalid lien rests, rather than the amount involved in the lien, is the true test of jurisdiction.

Smith v. Adams, 130 U. S. 175, 32 L. ed. 898, 9 Sup. Ct. Rep. 566; *Parker v. Morrill*, 106 U. S. 1, 27 L. ed. 72, 1 Sup. Ct. Rep. 14; *Simon v. House*, 46 Fed. 317; *Woodside v. Cicconi*, 35 C. C. A. 177, 93 Fed. 1; *Cowell v. City Water Supply Co.* 57 C. C. A. 393, 121 Fed. 53; *Fuller v. Grand Rapids*, 40 Mich. 395; *Scripture v. Johnson*, 3 Conn. 211; *Simon v. Richard*, 42 La. Ann. 842, 8 So. 629; *Kahn v. Kerngood*, 80 Va. 342; *Ayers v. Blair*, 26 W. Va. 558.

Mr. N. W. Norton submitted the cause for appellees. Mr. R. W. Nicholls was on the brief.

Mr. Justice McKenna delivered the opinion of the court:

This is the second appeal in this case. The first appeal was on a question of jurisdiction.

and is reported in 196 U. S. 415, 49 L. ed. 533, 25 Sup. Ct. Rep. 369. The object of the suit is to set aside and to declare invalid the liens of certain judgments of the probate court of St. Francis county, Arkansas, upon certain real estate, and that the defendants be enjoined from enforcing such judgments. The judgments were rendered upon claims against the estate of Hiram Evans, deceased.

*James Evans was appointed administrator of the estate. Among the assets which came to his hands was a drug store, with its stock of goods, fixtures, book accounts and other things, which he sold to John Evans on the 1st of May, 1891. The latter conducted the business in his own name and incurred obligations to the defendants aggregating \$3,000, as well as debts and obligations to other persons, but no single one of his debts exceeded \$2,000. John Evans became insolvent, and on May 27, 1892, transferred to the administrator the drug store and all that remained of the goods, fixtures, and book accounts. The bill alleged that the defendants "conspired, colluded, and confederated together with John Evans and the administrator to secure the payment of their claims and demands against John Evans out of the estate of Hiram Evans, deceased," and, "so conspiring and confederating," they presented to the probate court their several claims and demands, and that the administrator, James Evans, fraudulently and illegally approved them for allowance against the estate of Hiram Evans. And for like purpose, it was alleged, they procured the judgment of the probate court, establishing their claims, by concealing from the court that they were debts and obligations of John Evans, and "cloaking the same under the name of expenses of administration of the said estate, all of which transactions were a part of the same scheme and were participated in by each and all of the said defendants and by said John Evans and James Evans, administrator." It was further alleged that the judgments were wholly the result of the conspiracy and confederation set out and the fraud practised in pursuance thereof, and are, in equity and good conscience, void and ineffectual for any purpose whatever, and ought not to be enforced, but that, nevertheless, the same are at law "liens upon the real estate" described in the bill, "and charges against the respective interests of the plaintiffs." There were other allegations showing that plaintiffs could only obtain relief in equity.

The circuit court sustained a demurrer to the bill, being of opinion that the value of the matter in dispute was not sufficient to give jurisdiction. On appeal to this

court, we said, defining the matter in dispute and its value:

"The matter in dispute is whether the lands in which the plaintiffs have a joint undivided interest of one half can be sold to pay *all* the claims, *in the aggregate*, which the defendants, by *combination and conspiracy*, procured the probate court to allow against the estate of Hiram Evans. The essence of the suit is the alleged fraudulent combination and conspiracy to fasten upon that estate a liability for debts of John Evans, which were held by the defendants and which they, acting in combination, procured, in co-operation with James Evans, to be allowed as claims against the estate of Hiram Evans. By reason of that combination, resulting in the allowance of all those claims in the probate court, as expenses of administering the estate of Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *one claim*."

And we further said:

"1. That it was competent for the circuit court upon the case made by the bill to deprive the defendants, acting in combination and claiming the benefit of the orders made in the probate court, allowing their respective claims. 2. That the value of the matter in dispute in the circuit court was the aggregate amount of all the claims so allowed against the estate of Hiram Evans."

The decree of the circuit court was reversed with directions to set aside the order dismissing the bill and to overrule the demurrer.

Upon the return of the case to the circuit court, defendants answered, and the court, after hearing evidence, found that there was a "total failure to establish the fact alleged in the bill, that the said defendants or any two or more of them, whose claims in the aggregate exceeded the sum of \$2,000, exclusive of interest, conspired and confederated together in procuring *the allowance of said claims, and therefore the court is without jurisdiction."

On this ruling errors are assigned, and it is contended (1) that an actual conspiracy was not necessary where the action and conduct of the defendants, acting by and through their attorneys with the attorney of the administrator, were such as to procure the fraudulent allowance of the claims; (2) that the true test of jurisdiction in a proceeding of this kind is the value of the property upon which the inequitable liens rest, and not the amount of such liens.

The first proposition was decided adversely to appellants' contention on the former appeal. As we have already seen, it was the

fraudulent combination and conspiracy which united the claims and made the aggregate of the claims the matter in dispute. By reason of that combination we decided the claims were "so tied" together as to make them, "so far as the plaintiffs and the relief sought by them are concerned, *one claim*." We further decided, "the validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action. Those orders were conclusive against the plaintiffs, as to all the claims, if the claims could be allowed at all against the estate of Hiram Evans. A comprehensive decree by which the plaintiff can be protected against those orders will avoid a multiplicity of suits, save great expense, and do justice." If the plaintiffs do not prove such a combination and conspiracy, in respect, at least, of so many of the specified claims as, in the aggregate, will be of the required amount, then their suit must fail for want of jurisdiction in the circuit court; for, in the absence of the alleged combination, the claim of each defendant must, according to our decisions, be regarded, for purposes of jurisdiction, as separate from all the others." With this ruling the decision of the circuit court was accurately in accord.

*But the finding of the court, that[434 there was no combination between defendants having claims to the jurisdictional amount, is contested. "The specific and material charge is," counsel say, "that there was an agreement or undersanding between the defendants on the one hand and the administrator on the other." And it is contended further that parties may "conspire through their attorneys as well as in person." This may be conceded, but the attorney must be the agent of all to bind all, and the testimony does not establish such agency. It shows only that the attorney for one of the claimants was also the attorney for the administrator, and advised him to allow all the claims. It is not shown that he was the attorney of any other claimant. It is, however, contended that it must be presumed that he was attorney for all from the fact of his having advised the payment of all, and from the fact that he is the attorney for several of the claimants in this case. The presumption cannot be made. It was easy for appellants to have shown that he was the attorney for the other claimants. He and they were available witnesses, and as the burden was upon appellants to establish the charge of the conspiracy, which was the

foundation of the suit, the presumptions are against appellants' contention rather than for it.

Decree affirmed.

JOHN R. GREENAMEYER, Appt.,

v.

ISAAC C. COATE.

(See S. C. Reporter's ed. 434-445.)

Public lands — contest — conclusiveness of prior findings of fact.

1. The Secretary of the Interior, having complete jurisdiction of a contest before the Land Department, is not bound by findings of fact made by his predecessor at a previous stage of the controversy.

[For other cases, see Public Lands, 994-996, in Digest Sup. Ct. 1908.]

Courts — relation to Land Department — findings of fact.

2. The conclusion as to ultimate facts finally reached by the Land Department must be accepted by the courts, although differing from the conception of such facts entertained by the Department at previous stages of the controversy.

[For other cases, see Courts, 260a-267a, in Digest Sup. Ct. 1908.]

Public lands — fraud as ground for relief against action of Department.

3. Newly-discovered evidence upon the issue of fraud made before the Land Department, which complainant had abundance of time and opportunity to discover and present, is not ground for relief in equity from the final action of the Department, where no fact is alleged that anything was done to prevent complainant from discovering or presenting such evidence except the general allegation that cunning and deceit were practised upon him.

[For other cases, see Public Lands, 1011-1020, in Digest Sup. Ct. 1908.]

[No. 100.]

Submitted January 4, 1909. Decided February 23, 1909.

A PPEAL from the Supreme Court of the Territory of Oklahoma to review a decree which affirmed a decree of the District Court of Kay County in that territory, dismissing a suit to have complainant declared to be the owner of the legal title to certain land, and to require the defendant to convey such land to him. Affirmed.

See same case below, 18 Okla. 160, 88 Pac. 1054.

NOTE.—On the conclusiveness and effect of the decisions of the Land Department—see notes to Hartman v. Warren, 22 C. C. A. 38; Carson City Gold & S. Min. Co. v. North Star Min. Co. 28 C. C. A. 344; and Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. 57 C. C. A. 207. 53 L. ed.

Statement by Mr. Justice McKenna:

Appellant and appellee were respectively plaintiff and defendant in the courts below, and we shall so designate them.

Plaintiff brought this suit in the district court of Kay county, Oklahoma, to be declared the owner of the legal title to lots 1 and 2 and the E. ½ of the N. W. ¼, section 18, township 26 N., R. 2 E., Indian meridian, and to require a conveyance of the land to him by defendant. A demurrer to the petition was sustained and a judgment entered dismissing the suit, which was affirmed by the supreme court of the territory.

The petition shows the following facts: August 9, 1893, a portion of the territory, known as the Cherokee outlet, was opened for settlement. The plaintiff complied with the terms of the proclamation of the President of the United States, and, having served as a soldier during the War of the Rebellion for a period of two years, and being otherwise qualified, filed in the United States land office at Perry, Oklahoma, a soldier's declaratory statement for the land. On the 8th of March, 1894, he duly transmitted his declaratory statement into homestead entry No. 5588, for the same premises, moved a house upon and took up his residence upon them, and continuously lived thereon with his family from such time for seven years, cultivated 40 acres thereof, "cropped the same, and grazed 40 acres in addition," and erected improvements of the value of \$450. That after such residence and cultivation he made application in due form to make final proof, which offer was rejected.

On November 24, 1893, the defendant made homestead entry No. 4447 upon the land, subject to plaintiff's soldier's declaratory statement, and on the 4th of March, 1904, filed a contest affidavit in the land office at Perry, alleging settlement three days prior to such declaratory statement.

The contest came on for hearing before the local land office, and that office decided in favor of defendant. This decision was reversed by the Commissioner of the General Land Office, and, on appeal to the Secretary of the Interior, by that officer. Their opinions and judgments are attached to the petition.

A petition for review being filed by defendant, a rehearing was ordered and the matter remanded to the local land office for further hearing upon questions of fact, but the petition for review was denied. The opinion of the Secretary is attached to the petition. The matter was duly heard by the local office, which office recommended adversely to plaintiff. The decision was affirmed by the Commissioner, and the homestead entry of plaintiff "held for cancela-

tion, subject to the right of appeal." An appeal was taken to the Secretary of the Interior on July 3, 1900, and that officer reversed the departmental decision of June 21, 1898, in favor of plaintiff, affirmed the ruling of the local land office against him, and canceled his entry.

Plaintiff filed a petition for review, which was denied, and the case was finally closed, the entry of defendant "reinstated, and his rights in and to said tracts were held to be both prior and superior to those of this plaintiff."

Defendant submitted his final proofs, and, prior to the commencement of the suit, obtained a patent conveying to him the tract in question, and holds the legal title thereto.

The petition alleges the superiority of plaintiff's right to defendant's right, and that, by a proper application of the law to the facts, as proved in said cause and found by the decision of the land office, the claim of the plaintiff "should have been finally held prior and superior to the claim of said defendant, and the patent conveying title to said tract should and would have been made and delivered" to plaintiff. The misapplication of the law, plaintiff alleges, 437]consisted in the different *conclusion drawn from the facts in the decision of July 3, 1900, in which the improvements put upon the land by defendant were declared sufficient, from that deduced in the decision of June 21, 1898, in which the improvements were decided to be insufficient to initiate a valid right of settlement. The last opinion is quoted from as follows:

"After a thorough examination of the testimony, the Department is of the opinion that the acts of Coate were insufficient to hold the land against the soldier's declaratory filing of Greenameyer.

"If it should be conceded that everything claimed to have been done by Coate in the way of settlement were true, his said acts would not, in the judgment of this Department, constitute him a bona fide settler prior to the 19th day of September, 1893, when the defendant made his declaratory statement of record."

And it is alleged that defendant—

"Coate reached the land between 1 and 2 o'clock on the afternoon of the opening, and remained on or adjacent to the claim until the 20th,— four days. All that he did in these four days was to stick his flag and dig a hole which he calls a starting of a well, 2 feet deep and 2½ or 3 feet across. He then left and went back to his home in Kansas, 150 miles distant. The digging of this hole would not require more than an hour's labor by one man. This was all he did between the 16th and 20th, while he re-

mained on or near this claim, to his return to Kansas; the rest of his time he spent 'watching people off' of the claim and in going to Newkirk on the 19th to 'file by mail.' He did not return to the claim after leaving, on the 20th of September, until the 22d of October; and his return at that time was due to the fact that he received a letter from one White, stating a soldier had filed on the land."

It is alleged that the two decisions were made upon "precisely the same state of facts;" that the decision of June 21, 1898, and October 5, 1898, correctly applied the law, and that of July 3, 1900, reversing the prior decisions, misapplied the law.

*For a second cause of action plaintiff[438 alleged the foregoing facts, and further alleged that fraud and deceit were practised upon the land office by defendant, which caused the defeat of plaintiff in the litigation, and that, by cunning and deceit, defendant so concealed his fraudulent practices from plaintiff that the latter was unable to procure evidence to prove the fraud in the contest suit. That about the 1st of December, 1893, the plaintiff learned that defendant was the owner of and in possession of 160 acres of land in Morris county, Kansas; that he obtained an abstract of the "registry records" of Morris county, which showed that defendant was owner of 180 acres of land, and July 9, 1894, he further learned that in January of that year defendant had fraudulently placed on record a deed for the land to his son-in-law, to enable defendant to make proof before the Land Department, and that plaintiff was unable to obtain proof thereof in time to use in said contest. That the nature of defendant's fraud was such that he could and did conceal it from plaintiff and the Land Department; that the deed, while it was executed upon the 27th of January, 1894, was antedated so as to appear to have been made August 30, 1893, and that, by these fraudulent means, defendant caused it to appear that he had sold and conveyed the land on the 30th of August, 1893, whereas he continued to own the same until January, 1894, and was therefore disqualified from taking and holding any interest in the land involved in the action. And it is alleged that defendant introduced in evidence in the contest cause a certified copy or statement from the records of Morris county, in order to deceive the Land Department and defraud plaintiff, and to establish that defendant had the necessary qualifications to make entry and settlement upon the land.

It is alleged that plaintiff has but recently discovered the "evidence to prove the foregoing charge of fraud, concealment, and imposition, and is now able to prove the

facts as to both as set forth." Other facts will appear in the opinion.

Mr. John W. Adams submitted the cause for appellant. Messrs. Kos Harris and William E. Keith were on the brief:

A party cannot blow hot and cold. A party by acquiescing in or acknowledging the title of another, or standing by and seeing another making costly improvements, or recognizing a claim or lien of another, is estopped from subsequently disputing its validity.

2 Herman, Estoppel, § 1069; Broyles v. Nowlin, 3 Baxt. 191; Moale v. Baltimore, 56 Md. 496; Board of Liquidators v. Huguet, 33 La. Ann. 362; Betts v. Wurth, 32 N. J. Eq. 82.

The allegations of the petition present such a case of fraud, cunning, and deceit as will warrant a court of equity to grant relief.

Johnson v. Towsley, 13 Wall. 86, 20 L. ed. 487; Vance v. Burbank, 101 U. S. 519, 25 L. ed. 931; Craig v. Leiensdorfer (Downs v. Hubbard) 123 U. S. 212, 31 L. ed. 123, 8 Sup. Ct. Rep. 85; Gonzales v. French, 164 U. S. 342, 41 L. ed. 459, 17 Sup. Ct. Rep. 102; Quinby v. Conlan, 104 U. S. 425, 26 L. ed. 802; Lytle v. Arkansas, 22 How. 203, 16 L. ed. 309; Calhoun v. Violet, 173 U. S. 63, 43 L. ed. 615, 19 Sup. Ct. Rep. 324.

Where a patent has been wrongfully or fraudulently obtained, equity will treat the fraudulent patentee as a trustee for the party against whose rights the fraud has operated, and decree a transfer of the legal title to the party who, but for the wrong or fraud would have received the title.

Re Emblen, 161 U. S. 52, 40 L. ed. 613, 16 Sup. Ct. Rep. 487; Johnson v. Towsley, 13 Wall. 80, 20 L. ed. 486; Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 636, 26 L. ed. 875; Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Monroe Cattle Co. v. Becker, 147 U. S. 47, 37 L. ed. 72, 13 Sup. Ct. Rep. 217; Turner v. Sawyer, 150 U. S. 578, 37 L. ed. 1189, 14 Sup. Ct. Rep. 192; Emblen v. Lincoln Land Co. 184 U. S. 660, 46 L. ed. 736, 22 Sup. Ct. Rep. 523.

Mr. William S. Oline submitted the cause for appellee. Mr. C. L. Pinkham was on the brief:

The Land Department of the government is supreme in determining the facts upon which and by reason of which a person may acquire title to government land, which facts are determined under rules of practice adopted by that Department, governing the 53 L. ed.

procedure before officials of the Department in the determination of individual rights.

Moore v. Robbins, 96 U. S. 530, 24 L. ed. 848; Marquez v. Frisbie, 101 U. S. 473, 25 L. ed. 800; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 323, 41 L. ed. 176, 16 Sup. Ct. Rep. 1018.

In the case at bar the Land Department did not override any act of Congress, but, on the contrary, carried out the intent of the law that has conferred upon it the right to pass finally upon all questions of fact.

Vance v. Burbank, 101 U. S. 514, 25 L. ed. 929; Quinby v. Conlan, 104 U. S. 420, 26 L. ed. 800.

The Land Department in the case at bar passed upon the question of the qualifications of the defendant, and the acts he had performed to secure title to the land in controversy, and decided from the evidence that he was qualified, and that his acts were sufficient to entitle him to the land. Its judgment in these matters is unassailable.

Steel v. St. Louis Smelting & Ref. Co. 106 U. S. 447, 27 L. ed. 226, 1 Sup. Ct. Rep. 389; Baldwin v. Stark, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; Northern P. R. Co. v. McCormick, 89 Fed. 659; De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519.

The Department merely reconsidered a question passed upon in the progress of the cause. The findings of Secretary Hitchcock became and are the findings of ultimate facts, finally reached in said contest.

Potter v. Hall, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545.

Th fraud practised which is sufficient to set aside the final judgment is one that arises extrinsically, that prevents a party from having a fair trial, or having any trial for the development of the facts, and not a case where a full, fair, and free trial is had or tendered, wherein the person alleged to have been defrauded was present in person and by attorney, and heard and saw what is alleged to have been the perpetration of a fraud, and had then and there the opportunity to refute it, which he failed to do, or, believing himself to have done it successfully, submits his cause for final determination. In such case, it is respectfully submitted that the conclusion reached is final.

Vance v. Burbank, 101 U. S. 519, 25 L. ed. 931; DeCambra v. Rogers, supra; United States v. Throckmorton, 98 U. S. 65, 25 L. ed. 95; Frieze v. Hummel, 26 Or. 145, 46 Am. St. Rep. 610, 37 Pac. 458; Estes v. Timmons, 12 Okla. 537, 73 Pac. 303; Hass v. Billings, 42 Minn. 63, 43 N. W. 797; Wilkins v. Sherwood, 55 Minn. 154, 56 N. W. 591; Gray v. Barton, 62 Mich.

186, 28 N. W. 813; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Cotzhausen v. Kerting*, 29 Fed. 821.

Mr. Justice McKenna, after stating the case as above, delivered the opinion of the court:

The case presents apparently contradictory decisions between two Secretaries of the Interior, and, plaintiff contends, upon the same set of facts. But this contention is not sustained by the record. The first decision of the local office was adverse to the plaintiff, but the decision was reversed by the Interior Department, the Commissioner and the Secretary of the Interior taking a different view of the facts from that taken by the local land office. But a rehearing was granted, and while, in the opinion granting it, the Secretary repeated his view of the facts, further testimony was allowed to be introduced. Further testimony was introduced, and the local office found that, while it was conflicting,—

"the preponderance of it showed: First, That the contestant settled on the land in controversy on the afternoon of September 16, 442]*1893; that he put up a flag and commenced a well; that he remained thereon until the 20th of September, 1893; that he returned in October, 1893, and built a small house, put up a few trees, and had some breaking done; that he again went to Kansas in November, 1893, and remained there until February, 1894, when he again returned to the land in controversy and built a large and better house; that he has resided [upon], improved, and cultivated part of the said land from that time to the present; that he has substantially complied with all the requirements of the homestead law.

"Second. We find that his absence from the land from November, 1893, to February, 1894, was excusable because of his financial and physical condition.

"Fourth. We find that there was no fraud in conveying the land formerly owned by the contestant to his son-in-law some months before the opening of the country to settlement.

"Fifth. That the settlement rights of the contestant were commenced before the defendant filed his soldier's declaratory statement, and that the said rights so acquired have been followed up as required by law."

The office recommended that the entry of the defendant "be permitted to stand." The finding and decision were successively affirmed by the Commissioner of the General Land Office and the Secretary of the Interior, in an elaborate opinion, in which the testimony was quoted and commented upon. And to these decisions we must look as the

ultimate action of the Department. It is of no legal consequence that different views were expressed in other decisions. It is not contended that Secretary Hitchcock, when he rendered the last decision, did not have complete jurisdiction of the case. It seems to be contended that he was bound by the facts found by his predecessor, Mr. Bliss, and that this court is likewise so bound. The contention is untenable. *Potter v. Hall*, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545. In that case it was said:

"The fact that the final conclusion as to the ultimate facts *reached by the De-[443]partment differed from the conception of such ultimate facts entertained by the Department in previous stages of the controversy affords no ground for disregarding the conclusion of ultimate fact finally reached, which was binding between the parties."

But besides, as we have seen, additional testimony was taken. It was upon that testimony, as well as upon that which was before Secretary Bliss, that the decision of Secretary Hitchcock was based. It is true the petition alleges that such decision was made upon "precisely the same state of facts" as that of Secretary Bliss, but the allegation is contradicted by the exhibits which are attached to the petition and expressly made part thereof.

The contentions upon which plaintiff bases his second cause of action are equally without merit. The issue of fraud which plaintiff made upon the ownership of land in Kansas and the conveyance thereof to his son-in-law was passed on by the Land Department and decided adversely to plaintiff. There was evidence other than copies of the record. The integrity of the deed by the defendant to his son-in-law was challenged. The evidence is not recited in the opinion of the local land office. It is recited in the opinion of Secretary Hitchcock, and it tended to show that the deed was a consummation of transactions between defendant and his son-in-law which established its validity, and which were inconsistent with the supposition of its having been antedated. However, the issue was met and decided upon testimony submitted, and no fact is alleged which supports the statement that plaintiff was prevented from exhibiting his whole case. He had certainly plenty of time for preparation. The land was opened to settlement September 3, 1893. On the 19th of that month plaintiff filed his soldier's declaratory statement upon the land. Defendant made his homestead entry November 24, 1893, and on the 28th of March, 1894, instituted a contest against plaintiff, which was not heard until October 18, 1895. A decision was rendered on such contest October 24, 1895. *The progress of the case[444

was somewhat slow in the Interior Department, the rehearing applied for by defendant being granted February, 1899, five years after the institution of the contest. It thus appears that plaintiff had from the 28th of March, 1894, until October 18, 1895, to prepare for the first hearing upon the contest, and had over five years to the final hearing, in 1899. And he alleges that he had learned as early as January, 1894, that the deed of defendant to his son-in-law was fraudulent. It is true he attempted to show diligence in his investigations, but all he did was to visit Morris county in 1894, and to send an attorney there in 1899, who discovered nothing. And he finally alleges that on or about the 1st of March, 1901, which was after the proceedings in the Land Department had closed, he learned "of the existence of proof sufficient to substantiate the allegations of fraud and imposition on the defendant's part." From whom or how he learned it or what defendant did to keep it from him, is not alleged. These allegations only show that the plaintiff has further evidence upon one of the issues made before the Land Department, which he had abundance of time and opportunity to discover and present, and no fact is alleged that anything was done to prevent him from discovering or presenting it, except the general allegation that cunning and deceit were practised upon him. Of what they consisted he does not allege, or why they endured and were successful for over five years and until the case was closed in the Land Department.

The case therefore falls within the doctrine of *Vance v. Burbank*, 101 U. S. 519, 25 L. ed. 931; *De Cambra v. Rogers*, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; *Estes v. Timmons*, 199 U. S. 391, 50 L. ed. 241, 26 Sup. Ct. Rep. 85; *United States v. Throckmorton*, 98 U. S. 65, 25 L. ed. 95; *Friese v. Hummel*, 26 Or. 152, 46 Am. St. Rep. 610, 37 Pac. 458. In *Vance v. Burbank*, supra, this court said, expressing the principle that is to be applied in cases like that at bar:

"It has also been settled that the fraud in respect to which relief will be granted in this class of cases must be such as has been practised on the unsuccessful party, and prevented him from exhibiting his case fully to 445] the Department, so that it may *properly be said there has never been a decision in a real contest about the subject-matter of inquiry. False testimony or forged documents even are not enough, if the disputed matter has actually been presented to or considered by the appropriate tribunal. *United States v. Throckmorton*, 98 U. S. 61, 25 L. ed. 93; *Marquez v. Frisbie*, 101 U. S. 473, 25 L. ed. 800. The decision of 53 L. ed.

the proper officers of the Department is in the nature of a judicial determination of the matter in dispute."

The cases adduced by plaintiff are consistent with that principle. They only declare the general doctrine that the holder of a patent may be declared to hold the same as trustee for another when he has procured it by an error of law committed by the Land Department, the facts being undisputed, or by fraud or imposition upon that Department. Of the character of the fraud and in what way or under what circumstances exerted in order to be a ground of relief, the cases we have cited are examples.

Decree affirmed.

FREDERIC L. GRANT SHOE COMPANY,
Bankrupt, Plff. in Err.,

v.

W. M. LAIRD COMPANY, of Pittsburg, Pa.

(See S. C. Reporter's ed. 445-449.)

Error to court of bankruptcy — time for instituting proceedings.

1. The thirty days' limitation for appeals in bankruptcy cases, made by general orders in bankruptcy, rule 36, does not apply to a writ of error from the Federal Supreme Court to a court of bankruptcy, presenting the question of the jurisdiction to make an adjudication of bankruptcy on a claim for unliquidated damages, but such proceeding is governed by the two years' limitation fixed by U. S. Rev. Stat. § 1008, U. S. Comp. Stat. 1901, p. 715, and the act of March 3, 1891 (26 Stat. at L. 826, 827, chap. 517, U. S. Comp. Stat. 1901, p. 547), §§ 4, 5.

[For other cases, see Appeal and Error, IV. d, in Digest Sup. Ct. 1908.]

Error to district court — necessity of bill of exceptions.

2. A bill of exceptions is not essential to a writ of error from the Federal Supreme Court to a district court, presenting the sole question of the jurisdiction of the latter court, where it can add nothing to what is apparent on the face of the record.

[For other cases, see Appeal and Error, 920, 3417-3453, in Digest Sup. Ct. 1908.]

NOTE.—On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

On the practice and procedure governing the transfer of causes to the Federal Supreme court on writ of error or appeal—see note to *Wedding v. Meyler*, 66 L.R.A. 833.

On direct review of judgments of circuit and district courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

On the right to prove unliquidated claim for tort in bankruptcy—see case note to *Brown v. United Button Co.* 8 L.R.A. (N.S.) 961.

Error to district court — case involving jurisdiction below — effect of prior decision by a circuit court of appeals.

3. A decision of a circuit court of appeals, affirming, on the revisory proceeding authorized by the bankrupt act of July 1, 1898 (30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432), § 24b, an interlocutory order of the court of bankruptcy which overruled a motion to dismiss the proceedings, cannot preclude a writ of error from the Federal Supreme Court to the bankruptcy court, to review the final decision, bringing up the question of the jurisdiction of that court to make an adjudication of bankruptcy on a claim for unliquidated damages.

[For other cases, see Appeal and Error, 990-993, in Digest Sup. Ct. 1908.]

Bankruptcy — unliquidated claim as basis of proceeding.

4. An involuntary petition in bankruptcy may be based upon a claim for unliquidated damages arising out of a breach of warranty on the sale of personalty, although, by the provision of the bankrupt act of July 1, 1898, § 59b, such petitions may be filed only by creditors who have provable claims, since, if the claim is of a kind that can be proved in bankruptcy, this provision is satisfied; and the claim in question is provable under § 63a of that act, as founded upon a contract, even if, in case of fraud, there may be an independent claim purely in tort.

[For other cases, see Bankruptcy, 83-84a, 335, 336, in Digest Sup. Ct. 1908.]

[No. 35.]

Argued December 2, 1908. Decided February 23, 1909.

IN ERROR to the District Court of the United States for the Western District of New York to review a judgment making an adjudication of bankruptcy upon a claim for unliquidated damages. Affirmed.

See same case below, 125 Fed. 576.

The facts are stated in the opinion.

Mr. **P. M. French** argued the cause, and, with Messrs. Satterlee, Bissell, Taylor, & French, filed a brief for plaintiff in error:

The writ of error was sued out in time.

Allen v. Southern P. R. Co. 173 U. S. 479, 486, 43 L. ed. 775, 777, 19 Sup. Ct. Rep. 518; Holt v. Indiana Mfg. Co. 176 U. S. 70, 44 L. ed. 375, 20 Sup. Ct. Rep. 272; Excelsior Wooden Pipe Co. v. Pacific Bridge Co. 185 U. S. 282, 285, 46 L. ed. 910, 913, 22 Sup. Ct. Rep. 681.

A bill of exceptions is not necessary in this case.

C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102. See also St. Paul, M. & M. R. Co. v. Drake, 19 C. C. A. 252, 44 U. S. App. 271, 72 Fed. 945; Storm v. United States, 94

U. S. 76, 24 L. ed. 42; Perez v. Fernandez, 202 U. S. 80, 100, 50 L. ed. 942, 949, 26 Sup. Ct. Rep. 561; Moline Plow Co. v. Webb, 141 U. S. 616, 35 L. ed. 879, 12 Sup. Ct. Rep. 100; Young v. Martin, 8 Wall. 354, 19 L. ed. 418; Thomas v. Ohio State University, 195 U. S. 207, 211, 49 L. ed. 160, 25 Sup. Ct. Rep. 24.

The plaintiff in error is not concluded by the decision of the circuit court of appeals upon the petition for review of the order of the district court, denying the original motion to dismiss.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; United States v. Jahn, 155 U. S. 109, 114, 39 L. ed. 87, 90, 15 Sup. Ct. Rep. 39; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; Pullman's Palace Car Co. v. Central Transp. Co. 171 U. S. 138, 43 L. ed. 108, 18 Sup. Ct. Rep. 808; Columbus Constr. Co. v. Crane Co. 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721; Carter v. Roberts, 177 U. S. 496, 44 L. ed. 861, 20 Sup. Ct. Rep. 713; Cincinnati, H. & D. R. Co. v. Thiebaud, 177 U. S. 615, 44 L. ed. 911, 20 Sup. Ct. Rep. 822; Re Huguley Mfg. Co. 184 U. S. 207, 46 L. ed. 549, 22 Sup. Ct. Rep. 455; Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211; Ayres v. Polsdorfer, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196; Union & Planters' Bank v. Memphis, 189 U. S. 72, 47 L. ed. 713, 23 Sup. Ct. Rep. 604; Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 405, 410, 48 L. ed. 496, 498, 24 Sup. Ct. Rep. 376.

The writ of error which presents a question of jurisdiction of the district court, arising under the bankruptcy act of July 1, 1898, is, after final judgment, well taken under the provisions of that act and the 5th section of the judiciary act of March 3, 1891.

United States v. Jahn, 155 U. S. 109, 114, 115, 39 L. ed. 87, 90, 15 Sup. Ct. Rep. 39; Bardes v. First Nat. Bank, 175 U. S. 526, 44 L. ed. 261, 20 Sup. Ct. Rep. 196; Frederic L. Grant Shoe Co. v. W. M. Laird Co. 203 U. S. 502, 51 L. ed. 292, 27 Sup. Ct. Rep. 161.

Unliquidated claims based upon tort will not sustain a petition in bankruptcy.

Beers v. Hanlin, 3 Am. Bankr. Rep. 745, 99 Fed. 695; Re Brinckmann, 4 Am. Bankr. Rep. 551, 103 Fed. 65.

The same proposition with reference to actions for breach of warranty has been held in Florida and in Pennsylvania.

Re Morales, 5 Am. Bankr. Rep. 425, 105 Fed. 761; Re Big Meadows Gas Co. 7 Am. Bankr. Rep. 697, 113 Fed. 974. See also Re Rogers Mill Co. 4 Am. Bankr. Rep. 540; Re Gillette, 5 Am. Bankr. Rep. 119; Phil-

lips v. Dreher Shoe Co. 7 Am. Bankr. Rep. 326.

Mr. Hiram R. Wood argued the cause, and, with Mr. Horace McGuire, filed a brief for defendant in error:

The claim of the defendant in error was and is a provable claim.

Re Hornstein, 10 Am. Bankr. Rep. 317; Crawford v. Burke, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9.

The plaintiff in error is concluded by the decision of the circuit court of appeals, affirming the order of the district court, denying the alleged bankrupt's preliminary motion to dismiss for want of jurisdiction.

McLish v. Roff, 141 U. S. 661, 35 L. ed. 893, 12 Sup. Ct. Rep. 118; United States v. Jahn, 155 U. S. 109, 114, 39 L. ed. 87, 90, 15 Sup. Ct. Rep. 39; Robinson v. Caldwell, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343; Columbus Constr. Co. v. Crane Co. 174 U. S. 600, 43 L. ed. 1102, 19 Sup. Ct. Rep. 721.

Mr. Justice Holmes delivered the opinion of the court:

This case comes up on a certificate concerning the jurisdiction of the district court on the following facts: The W. M. Laird Company filed a petition in bankruptcy against the Frederic L. Grant Shoe Company, alleging acts of bankruptcy, and setting up a claim for \$3,732.80 for the breach of an express warranty of shoes sold to it by the latter. The shoe company answered, denying the foregoing allegations, and denying that the claim alleged was a provable claim. The case coming on to be tried before a jury, it moved the court to dismiss the proceeding for want of jurisdiction. The motion was denied, and insolvency and acts of bankruptcy being admitted, the claim was liquidated at \$3,454, the shoe company offering no evidence. The shoe company was adjudged a bankrupt, and, at the same time, the judge certified that the jurisdiction of the court to make such an adjudication on a claim for unliquidated damages was the only question in issue. Afterwards this writ of error was brought, the taking of jurisdiction being the only error assigned.

It already has been decided between these parties that a writ of error, not an appeal, is [447] the proper means of bringing the case here. 203 U. S. 502, 51 L. ed. 292, 27 Sup. Ct. Rep. 161. But the defendant in error moves to dismiss on the grounds that the writ was not sued out in time, because general order 36 (2) allows only thirty days for appeals; and that no bill of exceptions was filed. Neither reason is good. The statutes fix the time within which writs of

error may be brought. Rev. Stat. § 1008, U. S. Comp. Stat. 1901, p. 715. See act of March 3, 1891, chap. 517, §§ 4, 5, 26 Stat. at L. 826, 827, U. S. Comp. Stat. 1901, p. 547. Allen v. Southern P. R. Co. 173 U. S. 479, 486, 43 L. ed. 775, 777, 19 Sup. Ct. Rep. 518. A bill of exceptions was not necessary, as it would have added nothing to what is patent on the face of the record. C. H. Nichols Lumber Co. v. Franson, 203 U. S. 278, 51 L. ed. 181, 27 Sup. Ct. Rep. 102.

Perhaps it should be mentioned that a motion to dismiss, earlier than the one we have mentioned, was made and overruled (125 Fed. 576), and that thereafter, on a petition for review, the decision was affirmed by the circuit court of appeals, 66 C. C. A. 78, 130 Fed. 881. Although in the report the case is headed "In Error to the District Court," it appears by stipulation that the proceeding was a revisory one under § 24b of the bankruptcy act [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3432], the order having been interlocutory. It is suggested that the plaintiff in error is concluded by the action of the circuit court of appeals. But, notwithstanding the objections to a double resort, we do not perceive how such an interlocutory decision, even of the higher court, can prevent a case, otherwise proper to be brought here, from being taken up after a final judgment is reached.

Coming to the question certified, we are of opinion that the decision of the courts below was right. The argument to the contrary is based on the letter of the statute, and is easily stated and understood. By § 59b petitions to have a debtor adjudged a bankrupt may be filed only by creditors who have provable claims. By § 63b, "Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate." The word "thereafter" shows, it is said, that they are not yet proved to exist when merely presented and sworn to. Therefore it does not yet [448] appear that there is any foundation for the proceeding, in the requisite amount or even the existence of the claim. But there must be a proceeding in court before a liquidation can take place, and, therefore, the claim cannot be liquidated until a proceeding is started in some other way. In short, the claim upon which the petition is based must be provable when the petition is filed, and this claim was not provable then, since, by the express words of the act, it had to be liquidated before it could be proved.

On the other hand, by the equally express

words of § 63a, among the debts that may be proved are those founded upon a contract, express or implied. Again, by § 17, the discharge is of all "provable debts" with certain exceptions, and it would not be denied that this claim would be barred by a discharge. *Tindle v. Birkett*, 205 U. S. 183, 51 L. ed. 762, 27 Sup. Ct. Rep. 493. If the argument for the plaintiff in error is sound, a creditor for goods sold on a *quantum valebant* would be as badly off as the petitioner, and both of them might be postponed in reducing their claims to judgment until it was too late. The intimations in *Tindle v. Birkett*, *supra*, and *Crawford v. Burke*, 195 U. S. 176, 49 L. ed. 147, 25 Sup. Ct. Rep. 9, are adverse to such a result. The whole argument from the letter of the statute depends on reading "provable claims" in § 59b as meaning claims that may be proved then and there when the petition is filed. But, if it can be seen then and there that the claims are of a kind that can be proved in the proceedings, the words are satisfied; and further, no reason appears why a liquidation may not be ordered on the filing of the petition, to ascertain whether it is filed rightly or not.

It is said that an unfounded claim of this sort might be used as a weapon to enforce an unjust demand or to make a solvent but struggling debtor bankrupt. *Re Big Meadows Gas Co.* 113 Fed. 974. But an unjust demand may be made for a liquidated sum, also, and we have mentioned the injustice on the other side. Again, it has been suggested that a cause of action for a breach of warranty really is for deceit, and sounds in tort, claims for torts not being mentioned among the "debts *which may be proved" in § 63a. *Re Morales*, 105 Fed. 761. No doubt at common law a false statement as to present facts gave rise to an action of tort, if the statement was made at the risk of the speaker, and led to harm. But ordinarily the risk was not taken by the speaker unless the statement was fraudulent; and it was precisely because it was a warranty,—that is, an absolute undertaking by contract that a fact was true,—that, if a warranty was alleged, it was not necessary to lay the *scienter*. *Schuchardt v. Allen*, 1 Wall. 359, 17 L. ed. 642; *Norton v. Doherty*, 3 Gray, 372, 63 Am. Dec. 758. In other words, a claim on a warranty, as such, necessarily was a claim arising out of a contract, even if, in case of actual fraud, there might be an independent claim purely in tort.

Judgment affirmed.

MATEO CARIÑO, Plff. in Err.,

v.

INSULAR GOVERNMENT OF THE PHILIPPINE ISLANDS.

(See S. C. Reporter's ed. 449-463.)

Appeal — mode of review — proceeding for the registration of land.

1. Writ of error is the proper mode of bringing up to the Federal Supreme Court for review a judgment of the supreme court of the Philippine Islands, affirming a judgment below, dismissing, upon grounds of law, an application for the registration of land.

[For other cases, see Appeal and Error, II. b, in Digest Sup. Ct. 1908.]

Recording laws — registration of title in Philippine Islands.

2. The exception of the province of Benguet from the operation of the Philippine Commission's act of 1903, No. 926, relating to the registration of land titles, does not apply to one who claims present ownership of land in that province; but he is entitled to registration, if his claim of ownership can be maintained, under the Commission's act of 1902, No. 406, establishing a court for registration purposes, with jurisdiction "throughout the Philippine archipelago," and authorizing, in general terms, applications to be made by persons claiming to own the legal estate in fee simple.

[For records of title, see Real Property, II. in Digest Sup. Ct. 1908.]

Evidence — presumption — ownership as against government.

3. Every presumption should be indulged against the United States claiming title to land in the province of Benguet in the Philippine Islands, which, for more than fifty years prior to the treaty of peace with Spain of April 11, 1899 (30 Stat. at L. 1754), has been held by the present native Igorot holder and his ancestors under claim of private ownership.

[For other cases, see Evidence, II. k, 4, in Digest Sup. Ct. 1908.]

Adverse possession — against government — land in Philippine Islands.

4. A native title to land in the province of Benguet in the Philippine Islands, which, for more than fifty years prior to the treaty of peace with Spain of April 11, 1899, a native Igorot and his ancestors have held in accordance with Igorot custom, as private property, should be recognized by the insular government, although no document of title has issued from the Spanish Crown, where, even if tried by the law of Spain, without reference to the effect of the change of sovereignty and of the declaration of purpose and safeguards embodied in the organic act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), it is not clear that he is not the owner.

[For other cases, see Adverse Possession, I. h, in Digest Sup. Ct. 1908.]

[No. 72.]

NOTE.—On distinction between appeal and writ of error—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

Argued January 13, 1909. Decided February 23, 1909.

IN ERROR to the Supreme Court of the Philippine Island to review a judgment which affirmed a judgment of the Court of First Instance of the Province of Benguet, dismissing an application for the registration of certain land. Reversed.

See same case below, 7 Philippine, 132.

The facts are stated in the opinion.

Messrs. Frederic R. Coudert and Howard Thayer Kingsbury argued the cause, and, with Messrs. Charles C. Cohn and D. R. Williams, filed a brief for plaintiff in error:

Aboriginal property rights are recognized by American law.

United States v. Paine Lumber Co. 206 U. S. 467, 51 L. ed. 1139, 27 Sup. Ct. Rep. 697; Lone Wolf v. Hitchcock, 187 U. S. 564, 47 L. ed. 305, 23 Sup. Ct. Rep. 216; Doe ex dem. Mann v. Wilson, 23 How. 463, 16 L. ed. 586.

The "Laws of the Indies" shows a continuous, consistent, and conscientious purpose to protect the native inhabitants in their persons, liberties, and possessions; to secure their property rights against Spanish greed and native improvidence; and, in general, to put them in the position not of conquered subjects, but of favored wards.

Prescription ran against the state under Spanish law.

46 Jurisprudencia Civil, p. 9; 3 Sanchez Roman, pp. 277 et seq.

Even in English law we find Bracton, whose work was substantially contemporary with the compilation of the Partidas, recognizing certain Crown lands as prescriptible.

Bracton, Lib. 2, chap. 5, § 7.

The maxim *Nullum tempus occurrit regi* appears to have been first applied, and in fact confined, to franchises, and only gradually extended to ordinary Crown property, through the efforts of overzealous Crown lawyers. (See 1 Pollock & M. History of English Law, p. 572; 2 Pollock & M. History of English Law, p. 144.)

If Mateo Cariño possessed any property right or interest in the lands in question, he is clearly protected by the treaty as well as by the settled rules of international law prevailing among civilized nations.

Delassus v. United States, 9 Pet. 133, 9 L. ed. 77; Buenaventura v. The Commanding General, 6 Philippine, 607.

The somewhat nihilistic views of property entertained by the Philippine supreme court in the Valenton and Cariño cases are not in accordance with those entertained by this court.

53 L. ed.

Strother v. Lucas, 12 Pet. 436, 9 L. ed. 1147.

Messrs. Frederic R. Coudert, Howard Thayer Kingsbury, and Mr. Paul Fuller also filed a brief in reply for plaintiff in error:

This court has jurisdiction to review the judgment in the case at bar on writ of error.

Ormsby v. Webb, 134 U. S. 47, 33 L. ed. 805, 10 Sup. Ct. Rep. 478; Campbell v. Porter, 162 U. S. 478, 40 L. ed. 1044, 16 Sup. Ct. Rep. 871; Metropolitan R. Co. v. District of Columbia (Metropolitan R. Co. v. Macfarland) 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28; United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416; United States ex rel. Lowry v. Allen, 203 U. S. 476, 51 L. ed. 281, 27 Sup. Ct. Rep. 141; Smith v. Whitney, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570.

It is elementary that equity acts not *in rem*, but *in personam*, and that "a naked question of title" is not cognizable in a court of equity at all.

Massie v. Watts, 6 Cranch, 148, 158, 159, 3 L. ed. 181, 185; Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 641, 47 L. ed. 626, 632, 23 Sup. Ct. Rep. 434.

Solicitor General Hoyt argued the cause, and, with Mr. Paul Charlton, filed a brief for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This was an application to the Philippine court of land registration for the registration of certain land. The application was granted by the court on March 4, 1904. An appeal was taken to the court of first instance of the province of Benguet, on behalf of the government of the Philippines, and also on behalf of the United States, those governments having taken possession of the property for public and military purposes. The court of first instance found the facts and dismissed the application upon grounds of law. This judgment was affirmed by the supreme court (7 Philippine, 132), and the case then was brought here by writ of error.

The material facts found are very few. The applicant and plaintiff in error is an Igorot of the province of Benguet, where the land lies. For more than fifty years before the treaty of *Paris, April 11, 1899 [30[456 Stat. at L. 1754], as far back as the findings go, the plaintiff and his ancestors had held the land as owners. His grandfather had lived upon it, and had maintained fences sufficient for the holding of cattle, according to the custom of the country, some of the

fences, it seems, having been of much earlier date. His father had cultivated parts and had used parts for pasturing cattle, and he had used it for pasture in his turn. They all had been recognized as owners by the Igorots, and he had inherited or received the land from his father, in accordance with Igorot custom. No document of title, however, had issued from the Spanish Crown, and although, in 1893-1894, and again in 1896-1897, he made application for one under the royal decrees then in force, nothing seems to have come of it, unless, perhaps, information that lands in Benguet could not be conceded until those to be occupied for a sanatorium, etc., had been designated,—a purpose that has been carried out by the Philippine government and the United States. In 1901 the plaintiff filed a petition, alleging ownership, under the mortgage law, and the lands were registered to him, that process, however, establishing only a possessory title, it is said.

Before we deal with the merits, we must dispose of a technical point. The government has spent some energy in maintaining that this case should have been brought up by appeal, and not by writ of error. We are of opinion, however, that the mode adopted was right. The proceeding for registration is likened to bills in equity to quiet title, but it is different in principle. It is a proceeding *in rem* under a statute of the type of the Torrens act, such as was discussed in *Tyler v. Registration Ct. Judges*, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812. It is nearer to law than to equity, and is an assertion of legal title; but we think it unnecessary to put it into either pigeon hole. A writ of error is the general method of bringing cases to this court, an appeal the exception, confined to equity in the main. There is no reason for not applying the general rule to this case. *Ormsby v. Webb*, 134 U. S. 47, 65, 33 L. ed. 805, 812, 10 Sup. Ct. Rep. 478; *Campbell v. Porter*, 162 U. S. 478, 40 L. ed. 1044, 16 Sup. Ct. Rep. 871; *Metropolitan R. Co. v. District of Columbia* (*Metropolitan R. Co. v. Macfarland*) 195 U. S. 322, 49 L. ed. 219, 25 Sup. Ct. Rep. 28.

457] *Another preliminary matter may as well be disposed of here. It is suggested that, even if the applicant have title, he cannot have it registered, because the Philippine Commission's act No. 926, of 1903, excepts the province of Benguet among others from its operation. But that act deals with the acquisition of new titles by homestead entries, purchase, etc., and the perfecting of titles begun under the Spanish law. The applicant's claim is that he now owns the land, and is entitled to registration under the Philippine Commission's act No. 496, of

1902, which established a court for that purpose with jurisdiction "throughout the Philippine archipelago," § 2, and authorized in general terms applications to be made by persons claiming to own the legal estate in fee simple, as the applicant does. He is entitled to registration if his claim of ownership can be maintained.

We come, then, to the question on which the case was decided below,—namely, whether the plaintiff owns the land. The position of the government, shortly stated, is that Spain assumed, asserted, and had title to all the land in the Philippines except so far as it saw fit to permit private titles to be acquired; that there was no prescription against the Crown, and that, if there was, a decree of June 25, 1880, required registration within a limited time to make the title good; that the plaintiff's land was not registered, and therefore became, if it was not always, public land; that the United States succeeded to the title of Spain, and so that the plaintiff has no rights that the Philippine government is bound to respect.

If we suppose for the moment that the government's contention is so far correct that the Crown of Spain in form asserted a title to this land at the date of the treaty of Paris, to which the United States succeeded, it is not to be assumed without argument that the plaintiff's case is at an end. It is true that Spain, in its earlier decrees, embodied the universal feudal theory that all lands were held from the Crown, and perhaps the general attitude of conquering nations toward people not recognized as entitled to the treatment accorded to those *in the same zone of civilization with[458 themselves. It is true, also, that, in legal theory, sovereignty is absolute, and that, as against foreign nations, the United States may assert, as Spain asserted, absolute power. But it does not follow that, as against the inhabitants of the Philippines, the United States asserts that Spain had such power. When theory is left on one side, sovereignty is a question of strength, and may vary in degree. How far a new sovereign shall insist upon the theoretical relation of the subjects to the head in the past, and how far it shall recognize actual facts, are matters for it to decide.

The province of Benguet was inhabited by a tribe that the Solicitor General, in his argument, characterized as a savage tribe that never was brought under the civil or military government of the Spanish Crown. It seems probable, if not certain, that the Spanish officials would not have granted to anyone in that province the registration to which formerly the plaintiff was entitled by the Spanish laws, and which would have made his title beyond question good. What-

ever may have been the technical position of Spain, it does not follow that, in the view of the United States, he had lost all rights and was a mere trespasser when the present government seized his land. The argument to that effect seems to amount to a denial of native titles throughout an important part of the island of Luzon, at least, for the want of ceremonies which the Spaniards would not have permitted and had not the power to enforce.

The acquisition of the Philippines was not like the settlement of the white race in the United States. Whatever consideration may have been shown to the North American Indians, the dominant purpose of the whites in America was to occupy the land. It is obvious that, however stated, the reason for our taking over the Philippines was different. No one, we suppose, would deny that, so far as consistent with paramount necessities, our first object in the internal administration of the islands is to do justice to the natives, not to exploit their country for private gain. By the organic act of July 1, 1902, chap. 1369, § 12, 32 Stat. at L. 691, all the property and rights 459] acquired there by the *United States are to be administered "for the benefit of the inhabitants thereof." It is reasonable to suppose that the attitude thus assumed by the United States with regard to what was unquestionably its own is also its attitude in deciding what it will claim for its own. The same statute made a bill of rights, embodying the safeguards of the Constitution, and, like the Constitution, extends those safeguards to all. It provides that "no law shall be enacted in said islands which shall deprive any person of life, liberty, or property without due process of law, or deny to any person therein the equal protection of the laws." § 5. In the light of the declaration that we have quoted from § 12, it is hard to believe that the United States was ready to declare in the next breath that "any person" did not embrace the inhabitants of Benguet, or that it meant by "property" only that which had become such by ceremonies of which 'presumably a large part of the inhabitants never had heard, and that it proposed to treat as public land what they, by native custom and by long association,—one of the profoundest factors in human thought,—regarded as their own.

It is true that, by § 14, the government of the Philippines is empowered to enact rules and prescribe terms for perfecting titles to public lands where some, but not all, Spanish conditions had been fulfilled, and to issue patents to natives for not more than 16 hectares of public lands actually occupied by the native or his ancestors before

August 13, 1898. But this section perhaps might be satisfied if confined to cases where the occupation was of land admitted to be public land, and had not continued for such a length of time and under such circumstances as to give rise to the understanding that the occupants were owners at that date. We hesitate to suppose that it was intended to declare every native who had not a paper title a trespasser, and to set the claims of all the wilder tribes afloat. It is true again that there is excepted from the provision that we have quoted as to the administration of the property and rights acquired by the United States, such land and property as shall be designated by the President for military or other reservations, *as this land since has been. But there[460 still remains the question what property and rights the United States asserted itself to have acquired.

Whatever the law upon these points may be, and we mean to go no further than the necessities of decision demand, every presumption is and ought to be against the government in a case like the present. It might, perhaps, be proper and sufficient to say that when, as far back as testimony or memory goes, the land has been held by individuals under a claim of private ownership, it will be presumed to have been held in the same way from before the Spanish conquest, and never to have been public land. Certainly in a case like this, if there is doubt or ambiguity in the Spanish law, we ought to give the applicant the benefit of the doubt. Whether justice to the natives and the import of the organic act ought not to carry us beyond a subtle examination of ancient texts, or perhaps even beyond the attitude of Spanish law, humane though it was, it is unnecessary to decide. If, in a tacit way, it was assumed that the wild tribes of the Philippines were to be dealt with as the power and inclination of the conqueror might dictate, Congress has not yet sanctioned the same course as the proper one "for the benefit of the inhabitants thereof."

If the applicant's case is to be tried by the law of Spain, we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will. For instance, Book 4, title 12, Law 14 of the Recopilación de Leyes de las Indias, cited for a contrary conclusion in *Valenton v. Murciano*, 3 Philippine, 537, while

it commands viceroys and others, when it seems proper, to call for the exhibition of grants, directs them to confirm those who hold by good grants or *justa prescripción*. 461] It is true that it *begins by the characteristic assertion of feudal overlordship and the origin of all titles in the King or his predecessors. That was theory and discourse. The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books.

Prescription is mentioned again in the royal cedula of October 15, 1754, cited in 3 Philippine, 546: "Where such possessors shall not be able to produce title deeds, it shall be sufficient if they shall show that ancient possession, as a valid title by prescription." It may be that this means possession from before 1700; but, at all events, the principle is admitted. As prescription, even against Crown lands, was recognized by the laws of Spain, we see no sufficient reason for hesitating to admit that it was recognized in the Philippines in regard to lands over which Spain had only a paper sovereignty.

The question comes, however, on the decree of June 25, 1880, for the adjustment of royal lands wrongfully occupied by private individuals in the Philippine Islands. This begins with the usual theoretic assertion that, for private ownership, there must have been a grant by competent authority; but instantly descends to fact by providing that, for all legal effects, those who have been in possession for certain times shall be deemed owners. For cultivated land, twenty years, uninterrupted, is enough. For uncultivated, thirty. Art. 5. So that, when this decree went into effect, the applicant's father was owner of the land by the very terms of the decree. But, it is said, the object of this law was to require the adjustment or registration proceedings that it described, and in that way to require every one to get a document of title or lose his land. That purpose may have been entertained, but it does not appear clearly to have been applicable to all. The regulations purport to have been made "for the adjustment of royal lands wrongfully occupied by private individuals." (We follow the translation in the government's brief.) It does not appear that this land ever was royal land or wrongfully occupied. In Article 6 it is provided that "interested parties not 462] included within the two preceding *articles [the articles recognizing prescription of twenty and thirty years] may legalize their possession, and thereby acquire the full ownership of the said lands, by means of adjustment proceedings, to be conducted in the following manner." This seems, by its very terms, not to apply to those declared

already to be owners by lapse of time. Article 8 provides for the case of parties not asking an adjustment of the lands of which they are unlawfully enjoying the possession, within one year, and threatens that the treasury "will reassert the ownership of the state over the lands," and will sell at auction such part as it does not reserve. The applicant's possession was not unlawful, and no attempt at any such proceedings against him or his father ever was made. Finally, it should be noted that the natural construction of the decree is confirmed by the report of the council of state. That report puts forward as a reason for the regulations that, in view of the condition of almost all property in the Philippines, it is important to fix its status by general rules, on the principle that the lapse of a fixed period legalizes completely all possession; recommends in two articles, twenty and thirty years, as adopted in the decree; and then suggests that interested parties not included in those articles may legalize their possession and acquire ownership by adjustment at a certain price.

It is true that the language of arts. 4 and 5 attributes title to those "who may prove" possession for the necessary time, and we do not overlook the argument that this means may prove in registration proceedings. It may be that an English conveyancer would have recommended an application under the foregoing decree, but certainly it was not calculated to convey to the mind of an Igorot chief the notion that ancient family possessions were in danger, if he had read every word of it. The words "may prove" (*acrediten*), as well, or better, in view of the other provisions, might be taken to mean when called upon to do so in any litigation. There are indications that registration was expected from all, but none sufficient to show that, for want of it, ownership actually gained would be lost. *The effect of the proof, wherever 463 made, was not to confer title, but simply to establish it, as already conferred by the decree, if not by earlier law. The royal decree of February 13, 1894, declaring forfeited titles that were capable of adjustment under the decree of 1880, for which adjustment had not been sought, should not be construed as a confiscation, but as the withdrawal of a privilege. As a matter of fact, the applicant never was disturbed. This same decree is quoted by the court of land registration for another recognition of the common-law prescription of thirty years as still running against alienable Crown land.

It will be perceived that the rights of the applicant under the Spanish law present a problem not without difficulties for courts

of a different legal tradition. We have deemed it proper on that account to notice the possible effect of the change of sovereignty and the act of Congress establishing the fundamental principles now to be observed. Upon a consideration of the whole case we are of opinion that law and justice require that the applicant should be granted what he seeks, and should not be deprived of what, by the practice and belief of those among whom he lived, was his property, through a refined interpretation of an almost forgotten law of Spain.

Judgment reversed.

LEONARDO SANTOS, Matias Adriano, Angel Luna, and Teodoro Santos, Plffs. in Err.,

v.

HOLY ROMAN CATHOLIC AND APOSTOLIC CHURCH and Lorenzo Gregorio, Parish Priest of Said Church, in the Municipality of Tambobong, Province of Rizal.

(See S. C. Reporter's ed. 463-465.)

Error to Philippine supreme court — questions reviewable.

1. Only questions of law are brought up for review by a writ of error from the Federal Supreme Court to the supreme court of the Philippine Islands.

[For other cases, see Appeal and Error, 4889-4891, in Digest Sup. Ct. 1908.]

Appeal — presumptions.

2. The grounds for refusing to grant a new trial for newly discovered evidence will be presumed, on a writ of error, to have been sufficient, where they do not appear on the record.

[For other cases, see Appeal and Error, VIII. d, in Digest Sup. Ct. 1908.]

Religious societies — corporate nature — title to property.

3. The Roman Catholic Church in the Philippine Islands is a legal personality with capacity to hold property acquired by gift.

[For other cases, see Religious Societies, II. in Digest Sup. Ct. 1908.]

[No. 73.]

Submitted January 13, 1909. Decided February 23, 1909.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the Court of First Instance of the Province of Rizal, in favor of plaintiffs, in an action to recover possession of a chapel. Affirmed.

See same case below, 7 Philippine, 66.

The facts are stated in the opinion.

53 L. ed.

Messrs. Charles F. Consaul and George F. Pollock submitted the cause for plaintiffs in error. Mr. Frank B. Ingersoll was on the brief.

No appearance for defendants in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought by the defendants in error to recover a chapel. They obtained a judgment which was affirmed by the supreme court of the Philippine Islands, and then was brought here by writ of error. The errors assigned are that the court denied the existence of a *cofradia* alleged by the answer to own the property, and held that it was not a "judicial entity," and that it was not entitled to possession; that the court held that the Roman Catholic Church was entitled to the possession of the property; that it denied a motion for a new trial; and that it ordered the defendants to deliver possession to the plaintiffs. The facts found, so far as material, are that the chapel always was devoted to the ceremonies and worship of the Roman Catholic Church until December, 1902, when it was taken possession of by members of an Aglipayan community, who have kept possession and worshipped there up to the present time; that it was built, and, as we gather, the lot on which it stands acquired, from gifts of the residents of the barrio of Concepción, where the chapel is, these gifts having been intended to be for the uses of the Roman Catholic Church and *for the exclusive[465 benefit of those who professed the Roman Catholic religion; and that many of the benefactors still wish the chapel to be devoted to the former worship, and by the present occupation are deprived of its use.

The finding that the existence of the *cofradia* is not proved is not open to re-examination here, as only questions of law are brought up. So as to the affirmance of the refusal to grant a new trial on the ground of newly-discovered evidence. The evidence may have been important, but the reasons for the refusal do not appear, and must be presumed to have been sufficient, as they very well may have been. The only questions open are those raised by the decision that the Roman Catholic Church is entitled to the possession of the property, and they now have been answered by *Ponce v. Roman Catholic Apostolic Church*, 210 U. S. 296, 52 L. ed. 1068, 28 Sup. Ct. Rep. 737. In that case *Barlin v. Ramirez*, 7 Philippine, 41, on the authority of which the present case was decided, is referred to with approval; the legal personality of the Roman Church, and its capacity to hold property in our insular possessions, is recognized; and

the fact that such property was acquired from gifts, even of public funds, is held not to affect the absoluteness of its right. We think it unnecessary to repeat the discussion. In this case the Roman Catholic Church appears to have been in possession until ejected by the defendants without right, and, so far as the facts before this court go, appears actually to own the property concerned.

Judgment affirmed.

466]*THE STEAM TUG EUGENE F. MORAN, Michael Moran, Claimant, and the Scows 15 D and 18 D, Henry Dubois Sons Company, Claimant,

v.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY and the Steam Tug Charles E. Matthews, John D. Daily et al., Claimants. (No. 87.)

HENRY DUBOIS SONS COMPANY and the Steam Tug Eugene F. Moran, Michael Moran, Claimant,

v.

THE STEAM TUG CHARLES E. MATTHEWS, John D. Daily et al., Claimants. (No. 88.)

(See S. C. Reporter's ed. 466-477.)

Collision — liability of tow.

1. A car float in tow of a tug hired to move her from place to place in a harbor is not responsible to a scow for damages resulting from a collision between the scow and the float, where the tug alone was at fault.

[For other cases, see Collision, 178-180, in Digest Sup. Ct. 1908.]

Collision — dividing damages between vessels at fault.

2. The damages sustained by a car float in tow of a tug hired to carry her from place to place in a harbor, as the result of a collision with one of two scows in tow of another tug, for which both scows and both tugs were severally at fault, should be assessed equally upon the four offending vessels, although the scows are the property of the same owner.

[For other cases, see Collision, 409-422, in Digest Sup. Ct. 1908.]

Collision — dividing damages between vessels at fault.

3. The damages sustained by one of two scows in tow of a tug, as a result of a col-

lision with a car float in tow of another tug, for which both scows and both tugs were severally at fault, should be assessed equally on all four offending vessels, the libellant's two scows each bearing its proportion of the loss.

[For other cases, see Collision, 409-422, in Digest Sup. Ct. 1908.]

[Nos. 87, 88.]

Argued January 22, 25, 1909. Decided February 23, 1909.

ON CERTIFICATES from the United States Circuit Court of Appeals for the Second Circuit, presenting questions as to the division of damages between vessels at fault for a collision. Answered by holding that such damages should be assessed equally upon all the offending vessels.

See same case below, 83 C. C. A. 153, 154 Fed. 41.

The facts are stated in the opinion.

Mr. James Emerson Carpenter argued the cause, and, with Messrs. Samuel Park and James Keith Symmers, filed a brief for the Henry Dubois Sons Company:

In the apportionment of damages in admiralty the fundamental equitable principle is to equalize the burden among those who should bear it.

The North Star (Reynolds v. Vanderbilt) 106 U. S. 17, 27 L. ed. 91, 1 Sup. Ct. Rep. 41; Atlee v. Northwestern Union Packet Co. 21 Wall. 389, 22 L. ed. 619.

While not possessing the general powers of a court of equity, yet a court of admiralty decides matters before it upon principles of equity.

United States v. Cornell S. B. Co. 202 U. S. 184, 50 L. ed. 987, 26 Sup. Ct. Rep. 648; The Max Morris, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29.

Cases arise, undoubtedly, when both the tow and the tug are jointly liable for the consequences of a collision, as when those in charge of the respective vessels jointly participate in their control and management, and the master or crew of both vessels are either deficient in skill, omit to take due care, or are guilty of negligence in their navigation.

Sturgis v. Boyer, 24 How. 110, 121, 122, 16 L. ed. 591, 594, 595. See also The Mabey (The R. L. Mabey v. Atkins) 14 Wall. 204, 20 L. ed. 881; The Virginia Ehrman (The Virginia Ehrman v. Curtis) 97 U. S. 309, 313, 24 L. ed. 890, 892.

Co-wrongdoers, not parties to the suit, cannot be decreed to pay any portion of the damage adjudged to libellant, nor is it a question in this case whether the parties served may have process to compel the other

212 U. S.

*This case is reported by the Official Reporter under the title of "The Eugene F. Moran."

NOTE.—On damages in collision cases—see notes to Smith v. Condry, 11 L. ed. U. S. 35, and The Amiable Nancy, 4 L. ed. U. S. 456.

wrongdoers to appear and respond to the alleged wrongful act.

The New York, 175 U. S. 187, 210, 44 L. ed. 126, 136, 20 Sup. Ct. Rep. 67.

After the respective claimants had appeared and bonded their vessels, the only parties really before the court were the owners of each of the tugs and the tow, for none of these boats can be heard in this court or elsewhere save through its owner or claimant, and the suit *in rem* is simply a ready and effectual means of compelling the wrongdoer to appear and defend the action, or to make recompense.

The Burns (The M. Burns v. Reynolds) 9 Wall. 237, 239, 19 L. ed. 620, 621; The City of Norwich (Place v. Norwich & N. Y. Transp. Co.) 118 U. S. 468, 503, 30 L. ed. 134, 147, 6 Sup. Ct. Rep. 1150; The Atlas (Phœnix Ins. Co. v. The Atlas) 93 U. S. 302, 311, 23 L. ed. 863, 865; Marsden, Maritime Collision, 5th ed. 1904, pp. 69-72.

In the case of the arrest of property in the admiralty, if the owners do not appear, the judgment is limited to the *res* in the custody of the court; but, if they appear and give bail, the lien is discharged, the vessel released, and they are in the same position as if they had been brought before the court by personal notice.

The Dictator [1892] P. 304; The Gemma, 8 Asp. Mar. L. Cas. N. S. 585; The Euripides, 18 C. C. A. 226, 38 U. S. App. 1, 71 Fed. 729.

A suit *in rem* is, in a very proper sense, a suit against the owner of the thing; and especially is this true when the owner appears in the suit and claims the thing attached.

Re Norwich & N. Y. Transp. Co. 17 Blatchf. 237, Fed. Cas. No. 10,362.

Suits *in rem* are not only against a thing, but also against all persons having or pretending to have any right, title, or interest in or to that thing. They are, in a sense, always personal actions, since all persons are notified, and all affected by the judgment.

Waples, Proceedings in Rem, p. 134. And see Boyd v. United States, 116 U. S. 616, 637, 638, 29 L. ed. 746, 753, 754, 6 Sup. Ct. Rep. 524; Windsor v. McVeigh, 93 U. S. 274, 277, 23 L. ed. 914, 915; United States v. 422 Casks of Wine, 1 Pet. 547, 7 L. ed. 257.

If the owner voluntarily appears and submits himself to the jurisdiction, contests the liability of the ship, which is his own liability, we see no substantial reason why a final decree against him for the payment of the damages should not be made, to be enforced as provided in admiralty rule 21.

2 Conkling, Admiralty, 2d ed. pp. 432-434.

The true rule is as stated in Sturgis v. 53 L. ed.

Boyer, supra, and in The Clarita and The Clara (The Clara Clarita v. Cox) 23 Wall. 11, 23 L. ed. 148.

It has been held in cases like those at bar that the tug Moran and scows for purposes of navigation with reference to other vessels are to be regarded as a single vessel.

New York & B. Transp. Co. v. Philadelphia & S. Steam Nav. Co. 22 How. 461, 16 L. ed. 397; The Ivanhoe, 7 Ben. 213, Fed. Cas. No. 7,113; The Civiltà (The Civiltà v. Perry) 103 U. S. 699, 26 L. ed. 599; The Gladys, 75 C. C. A. 455, 144 Fed. 655.

It has also been held that where the tug and tow are jointly liable to a third ship, the owners of the latter may sue either or both; but that a right of apportionment lies between a tug and tow.

The Atlas (Phœnix Ins. Co. v. The Atlas) 93 U. S. 302, 23 L. ed. 863.

The court will not hold the tug and tow jointly liable unless there is fault in both.

Cushing v. The John Fraser (The James Gray v. The John Fraser) 21 How. 184, 16 L. ed. 106; The Civiltà, supra; The Express, 3 C. C. A. 342, 1 U. S. App. 658, 52 Fed. 892; Sturgis v. Boyer, 24 How. 110, 16 L. ed. 591; The Clarita and The Clara (The Clara Clarita v. Cox) 23 Wall. 1, 11, 23 L. ed. 146, 148.

And where both tug and tow are held jointly liable, the damages are to be divided between them subject to the rule laid down in the case of The Alabama, 92 U. S. 695, 23 L. ed. 763.

Where both tug and tow and a third ship are to blame for a collision between the tug or tow and a third ship, the tug and the tow will be considered as one vessel and contribute together one half, the remaining half to be borne by the third vessel.

The Englishman [1894] P. 239; The Komuk, 120 Fed. 841; The Merrill C. Hart, 162 Fed. 371; The Fred W. Chase, 31 Fed. 91.

A tug and tow, as in this case, guilty of a common fault, should be condemned to bear jointly one half the damages due to collision with a third vessel also in fault, since the tug and tow, for the purposes of navigation, are deemed in law to be a single vessel under steam, and subject to all the responsibilities of such a vessel under the rules, and we see no reason why they should not be deemed a single vessel for all purposes.

The Civiltà (The Civiltà v. Perry) 103 U. S. 701, 26 L. ed. 600; Sturgis v. Boyer, supra; The Mabey (The R. L. Mabey v. Atkins) 14 Wall. 204, 20 L. ed. 881; The Virginia Ehrman (The Virginia Ehrman v. Curtis) 97 U. S. 309, 313, 24 L. ed. 890, 892; The L. P. Dayton (McNally v. The L. P. Dayton) 120 U. S. 337, 30 L. ed. 669, 7 Sup. Ct. Rep. 568.

Whether the argument proceed upon the question that the vessel or vessels causing the damage are to be considered the offending thing, and liable without regard to ownership or agency (*The China*, 7 Wall. 53, 19 L. ed. 67), or whether the offending thing is to be regarded merely as the instrument by the improper use of which the injury is inflicted by the real wrongdoer (*The City of Norwich* [*Place v. Norwich & N. Y. Transp. Co.*] 118 U. S. 503, 504, 30 L. ed. 147, 6 Sup. Ct. Rep. 1150), justice would seem to require that the person who has actually to pay should stand on an equal footing with others whose vessels are equally guilty of fault, and *a fortiori* where those other vessels are guilty of other faults contributing to the collision.

Messrs. Archibald G. Thacher and Frederick M. Brown argued the cause, and, with Messrs. Wallace, Butler, & Brown, filed a brief for the New York Central & Hudson River Railroad Company:

Admiralty personifies the vessel.

The Blackheath (*United States v. Evans*) 195 U. S. 361, 366, 49 L. ed. 236, 237, 25 Sup. Ct. Rep. 46; *Holmes*, Common Law, pp. 26-33; *Tucker v. Alexandroff*, 183 U. S. 424, 438, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195; *The Palmyra*, 12 Wheat. 1, 14, 6 L. ed. 531, 535; *United States v. The Malek Adhel*, 2 How. 210, 11 L. ed. 239; *The China*, 7 Wall. 58, 61, 19 L. ed. 70, 71; *Ralli v. Troop*, 157 U. S. 386, 402, 403, 39 L. ed. 742, 749, 750, 15 Sup. Ct. Rep. 657; *The John G. Stevens*, 170 U. S. 122, 42 L. ed. 973, 18 Sup. Ct. Rep. 544; *The Barnstable*, 181 U. S. 464, 467, 468, 45 L. ed. 954, 957, 21 Sup. Ct. Rep. 684; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 413, 414, 45 L. ed. 1160, 21 Sup. Ct. Rep. 831; 1 *Bédarride*, *Commentaire*, art. 216; *The City of Norwich* (*Place v. Norwich & N. Y. Transp. Co.*) 118 U. S. 504, 30 L. ed. 147, 6 Sup. Ct. Rep. 1150.

Tug and tow are identified as one vessel.

The Civilta (*The Civilta v. Perry*) 103 U. S. 699, 701, 26 L. ed. 599, 600; *Robinson v. Detroit & C. Steam Nav. Co.* 20 C. C. A. 86, 43 U. S. App. 190, 73 Fed. 891; *The Columbia*, 19 C. C. A. 436, 44 U. S. App. 326, 73 Fed. 226; *The Bordentown*, 40 Fed. 687; *The Englishman* [1894] P. 239.

A tug and her tows should be regarded as a navigable unit, responsible to the extent of the total value of the unit to innocent third parties. The rights of the owners of the component parts are to be adjusted between themselves.

The Palmyra, 12 Wheat. 1, 14, 6 L. ed. 531, 535; *United States v. The Malek Adhel*,

2 How. 210, 11 L. ed. 239; *The Freeman v. Buckingham*, 18 How. 182, 15 L. ed. 341; *The Barnstable*, *supra*; *The China*, 7 Wall. 53, 68, 19 L. ed. 67, 73; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 413, 414, 45 L. ed. 1155, 1160, 21 Sup. Ct. Rep. 831; *United States v. Wilder*, 3 Sumn. 308, Fed. Cas. No. 16,694; *United States v. Cornell S. B. Co.* 202 U. S. 190, 50 L. ed. 990, 26 Sup. Ct. Rep. 648; *The Davis* (*United States v. Douglas*) 10 Wall. 15, 22, 19 L. ed. 875, 878; *The Siren* (*The Siren v. United States*) 7 Wall. 152, 162, 19 L. ed. 129, 133; *Workman v. New York*, 179 U. S. 552, 568, 45 L. ed. 314, 323, 21 Sup. Ct. Rep. 212. See also *The Cleadon*, 14 Moore P. C. C. 92; *The Niobe* [1891] A. C. 401; *Sherlock v. Ailing*, 93 U. S. 99, 108, 23 L. ed. 819, 822; *The Express*, 1 Blatchf. 365, Fed. Cas. No. 4,596; *The J. H. Gautier*, 5 Ben. 469, Fed. Cas. No. 7,319; *The Alabama*, 22 Fed. 449; *The Fred W. Chase*, 31 Fed. 91; *The Express*, 46 Fed. 863; *Evans v. The Starbuck*, 61 Fed. 502; *The Rescue*, 74 Fed. 847; *The Chicago*, 78 Fed. 823.

Mr. Harrington Putnam argued the cause, and, with Mr. Charles C. Burlingham, filed a brief for the tug Eugene F. Moran:

The only clear working rule is that, where a vessel has contributed to a collision by her own fault, her owner cannot recover more than one half of his damages.

The Alabama, 92 U. S. 695, 697, 23 L. ed. 763, 764; *The Englishman* [1894] P. 239; *Entscheidungen des Reichsgerichts in Civilsachen* (14 Feb. 1903), LIV. p. 13; *Hanseatische Gerichtszeitung* (1903), Part I. p. 285, Appx.

The scope of the moiety rule is not limited to collision. *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29. It is now applied generally in the admiralty. Although admiralty rule 59 was originally promulgated for collision suits (see *The Hudson*, 15 Fed. 162), its application is now extended to almost any case where a third party is deemed to be answerable over in whole or in part to the respondent in the original cause. Thus, a libellant guilty of contributory fault may nevertheless recover against a shipowner jointly with the charterer (*Re New York & P. R. S. S. Co.* 155 U. S. 523, 39 L. ed. 246, 15 Sup. Ct. Rep. 183; *The Barnstable*, 181 U. S. 464, 45 L. ed. 954, 21 Sup. Ct. Rep. 684), or against a shipowner and a codefendant stevedore who may be loading the ship under contract (*The Manitoba*, 104 Fed. 145), or against one who negligently casts a vessel adrift (*Dailey v. New York*, 119 Fed. 1005).

Mr. William S. Montgomery argued the cause, and, with Mr. George H. Emerson, filed a brief for the tug Charles E. Matthews:

The district court correctly apportioned the damages to the car float equally among the four vessels sued.

The *W. G. Mason*, 74 C. C. A. 83, 142 Fed. 913; *The Juniata* (*United States v. The Juniata*) 93 U. S. 340, 23 L. ed. 931; *Sturgis v. Boyer*, 24 How. 110, 16 L. ed. 591; *Hughes*, Admiralty, 1st ed. pp. 276, 277; *The North Star* (*Reynolds v. Vanderbilt*) 106 U. S. 17, 20, 27 L. ed. 91, 93, 1 Sup. Ct. Rep. 41; *The Brothers*, 2 Biss. 104, Fed. Cas. No. 1,969; *The Peshtigo*, 25 Fed. 488; *The Doris Eckhoff*, 41 Fed. 156; *The Lyndhurst*, 92 Fed. 681; *The Nettie L. Tice*, 110 Fed. 461; *The Maling*, 110 Fed. 227; *The S. A. McCaulley*, 116 Fed. 107.

The damages in the second case were also correctly apportioned. *The Mariska*, 47 C. C. A. 115, 107 Fed. 989; *Erie R. Co. v. Erie & W. Transp. Co.* 204 U. S. 220, 51 L. ed. 450, 27 Sup. Ct. Rep. 246.

Mr. Justice Holmes delivered the opinion of the court:

These cases come here on certificates setting forth in nearly the same terms the facts of a collision. They both are proceedings *in rem*. In the first the New York Central & Hudson River Railway Company, as owners of a car float that was damaged, libels the steam tug Charles E. Matthews, the steam tug Eugene F. Moran, and the scows 15 D and 18 D. In the second, the Henry Dubois Sons Company, as owner of the two scows, libels the two steam tugs. The statement of facts, slightly abridged, is as follows: At about half-past 7, in the evening of February 1, 1905, the railroad 473] company's car float was proceeding *up the Hudson river in tow of the tug Matthews, the navigation of the two being conducted solely by the master of the tug. They met the tug Moran, which was towing two mud scows down the river, scow 15 D, immediately behind the Moran, on a hawser, and, behind 15 D, scow 18 D on another hawser. A collision took place between the car float and 15 D. Neither 15 D nor 18 D had the required lights. There was an employee of the owner in charge of each scow, and it was their duty as well as the duty of the master of the Moran to have the lights put up. The Moran was guilty of other faults also, so that the tug and the scows all three wrongfully contributed to the damage done to the float. The tug Matthews also was to blame, but the car float was not, unless, contrary to *Sturgis v. Boyer*, 24 How. 110, 16 L. ed. 591, answerable for the faults of the Matthews, which her owner had hired

to move her from place to place in the harbor. The cases in the district court are reported in 143 Fed. 187; in the circuit court of appeals, in 83 C. C. A. 153, 154 Fed. 41.

The question certified in the first case is, "In what proportion shall the damages sustained by the car float be assessed upon the offending vessels?" In the second the same question is put concerning the damages sustained by the libellant, the owner of the two scows. In the latter case neither the car float nor the scow 18 D are made parties or brought in. The district judge divided the liability for damages to the float equally among the four vessels in fault, and on the same principle charged one quarter of the damage suffered by scow 15 D to that scow and one quarter to each of the other three, thus leaving the libellant to bear one half and dividing the other half between the two tugs. Counsel for the two tugs agree that this result was right, although it is argued for the Moran that the true ground for it in the second case is the rule, that, when a vessel has contributed to a collision by her own fault, her owner cannot recover more than one half of the damages.

For the Henry Dubois Sons Company, which, as owner of the two scows, was required to pay one half the total amount due *to the float, it is contended that the 474 court should look to the owners after they have appeared, and should divide the damages on the ordinary principles of personal liability into thirds, or else regard the Moran and the two scows as one vessel, jointly liable for one half, each owner to bear a quarter as between themselves. There is a faint suggestion that, in the last apportionment, regard might be had to the degree of fault.

The New York Central Railroad gets all its damages in any view, unless *Sturgis v. Boyer*, supra, should be overruled. In that case it was held that a tug having control of a vessel in tow was solely responsible to a lighter upset by the vessel through the fault of the tug alone. (For the opinion of Judge Betts below see note to *The Express*, 46 Fed. 864.) We see no reason why the decision should not stand. No doubt the fiction that a vessel may be a wrongdoer and may be held, although the owners are not personally responsible, on principles of agency or otherwise, is carried further here than in England. *The China*, 7 Wall. 53, 19 L. ed. 67; *The Barnstable*, 181 U. S. 464, 467, 468, 45 L. ed. 954, 957, 21 Sup. Ct. Rep. 684; *Homer Ramsdell Transp. Co. v. La Compagnie Générale Transatlantique*, 182 U. S. 406, 413, 414, 45 L. ed. 1155, 1160, 21 Sup. Ct. Rep. 831. See *The Blackheath* (*United States v. Evans*) 195 U. S. 361, 366, 49 L. ed. 236, 237, 25 Sup. Ct. Rep. 46. Pos-

sibly the survival of the fiction has been helped by the convenient security that it furnishes, just as no doubt the responsibility of a master for a servant's torts that he has done his best to prevent has been helped by the feeling that it was desirable to have someone who was able to pay. See *Williamson v. Price*, 4 Mart. N. S. 399, 401; *Williams v. Jones*, 3 Hurlst. & C. 256, 263. But, after all, a fiction is not a satisfactory ground for taking one man's property to satisfy another man's wrong, and it should not be extended. There is a practical line and a difference in degree between the case where the harm is done by the mismanagement of the offending vessel and that where it is done by the mismanagement of another vessel to which the immediate but innocent instrument of harm is attached. See *The Clarita and The Clara* (*The Clara Clarita v. Cox*) 23 Wall. 1, 23 L. ed. 146; *The Alabama*, 92 U. S. 695, 697, 23 L. ed. 763, 764; *The Atlas* (*Phoenix Ins. Co. v. The Atlas*) 93 U. S. 302, 318, 23 L. ed. 863, 867.

475] *The fact that the vessels composing each flotilla were bound together is not sufficient ground for treating each flotilla as a unit. This follows pretty closely from the considerations that we have urged. If the attachment of the car float to the Matthews did not make the car float responsible to 15 D, or affect the extent or principles of its recovery for damage to itself, there seems to be no reason why a similar attachment should affect the distribution of liability among the vessels that were in fault. Their faults were several. The failure of one scow to show a light was distinct in fact and as a cause from the failure of the others to do the same thing, and from the faults of navigation of the Moran. In this case, at least, the attachment ought to have no more effect in diminishing liability for the guilty than in creating it for those free from blame. See *The Express*, 44 Fed. 392, 46 Fed. 860, 3 C. C. A. 342, 1 U. S. App. 658, 52 Fed. 890; *The Lyndhurst*, 92 Fed. 681; *The Maling*, 110 Fed. 227, s. c. 116 Fed. 107; *The Nettie L. Tice*, 110 Fed. 461.

On the other hand, although not to be regarded as a unit simply because they were tied together, the offenders severally are subject to a lien by the established principles of the proceeding *in rem*. It is said, truly enough, that if each scow has to pay a quarter, the amount with which the owners will be charged will be greater than in a personal suit where the owners all are solvent and pay each his share. But without invoking on the other side the characteristic vicissitudes of personal suits in tort, we may say that there is no injustice. Although even the admiralty does not attempt to go far in the quantification of damages, it is not

an unreasonable supposition that, on an average, the owner of two vessels, each concurring in a wrongful result, will contribute twice as much toward producing it as if he had owned only one. If the second scow had been owned by another it would have had to pay its share. It is contrary to the theory of these proceedings to allow ownership to affect the case. We are of opinion that the district court was right in dividing the damages equally among the guilty vessels *in the first suit. There is nothing[476 stated sufficient to reopen the question, if there is one, as to changing the apportionment when there are different degrees of blame. *The Atlas* (*Phoenix Ins. Co. v. The Atlas*) 93 U. S. 302, 23 L. ed. 863; *The Max Morris*, 137 U. S. 1, 34 L. ed. 586, 11 Sup. Ct. Rep. 29. The fact that 18 D is not a party to the second suit does not matter, so far as the question of partially exonerating those before the court is concerned.

We have discussed the question on the assumptions upon which it is presented; but there is one point that seems to us to deserve further consideration from the circuit court of appeals. The only fault on the part of 18 D that is set out in the statement is the absence of a light; and it is said that "therefore" it was party to a common fault. We doubt whether the conclusion follows from the premises. When a duty is imposed for the purpose of preventing a certain consequence, a breach of it that does not lead to that consequence does not make a defendant liable for the tort of a third person merely because the observance of the duty might have prevented that tort. See *Gorris v. Scott*, L. R. 9 Exch. 125; *Ward v. Hobbs*, L. R. 4 App. Cas. 13, 23. The question arises, therefore, whether the duty to give warning by a light was imposed upon 18 D for any other purpose than to prevent collision with itself. If not, then, as the boats are dealt with as individuals, and not as parts of a single whole, we do not see how the absence of a light on 18 D can be said to have contributed to the loss. Pilot rule 11, under the act of June 7, 1897, chap. 4, § 2, 30 Stat. at L. 96, 102, U. S. Comp. Stat. 1901, pp. 2875, 2876, requiring the light, is quoted in *The Komuk*, 120 Fed. 841, 842. A duty of wider scope has been thought to exist in a somewhat different case. *The Lyndhurst*, 92 Fed. 681, 682.

On the second question, also, subject to the doubt just suggested, it appears to us that the course of the district judge was right in principle as well as in result. As observed in *The Maling*, 110 Fed. 227, the *quantum* of liability ought not to be affected by the position of the party concerned as codefendant or plaintiff, and the rule of equal division among the guilty vessels has

prevailed, in some cases, at least, as well when one of them was the libellant as when 477] they were all on the same side. *The Brothers, 2 Biss. 104, Fed. Cas. No. 1,969. See s. c. on appeal, Fed. Cas. No. 9,322; The Peshtigo, 26 Fed. 488.

We answer the question in the first case, No. 87: Equally.

We answer the question in the second case: Equally, the offending vessel or vessels of the libellant bearing their proportion of the loss.

JOHN N. BAGLEY, Plff. in Err.,

v.

GENERAL FIRE EXTINGUISHER COMPANY.

(See S. C. Reporter's ed. 477-480.)

Error to circuit court of appeals — Federal question raised at trial.

1. Jurisdiction below depends entirely upon diverse citizenship within the meaning

NOTE. — Appellate jurisdiction of Federal Supreme Court over circuit courts of appeals.

I. In general.

II. Jurisdiction below depending entirely on diverse citizenship.

a. In general.

b. Other questions arising subsequently.

c. Intervention.

d. Ancillary jurisdiction.

e. Suits by or against Federal corporation.

III. Patent, revenue, criminal, and admiralty cases.

IV. Bankruptcy cases.

V. Cases within appellate jurisdiction of Supreme Court over circuit and district courts.

I. In general.

The review as of right by the Federal Supreme Court of judgments or decrees of the circuit courts of appeals is governed (except so far as certain decisions in bankruptcy proceedings are concerned, as to which, see *infra*, IV.) by the act of March 3, 1891, § 6, which makes the judgments or decrees of those courts final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." In all cases not so made final, this section provides that there shall be of right an appeal or writ of error or review of the case by the Federal Supreme Court where the matter in controversy exceeds \$1,000 besides costs.

53 L. cd.

of the act of March 3, 1891 (26 Stat. at L. 826, 828, chap. 517, U. S. Comp. Stat. 1901, pp. 547, 549), § 6, making judgments of the circuit courts of appeals final in such cases, where that is the only ground of jurisdiction disclosed by the complaint, although a Federal question may have been raised at the trial.

[For other cases, see Appeal and Error, 780-784, in Digest Sup. Ct. 1908.]

Error to circuit court of appeals — Federal question — full faith and credit.

2. A question as to the full faith and credit to be given judgments of another state is not disclosed so as to permit a review in the Federal Supreme Court, under the act of March 3, 1891, § 6, of a judgment of the circuit court of appeals, by a complaint in which such judgments seem to be referred to primarily, if not solely, as fixing the amount of the plaintiff's claim.

[For other cases, see Appeal and Error, 790-807, in Digest Sup. Ct. 1908.]

Error to circuit court of appeals — Federal question — full faith and credit.

3. A complaint invoking full faith and credit for judgments of another state does not present a case arising under the Federal

No right of appeal from a decree of the circuit court of appeals which is made final by the act of Congress of March 3, 1891, § 6, is given by the provision of that section that such case may be brought to the United States Supreme Court "by certiorari or otherwise," as, if some other order or writ may be resorted to, it must be *ejusdem generis* with certiorari. *Huguley Mfg. Co. v. Galt Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452.

A writ of certiorari to perfect the record on an appeal from the circuit court of appeals by supplying alleged omissions does not operate to bring the case before the United States Supreme Court, nor in itself to add any support to the appeal, which must stand or fall according as the act of Congress of March 3, 1891, § 6, did or did not allow such appeal to be taken. *Ibid*.

The absence of any specific reference to the Federal Supreme Court in the provisions of the act of March 1, 1895, § 11, and the act of March 3, 1905, § 12, for an appellate review in the circuit court of appeals for the eighth circuit of the final decisions of the court of appeals in the Indian territory in the same manner as decisions of the circuit courts, precludes any further review in the Supreme Court by appeal from or writ of error to the circuit court of appeals. *Laurel Oil & Gas Co. v. Morrison*, 212 U. S. 291, ante, 517, 29 Sup. Ct. Rep. 394.

A writ of error will lie from the Supreme Court of the United States to a circuit court of appeals to review a judgment dismissing, for want of jurisdiction, a writ of error directed to a territorial supreme court because not one of the class of cases which, under the act of March 3, 1891, § 15, can be taken to the circuit courts of

Constitution so as to permit a review in the Federal Supreme Court under the act of March 3, 1891, § 6, of the judgment of a circuit court of appeals, where the defendant was not a party to the judgments, and, if bound by them, is so bound not by their own operation, but by an estoppel arising out of the contract relations between the parties and notice to defend the suits in which the judgments were rendered, the ground of the decision of the courts below being that there was no such estoppel, the decision turning wholly on the construction of the contract as excluding a liability over in the event that happened.

[For other cases, see Appeal and Error, 790-807, in Digest Sup. Ct. 1908.]

[No. 96.]

Argued January 27, 1909. Decided February 23, 1909.

appeals from the territorial supreme courts. *Aztec Min. Co. v. Ripley*, 151 U. S. 79, 38 L. ed. 80, 14 Sup. Ct. Rep. 236.

An appeal from a decree of a circuit court of the United States affirming its own prior decree, in obedience to a mandate from a circuit court of appeals, with the declaration that a decree of such court is made the final decree of the circuit court, cannot be deemed an appeal from the circuit court of appeals, for the purpose of sustaining the jurisdiction of the Federal Supreme Court. *Webster v. Daly*, 163 U. S. 155, 41 L. ed. 111, 16 Sup. Ct. Rep. 961.

Finality of judgment or decree.

An order entered in an action to recover damages from a carrier for violations of the interstate commerce act of February 4, 1887, requiring certain specified officers and employees, who are not parties, to produce relevant books and papers, is not, as to those persons, a final decree within the meaning of the provision of the act of March 3, 1891, § 6, governing writs of error from circuit courts of appeals to the circuit courts, and hence will not sustain a writ of error sued out by them. *Webster Coal & Coke Co. v. Cassatt*, 207 U. S. 181, 52 L. ed. 160, 28 Sup. Ct. Rep. 108.

Amount in dispute.

The want of any money value in controversy precludes an appeal to the Supreme Court of the United States from an order of a circuit court of appeals, discharging, on a writ of certiorari issued on a petition for habeas corpus and certiorari, a person convicted of introducing intoxicating liquors into an Indian reservation, and sentenced to fine and imprisonment. *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, dismissing the complaint in an action for damages caused by the melting of the sprinkler heads in an automatic sprinkler. Dismissed for want of jurisdiction.

See same case below, 80 C. C. A. 172, 150 Fed. 284.

The facts are stated in the opinion.

Mr. Henry B. Closson argued the cause and filed a brief for plaintiff in error:

The contention of the plaintiff is, and has been from the beginning, that, by a right accorded to him by the Constitution of the United States, he is entitled in this action to have given to the Michi-

II. Jurisdiction below depending entirely on diverse citizenship.

a. In general.

An appeal lies to the Supreme Court of the United States from a decree of a circuit court of appeals in a controversy between a foreign state and citizens of one of the United States, since such decree is not made final by the provisions of the act of March 3, 1891, § 6, declaring decrees of such court to be final "in all cases where jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states." *Columbia v. Caucá Co.* 190 U. S. 524, 47 L. ed. 1159, 23 Sup. Ct. Rep. 704.

The jurisdiction of the Federal circuit court depended entirely upon diversity of citizenship, within the meaning of the act of March 3, 1891, § 6, making the circuit court of appeals the court of last resort in such cases, where the cause was removed for prejudice or local influence from a state court, under the provision of the act of March 3, 1887, as corrected by the act of August 13, 1888, for removals on those grounds of suits embracing a controversy between a citizen of the state in which the suit is brought and a citizen of another state, by "any defendant, being such citizen of another state." *Cochran v. Montgomery County*, 199 U. S. 260, 50 L. ed. 182, 26 Sup. Ct. Rep. 58, 4 A. & E. Ann. Cas. 451.

The removal from a state court to a Federal circuit court, for diverse citizenship, of a suit by a trustee in bankruptcy for the conversion of property, the title to which vested in him by the adjudication in bankruptcy, places such suit in the Federal court as if it had been commenced there on that ground of jurisdiction, within the rule making the judgment of the circuit court of appeals final when the jurisdiction of the circuit court depends entirely on diverse citizenship, and not as if it had been commenced there by consent of

gan judgments the faith and credit which they have by law and usage in the courts of the state of Michigan; and, by virtue thereof, to judgment against the defendant for the relief demanded. Necessarily, therefore, the case is one which involves the construction and application of the Constitution of the United States.

Brown v. Fletcher, 210 U. S. 82, 52 L. ed. 966, 28 Sup. Ct. Rep. 702; *Fauntleroy v. Lum*, 210 U. S. 230, 52 L. ed. 1039, 28 Sup. Ct. Rep. 641; *Merritt v. American Steel Barge Co.* 21 C. C. A. 525, 40 U. S. App. 127, 75 Fed. 813.

Although a case be one of those defined in § 6 of the act of March 3, 1891, in which the judgment of the circuit court of appeals is declared to be final, yet, if it belong

defendant, under § 23 of the bankruptcy act. *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

A case in which the jurisdiction of the circuit court was determined on appeal to depend solely upon diverse citizenship, and in which, after reversal, an amendment to show such jurisdiction by additional statements as to the citizenship of assignors of the claims was made, cannot be taken to this court by appeal from the decree of the circuit court of appeals, affirming the decree of the circuit court, dismissing the case for lack of jurisdiction. *Benjamin v. New Orleans*, 169 U. S. 161, 42 L. ed. 700, 18 Sup. Ct. Rep. 298. The diverse citizenship of the assignee of the claim was not another ground of jurisdiction than the diverse citizenship of complainant and defendant.

An appeal from a circuit court of appeals to the Federal Supreme Court will not be dismissed on the ground that the jurisdiction of the circuit court was invoked solely on the ground of diverse citizenship, where grounds of suit and relief were also based upon Federal statutes which were necessary elements of the decision of the circuit court of appeals. *Henningson v. United States Fidelity & G. Co.* 208 U. S. 404, 52 L. ed. 547, 28 Sup. Ct. Rep. 389.

A judgment of the circuit court of appeals cannot be held final on the ground that the jurisdiction of the circuit court was dependent entirely upon diverse citizenship, where the plaintiff's declaration claimed, although without real foundation, that the controversy turned on the construction of the laws of the United States, and both courts dealt with the case on that assumption. *Florida C. & P. R. Co. v. Bell*, 176 U. S. 321, 44 L. ed. 486, 20 Sup. Ct. Rep. 399.

Averments in a bill which charge the infringement of a trademark registered under the act of March 3, 1881, sufficiently invoked the jurisdiction of a Federal circuit court on the ground that the case arose under a law of the United States to

also to the class mentioned in the 5th section of the act, because it is likewise a case that involves the construction or application of the Constitution of the United States, then the judgment of the circuit court of appeals is not final; and an appeal lies to this court from its judgment as it would have lain directly from the circuit court.

Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397, 408, 48 L. ed. 496, 499, 24 Sup. Ct. Rep. 376.

A case of diverse citizenship, like one arising under the revenue laws, is one in which the judgment of the circuit court of appeals is declared to be final; and it, too, belongs to the class mentioned in the 5th section of the act, if it be a case

deprive the judgment of the circuit court of appeals in the suit of that finality which would exist had jurisdiction depended entirely upon diverse citizenship. *Warner v. Searle & H. Co.* 191 U. S. 195, 48 L. ed. 145, 24 Sup. Ct. Rep. 79.

A judgment of a circuit court of appeals in a suit on the bond of a clerk of a Federal court is reviewable in the Federal Supreme Court, since the case, depending upon the scope and effect of that bond, and the meaning of the Federal statutes in conformity with which it was given, is a suit arising under the laws of the United States, of which the circuit court had original jurisdiction without regard to the citizenship of the parties. *Howard v. United States*, 184 U. S. 676, 46 L. ed. 754, 22 Sup. Ct. Rep. 543.

A suit against a marshal of the United States and an attaching creditor for whom he had made a seizure is not one in which jurisdiction depends entirely upon diverse citizenship, within the meaning of the act of March 3, 1891, § 6, making judgments of the circuit courts of appeals final in such cases, although a separate suit against the attaching creditor would have come within that section, but such suit also arises under the Constitution and laws of the United States. *Sonnentheil v. Christian Moerlein Brewing Co.* 172 U. S. 401, 43 L. ed. 492, 19 Sup. Ct. Rep. 233.

The jurisdiction of a Federal circuit court of a suit over the ownership of real property, in which the plaintiff's title rests upon a proper interpretation of the exception of mineral lands in the Northern Pacific Railroad land grant act of July 2, 1864, is not dependent entirely upon diverse citizenship, within the meaning of the act of March 3, 1891, § 6, making judgments of the circuit courts of appeals final in such cases, but is one arising under the laws of the United States, of which the circuit court had jurisdiction wholly independent of citizenship. *Northern P. R. Co. v. Soderberg*, 188 U. S. 526, 47 L. ed. 575, 23 Sup. Ct. Rep. 365.

But the mere assertion of title under a

that also involves the construction or application of the Constitution of the United States; and this though the constitutional question came from the defendant, or arose after the filing of the petition, or during the progress of the suit.

Loeb v. Columbia Twp. 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174.

The judgment of the circuit court of appeals is as plainly made final in a mere internal revenue case as in a mere diverse citizenship case. This statute does not distinguish between them.

Yet, in either one of these classes of cases, if, when the appeal from the circuit court is taken, the case is also a case that involves the construction or application of the Constitution of the United States, an ap-

peal lies of right to this court (*Loeb v. Columbia Twp.* supra), or to the circuit court of appeals; and, in either court, brings up all the questions arising upon the record (*Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 407, 48 L. ed. 496, 499, 24 Sup. Ct. Rep. 376).

The plaintiffs asserted their right under the Constitution and laws of the United States to have the same judgment passed against the defendant in this suit in the circuit court of the United States for the southern district of New York. It is true that plaintiffs did not, in so many words, plead the existence of the provisions of the Constitution and laws of the United States which gave them this right; but they had

patent from the United States presents no question which, of itself, deprives the judgment of the circuit court of appeals, in a petitory action for real property, of that finality which exists if the jurisdiction of the circuit court depends solely upon diversity of citizenship. *Bonin v. Gulf Co.* 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608.

The jurisdiction of a Federal circuit court over a controversy between citizens of different states, claiming under grants from different states, depends entirely upon diversity of citizenship, within the meaning of the rule that makes the decrees of a circuit court of appeals final in cases in which diversity of citizenship is the sole ground of original jurisdiction, since Congress, in the various judiciary acts, has only conferred original jurisdiction on the circuit courts over controversies of this character when the parties are citizens of the same state. *Stevenson v. Fain*, 195 U. S. 165, 49 L. ed. 142, 25 Sup. Ct. Rep. 6.

A case does not arise under the Constitution or laws of the United States, so as to deprive the judgment of the circuit court of appeals therein of that finality which exists when the jurisdiction of the circuit court depends entirely on diverse citizenship, unless it appears by plaintiff's pleading that the suit really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or validity or construction of the laws or treaties of the United States, upon the determination of which the result depends. *Spencer v. Duplan Silk Co.* supra; *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* 192 U. S. 371, 48 L. ed. 484, 24 Sup. Ct. Rep. 325.

Jurisdiction depends entirely upon the citizenship of the parties, so that the decision of the circuit court of appeals is final, and not subject to review by the Federal Supreme Court, where the complaint in the circuit court, showing that the parties are citizens of different states, does not claim under or mention the Constitution or laws of the United States, and plaintiff, at the trial, relies wholly upon the

common-law right of an author in an unpublished work, although the defendant invokes the provisions of the Federal Constitution and laws relating to copyright. *Press Pub. Co. v. Monroe*, 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40.

A suit against a railway company engaged in carrying the United States mails under the Federal laws and postal regulations, to recover the value of a registered package alleged to have been lost through its negligence, does not arise under the Federal Constitution and laws, so as to deprive the judgment of the circuit court of appeals therein of the finality that exists when the jurisdiction of the circuit court depends entirely on diverse citizenship, where plaintiff relied on principles of general law, and nowhere asserted a right which might be defeated or sustained by one or another construction of the Constitution, or of any law of the United States. *Bankers' Mut. Casualty Co. v. Minneapolis, St. P. & S. Ste. M. R. Co.* supra.

A bill to enjoin a state official from charging that coffee coated with a glaze of sugar and eggs comes within the prohibition of the Ohio pure food law (2 Bates's Anno. Stat. [Ohio] 1897, p. 2229, title 5, chap. a) against coating an article to conceal damage or inferiority, or to make it appear better or of greater value than it really is, and to restrain him from instituting proceedings to prevent its sale, does not present a case arising under the Federal Constitution, so as to deprive the decree of the circuit court of appeals therein of that finality which exists when the case is one in which the jurisdiction of the lower court depends entirely upon diverse citizenship, although it contains averments that the construction which such official places upon the statute will render it repugnant to the Federal Constitution. *Arbuckle v. Blackburn*, 191 U. S. 405, 48 L. ed. 239, 24 Sup. Ct. Rep. 148.

An allegation by a party claiming an interest in a mining claim by virtue of a purchase from an administrator under a decree of the probate court, that a subsequent decree of that court, annulling the

the opinion of this court that it was altogether unnecessary for them to do so.

Bridge Proprs. v. Hoboken Land & Improv. Co. 1 Wall. 116, 17 L. ed. 571.

The question of the plaintiff's right, under the Constitution and laws of the United States, to have this defendant adjudged in the southern district of New York to be concluded by the adjudication of the facts made in the Michigan judgment, forms an original ingredient in the cause; and the validity of the right sued on depends on a law of the United States, and the case arises emphatically under the law; the act of Congress is its foundation.

Cooke v. Avery, 147 U. S. 375, 384, 390, 37 L. ed. 209, 212, 214, 13 Sup. Ct. Rep. 340.

prior decree, was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence, does not amount to an assertion that he was deprived of his interest by the court without due process of law, which would support the jurisdiction of a Federal circuit court irrespective of diversity of citizenship, and therefore permit an appeal to the Supreme Court from a decree of the circuit court of appeals in the cause. *Empire State-Idaho Min. & Developing Co. v. Hanley*, 198 U. S. 292, 49 L. ed. 1056, 25 Sup. Ct. Rep. 691.

Appellants cannot invoke the supposed presence of a constitutional question in a cause as the ground for depriving the judgment of a circuit court of appeals of that finality which exists when jurisdiction below depended entirely upon diverse citizenship, where, if any such question was disposed of by the decree, it was decided in their favor. *Ibid.*

Rights asserted under the Federal Constitution may be so wholly wanting in merit as not to deprive the judgment of a circuit court of appeals of that finality which exists where the jurisdiction below depended entirely upon diverse citizenship. *Farrell v. O'Brien (O'Callaghan v. O'Brien)* 199 U. S. 89, 50 L. ed. 101, 25 Sup. Ct. Rep. 727.

b. Other questions arising subsequently.

Other questions subsequently raised in a case in which the jurisdiction of the Federal circuit court depends, at the commencement of the action, upon the citizenship of the parties, cannot give appellate jurisdiction to the Supreme Court to review a judgment of the circuit court of appeals. *Borgmeyer v. Idler*, 159 U. S. 408, 40 L. ed. 199, 16 Sup. Ct. Rep. 34.

A decree of the circuit court of appeals in a case in which the jurisdiction at the outset depended on diversity of citizenship is final, even if another ground of jurisdiction was alleged in a supplemental bill by which a new defendant was made a party. *Third Street & Suburban R. Co. v. Lewis*, 53 L. ed.

Mr. Peter B. Olney argued the cause and filed a brief for defendant in error:

The doctrine of *res judicata* is applied in the same way by the Michigan courts to the question involved as by the New York court.

Reynolds v. Aetna L. Ins. Co. 160 N. Y. 635, 55 N. E. 305; *Prescott v. LeConte*, 83 App. Div. 485, 82 N. Y. Supp. 411; *Bond v. Markstrum*, 102 Mich. 11, 60 N. W. 282.

Where diverse citizenship was the only ground of jurisdiction appearing upon the face of the record at the time the jurisdiction of the Federal court was invoked, the decision of the circuit court of appeals is final, though another ground of jurisdiction may be developed in the course of the proceedings.

173 U. S. 457, 43 L. ed. 766, 19 Sup. Ct. Rep. 451.

A judgment of the circuit court of appeals in a case in which the jurisdiction of the circuit court was invoked solely on the grounds of diverse citizenship cannot be reviewed in the Supreme Court of the United States on writ of error because a Federal question arose in the course of the proceedings in the circuit court, even though such question may not be of such a character as would permit the case, under § 5 of the judiciary act of March 3, 1891, to be brought directly from the circuit court to the Supreme Court. *Ayres v. Polsdorfer*, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196.

c. Intervention.

The jurisdiction of a circuit court of the United States on an intervening petition is, for the purpose of an appeal to the Federal Supreme Court from a circuit court of appeals, to be ascribed to the same grounds as those upon which jurisdiction of the original action depends. *Rouse v. Letcher*, 156 U. S. 47, 39 L. ed. 341, 15 Sup. Ct. Rep. 266.

Hence, a petition of intervention against receivers in a Federal court, based on their negligence, does not present a Federal question, upon the ground that the claim is asserted against officers of a United States court, which will sustain an appeal to the Federal Supreme Court from a circuit court of appeals, where the original suit in which the intervention was made was within the jurisdiction of the circuit court solely by reason of the citizenship of the parties. *Ibid.*

The decision of a Federal circuit court of appeals on a petition in intervention in a suit to foreclose a railway mortgage, by which damages are sought for injuries inflicted through the negligence of the receivers appointed by the Federal court in the operation of the road, is final, where jurisdiction originally depended solely upon diverse citizenship. *Rouse v. Hornsby*, 161 U. S. 588, 40 L. ed. 817, 16 Sup. Ct. Rep. 610.

Arbuckle v. Blackburn, 191 U. S. 408, 48 L. ed. 241, 24 Sup. Ct. Rep. 148.

In the case at bar there is no dispute or controversy as to the effect or construction of the Constitution. The question is, How must the rule of *res judicata* be applied in the case of certain judgments?

Spencer v. Duplan Silk Co. 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

If there was a Federal question involved, the plaintiff has elected to appeal to the circuit court of appeals. Having been beaten there, he is not entitled to another appeal to this court.

American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

d. Ancillary jurisdiction.

A decree on ancillary or supplemental proceedings, although independent of the original controversy, must partake of the finality of the main decree, and cannot be brought to the Federal Supreme Court on an appeal from the circuit court of appeals if the jurisdiction of the circuit court of the main case was dependent upon diverse citizenship. Gregory v. Van Ee, 160 U. S. 643, 40 L. ed. 566, 16 Sup. Ct. Rep. 431.

An ancillary, auxiliary, or supplemental bill attacking for fraud a prior decree in a foreclosure suit of which the circuit court of the United States had jurisdiction only upon the ground of diverse citizenship is within the jurisdiction of that court on the same grounds, and is, therefore, a case in which a decree of the circuit court of appeals is made final by the act of March 3, 1891, § 6, so that an appeal cannot be taken to the Supreme Court. Carey v. Houston & T. C. R. Co. 161 U. S. 115, 40 L. ed. 638, 16 Sup. Ct. Rep. 537.

A suit by the receiver of a Federal court for the collection of assets is merely ancillary to the suit in which he was appointed, so that, if the jurisdiction of the original suit depended on diverse citizenship, the decree of the circuit court of appeals therein is final. Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 43 L. ed. 814, 19 Sup. Ct. Rep. 500.

e. Suits by or against Federal corporation.

A judgment of the circuit court of appeals in an action for damages for the negligence of a railroad corporation is not final if the jurisdiction of the circuit court depended not merely on diverse citizenship, but also upon the fact that the defendant was a Federal corporation. Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843.

See also *infra*, V., Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740.

But suits by or against a national bank are not merely by reason of Federal incorporation, suits arising under the laws of

*Mr. Justice Holmes delivered the [478 opinion of the court:

This is an action for damage caused by the melting on a hot day of fusible sprinkler heads in an automatic sprinkler put up in the plaintiff's building by the defendant for protection against fire. The complaint alleges diversity of citizenship, negligence on the part of the defendant, injury to goods of two tenants in the building, suits by or in the right of the tenants against the plaintiff, which the plaintiff notified the defendant to defend, the recovery of judgments, one of which was affirmed by the supreme court of Michigan (Peerless Mfg. Co. v. Bagley, 126 Mich. 225, 53 L.R.A. 285, 86 Am. St. Rep. 537, 85 N. W. 568), and payment of the same by the plaintiff, who seeks

the United States, so as to deprive the judgment of a circuit court of appeals of the finality which exists when jurisdiction below depends entirely upon diverse citizenship, since, by the act of August 13, 1888, the Federal courts have no other jurisdiction of actions by or against national banking associations than they would have in suits between individual citizens of the same state. Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. ed. 119, 24 Sup. Ct. Rep. 54; Ex parte Jones, 164 U. S. 691, 41 L. ed. 601, 17 Sup. Ct. Rep. 222.

III. Patent, revenue, criminal, and admiralty cases.

Patent cases.

A judgment of the circuit court of appeals, imposing a fine for contempt incurred by the violation of an injunction issued under a decree in a suit for the infringement of a patent, which is made final by the act of March 3, 1891, § 6, "because the case is one arising under the patent laws or criminal laws," is not reviewable by the Federal Supreme Court on writ of error, although the case also involves constitutional rights, and therefore might have been brought directly from the circuit court to the Supreme Court. Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211.

A suit brought by the United States to cancel a patent for an invention is not a case "arising under the patent laws," within the meaning of the act of March 3, 1891, § 6, making the judgments or decrees of the circuit courts of appeals final in such cases. United States v. American Bell Teleph. Co. 159 U. S. 548, 40 L. ed. 255, 16 Sup. Ct. Rep. 69. The court said that considerations of public policy forbade imputing to Congress the intention to narrow the appellate jurisdiction of the Supreme Court in a suit brought by the United States as a sovereign in respect of alleged mis-carriage in the exercise of one of its functions as such, deeply concerning the public interests, and not falling within the reason of the limitations of the statute.

to recover the sums paid, interest, and the costs of defense. The answer denies many of the material allegations, and relies upon the terms of the written contract under which the work was done, alleging the same to have been performed and the work accepted. The contract required the material to be first class, and all work specified to be done in a thorough and workmanlike manner, and in conformity with the Improved Risks Commission standard for automatic sprinkler installations. It also contained this clause: "It is explicitly understood and agreed that no obligations other than herein set forth and made a part of this proposal and acceptance shall be binding upon either party." The case was sent to a referee, and he found that the obligations of the agreement were

fulfilled, that, contrary to rulings asked by the plaintiff, the Michigan judgment did not determine that the defendant was negligent, or bind it, and that the defendant was entitled to judgment. Upon the referee's findings the complaint was dismissed on the merits by the circuit court, and the judgment was affirmed by the circuit court of appeals. 80 C. C. A. 172, 150 Fed. 284.

The first question that arises is whether this court has jurisdiction; and upon that we are of opinion that the plaintiff's argument fails. When the jurisdiction below depends entirely upon diversity of citizenship, the judgment of the circuit court *of [479] appeals is final, by the express terms of the act of March 3, 1891, chap. 517, § 6, 26 Stat. at L. 826, 828, U. S. Comp. Stat. 1901, pp.

Revenue cases.

Judgments of the circuit courts of appeals in revenue cases are, by the express terms of the act of March 3, 1891, § 6, made final. *Hubbard v. Soby*, 146 U. S. 56, 36 L. ed. 886, 13 Sup. Ct. Rep. 13.

A suit to review the decision of the board of general appraisers in the matter of the classification of imported articles is one "arising under the revenue laws," in which, by the judiciary act of March 3, 1891, the decision of the circuit court of appeals is final, so that no appeal can be taken to the Supreme Court. *Anglo-Californian Bank v. United States*, 175 U. S. 37, 44 L. ed. 64, 20 Sup. Ct. Rep. 19.

A suit to recover the amount of a tax exacted under the war revenue act of June 13, 1898, and paid under protest, in which not only is the construction of that statute involved, but the rights of the parties depend, on the plaintiff's own showing, upon the constitutionality of such statute and the construction or application of the Federal Constitution, is not one arising under the revenue laws, within the meaning of the act of March 3, 1891, § 6, which makes the judgment of the circuit courts of appeals in such cases final; and such judgment may therefore be brought to the Federal Supreme Court for review as of right. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376.

Criminal cases.

A writ of scire facias upon a forfeited recognizance to secure the appearance of a person to answer to a charge of embezzlement contrary to U. S. Rev. Stat. § 5209, U. S. Comp. Stat. 1901, p. 3497, is a case "arising under the criminal laws," within the meaning of the act of March 3, 1891, § 6, making judgments of the circuit courts of appeals final in such cases. *Hunt v. United States*, 166 U. S. 424, 41 L. ed. 1063, 17 Sup. Ct. Rep. 609.

A judgment of a circuit court of appeals in a case in which the jurisdiction of the district court depended solely upon the fact 53 L. ed.

that the case was one arising under the criminal laws is, by the very terms of the act of March 3, 1891, § 6, "final," and is not reviewable in the Federal Supreme Court, although constitutional rights were invoked by the accused, and the case might, therefore, have been brought directly from the district court to the Supreme Court. *Macfadden v. United States*, 213 U. S. 288, post, 801, 29 Sup. Ct. Rep. 490.

See also *Cary Mfg. Co. v. Acme Flexible Clasp Co.* supra; *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584, — supra, I.

Admiralty cases.

Proceedings under the act of Congress to limit the liability of shipowners, and the rules of the Supreme Court in that regard, are admiralty cases within the meaning of the judiciary act of March 3, 1891, § 6, making the judgments or decrees of the circuit courts of appeals from admiralty cases final, from which no appeal can be taken to the Supreme Court. *Oregon R. & Nav. Co. v. Balfour*, 179 U. S. 55, 45 L. ed. 82, 21 Sup. Ct. Rep. 28.

IV. Bankruptcy cases.

The provision of the act of March 3, 1891, § 6, giving an appeal to the Federal Supreme Court from the circuit court of appeals in cases not made final by that section, where the amount in dispute is sufficient, applies to bankruptcy cases where the proceeding is one of those "controversies arising in bankruptcy proceedings" over which the circuit courts of appeals exercise, under the bankruptcy act of July 1, 1898, § 24a, appellate jurisdiction as in other cases. Such a controversy is presented by an appeal to the circuit court of appeals from a judgment of a court of bankruptcy sustaining a title to property in the possession of a trustee in bankruptcy, asserted by intervention raising a distinct and separable issue. *Hewitt v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

An appeal lies to the Federal Supreme Court from a judgment of a circuit court

547, 549. This, of course, is not denied; but it is said that this section does not exclude a resort to this court when the complaint also invokes the application of the Constitution of the United States. *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376. It is urged that if an exception is made to the universality of the words when the constitutional question is disclosed in the complaint, it is unreasonable not to extend it sufficiently to include cases where the same question is raised at the trial, as it was in the present instance, and where the matter might have been brought at once from the circuit court to this court. *Loeb v. Columbia Twp.* 179

U. S. 472, 45 L. ed. 280 21 Sup. Ct. Rep. 174. But the difference is plain. When the constitutional right is claimed in the complaint, the jurisdiction does not depend entirely upon diversity of citizenship, and the exception is not read into the words, but is expressed by the act. When the question is raised at the trial for the first time the case cannot be taken up from the circuit court of appeals without a direct disregard of the words. The difference is pointed out in both of the cases to which we have referred. 179 U. S. 479, 45 L. ed. 284, 21 Sup. Ct. Rep. 174; 192 U. S. 409, 410, 48 L. ed. 500, 501, 24 Sup. Ct. Rep. 376. See also *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S.

of appeals, entered on an appeal from a court of bankruptcy, sustaining the contention asserted by a petition in intervention, that advances made by a railway company to enable a coal company, under contract to supply the railway company with coal, to meet its pay rolls, amount to a pledge enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued performance of the contract, of such a quantity of coal when mined as the moneys so advanced would pay for according to the terms of the original contract. *Hurley v. Atchison, T. & S. F. R. Co.* 213 U. S. 126, post, 729, 29 Sup. Ct. Rep. 466.

Appeals to the Federal Supreme Court from the circuit courts of appeals may, by § 25b of the bankruptcy act of July 1, 1898, be taken from final decisions allowing or rejecting a claim under the act (1) where the amount in controversy exceeds \$2,000, and the question involved is one which would sustain a writ of error to a state court; (2) where the justice of the Supreme Court shall certify that, in his opinion, the determination of the question involved in the allowance or rejection of the claim is essential to a uniform construction of the act.

A judgment of a circuit court of appeals affirming, on the appeal of a trustee in bankruptcy, the judgment of the bankruptcy court on a claim upon notes of the bankrupt, joined with the statement that the claimant had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets, is such a "final decision" "allowing or rejecting a claim," within the meaning of this section, although the trustee made no objection to the amount found due upon the notes, and only sought by his appeal to contest further the right to security. *Coder v. Arts*, 213 U. S. 223, post, 772, 29 Sup. Ct. Rep. 436.

The revising order of a circuit court of appeals, made in the exercise of its jurisdiction under the bankrupt act of July, 1898, § 24b, to review, by original petition, proceedings of inferior courts of bankruptcy, which revised an order of the district court allowing an exemption, is not a

"final decision . . . allowing or rejecting a claim" within the meaning of this section, and is reviewable only by certiorari. *Holden v. Stratton*, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

The question involved in allowing or rejecting a claim is one which, within the meaning of this section, would have sustained a writ of error from that court had the case been decided by the highest court of the state, where, in determining the validity of a lien asserted to secure a claim against the bankrupt's estate, a construction of the bankrupt act is directly involved, one party asserting a construction which would defeat the lien, and the other party one which would give it validity. *Coder v. Arts*, supra.

The same is true of the decision of a circuit court of appeals denying an asserted right of set-off in a proceeding in bankruptcy, which right is controlled by the provisions of the bankrupt act of July 1, 1898, § 68, governing set-offs and counterclaims. *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339.

But the bare denial by a trustee in bankruptcy of a claim of a creditor, asserted under the bankruptcy act of July 1, 1898, is not the assertion by the trustee of a right under such statute, so as to give him the right to appeal to the Federal Supreme Court from a decision of a circuit court of appeals in favor of the creditor, under this section. *Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

And a decision of a circuit court of appeals that a creditor is entitled to have his claim allowed against the bankrupt estate of the bankrupt partnership, which proceeds upon a well-settled principle of general law, broad enough to sustain it without reference to the provisions of the bankruptcy act of July 1, 1898, is not reviewable in the Federal Supreme Court under this section, as involving a question which would sustain a writ of error to a state court. *Ibid.*

See also supra, II. a, *Spencer v. Duplan Silk Co.* 191 U. S. 526, 48 L. ed. 287, 24 Sup. Ct. Rep. 174.

290, 295, 46 L. ed. 546, 548, 22 Sup. Ct. Rep. 452; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 282, 45 L. ed. 859, 862, 21 Sup. Ct. Rep. 646.

Failing the foregoing argument, it is contended that the jurisdiction of the circuit court did not depend entirely on the diverse citizenship of the parties. In other words, it is contended that the complaint sufficiently invoked article 4, § 1, of the Constitution, by alleging the Michigan judgment, and the fact that in those cases it was averred and adjudged that one of the sprinkler heads was negligently and improperly made of such material as to fuse at too low a temperature, and that the sprinkler and pipes were negligently and improperly erected and placed. But in the complaint there is no intimation, direct or indirect, of a reliance upon the Constitution. On the contrary, *instead of simply setting forth the defendant's contract, the suits, notice to the defendant to defend, and the judgments, and thus at least implying that, for some reason, those judgments were supposed to establish the defendant's liability, it is most elaborately alleged, seemingly as issuable matter, that the defendant was negligent in its work, and did not do what it had agreed to perform. The judgments seem,

V. Cases within appellate jurisdiction of Supreme Court over circuit and district courts.

The right to bring a case to the Federal Supreme Court from a circuit court of appeals where the jurisdiction below depended upon the fact that the defendant was a corporation created by an act of Congress is not lost because the case might have been taken directly to the Supreme Court from the circuit court, as presenting a question of the jurisdiction of that court. Northern P. R. Co. v. Amato, 144 U. S. 465, 36 L. ed. 506, 12 Sup. Ct. Rep. 740.

See also supra, II. e, Union P. R. Co. v. Harris, 158 U. S. 326, 39 L. ed. 1003, 15 Sup. Ct. Rep. 843.

If the case made by the plaintiff's statement involves no other question than one of those mentioned in the act of March 3, 1891, § 5, governing the appellate jurisdiction of the Federal Supreme Court over circuit and district courts, the Supreme Court alone has jurisdiction to review the judgment of the circuit court. But, if such case also involves diverse citizenship, then it can be carried to the circuit court of appeals, whose decision thereon will not be final. Spreckles Sugar Ref. Co. v. McClain, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376; American Sugar Ref. Co. v. New Orleans, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

See also supra, III., Cary Mfg. Co. v. Acme Flexible Clasp Co. 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211.

on the face of the complaint, to be referred to primarily, if not solely, as fixing the amount of the plaintiff's claim. See further, Provident Sav. Life Assur. Soc. v. Ford, 114 U. S. 635, 29 L. ed. 261, 5 Sup. Ct. Rep. 1104; Pope v. Louisville, N. A. & C. R. Co. 173 U. S. 573, 580, 43 L. ed. 814, 817, 19 Sup. Ct. Rep. 500.

But, if the plaintiff had set forth in so many words that he came into court relying upon full faith and credit being given to the Michigan judgment under the Constitution, still, on the face of the complaint, it would have been obvious that the Constitution was not the basis of his claim, as it is obvious, on reading the opinion of the circuit court of appeals, that full faith and credit to the Michigan judgment has not been denied. The defendant was no party to that judgment, and there is nothing in the Constitution to give it any force as against strangers. If the judgment binds the defendant, it is not by its own operation, even with the Constitution behind it, but by an estoppel arising out of the defendant's contract with the plaintiff and the notice to defend. The ground of decision in both courts below was that there was no such estoppel, the duty and responsibility of the defendant being limited by the words that we have quoted from the contract, excluding any obligation other than those set forth. The decision, in other words, turned wholly on the construction of the contract as excluding a liability over in the event that happened. Even if wrong, it did not deny the Michigan judgments their full effect, but denied the preliminary relation between the defendant and the party to them, without which the defendant remained a stranger to them, in spite of the notice to defend.

Writ of error dismissed.

*NEW YORK CENTRAL & HUDSON[481
RIVER RAILROAD COMPANY, Plff. in
Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 481-499.)

Constitutional law — due process of law — imputing crime to corporation.

1. Due process of law is not denied by the provisions of the Elkins act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), under which the commission by corporate offi-

NOTE.—On statutes part valid and part invalid—see notes to Titusville Iron Works v. Keystone Oil Co. 1 L.R.A. 363, and Fayette County v. People's & D. Bank, 10 L.R.A. 196.

cers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates, is imputed to the corporation, and the corporation is subjected to criminal prosecution therefor.

[Due process in criminal matters, see Constitutional Law, IV. b, 9, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

2. The possible invalidity as to individual carriers of the provisions of the Elkins act of February 19, 1903, imputing to the carrier the acts, omissions, or failures of the officers and agents of such carrier, acting within the scope of their employment, does not affect the validity of so much of that act as imputes to corporate carriers the commission by officers and agents of such carriers, acting within the scope of their employment, of criminal violations of the prohibitions of that act against giving rebates. [For other cases, see Statutes, I. d, 4, in Digest Sup. Ct. 1908.]

Indictment — joinder of defendants.

3. Both the corporation and its agents may be joined in an indictment for violating the provisions of the Elkins act of February 19, 1903, against rebates, under which the commission by corporate officers or agents, acting within the scope of their employment, of criminal violations of the provisions of that act, is imputed to the corporation, and the corporation subjected to criminal prosecution therefor.

Appeal — prejudicial error — defective indictment.

4. A want of particularity in describing the offense intended to be charged by an indictment cannot successfully be urged as a ground for reversing a conviction, where such indictment specifically states the elements of the offense with sufficient particularity fully to advise the defendant of the crime charged, and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense, in view of U. S. Rev. Stat. § 1025, U. S. Comp. Stat. 1901, p. 720, providing that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant.

[For other cases, see Appeal and Error, VIII. m, 2, in Digest Sup. Ct. 1908.]

Carriers — rebating — when offense complete.

5. The offense of giving rebates in violation of the Elkins act of February 19, 1903, is complete when the carrier, to whom the shipper has paid the full legal rate, pays over to the shipper, upon a claim presented by him, the amount of the rebate stipulated in the agreement under which the shipment was made.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — instructions upon facts.

6. Instructing the jury in the criminal prosecution of a carrier for giving rebates

to take into consideration the absence of a certain witness and the nonproduction of books in which entries were made concerning the transactions in question is not prejudicial error, where the jurors are left to attach such weight to these circumstances as they see fit, and are further instructed that there is no evidence that the defendant or those who controlled its corporate action destroyed or failed to produce any paper for which the government asked.

[For other cases, see Appeal and Error, 5112-5116, in Digest Sup. Ct. 1908.]

[No. 57.]

Argued December 14, 15, 16, 1908. Decided February 23, 1909.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a conviction of a carrier for giving rebates in violation of the Elkins act. Affirmed.

See same case below on demurrer, 146 Fed. 298.

The facts are stated in the opinion.

Messrs. Austen G. Fox and John D. Lindsay argued the cause, and, with Mr. Albert H. Harris, filed a brief for plaintiff in error:

It is a doctrine in conformity with the demands of justice and a proper distinction between the innocent and the guilty that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted.

State v. Great Works Mill. & Mfg. Co. 20 Me. 41, 37 Am. Dec. 38; State v. Ohio & M. R. Co. 23 Ind. 362; 2 Juridical Soc. Papers, 31.

If a stockholder himself commits, or commands, or procures the commission of, a crime by a corporate agent, either or both may be indicted and punished. But to ascribe their guilt to the whole body by a fiction is to condemn, not for actual, but for ideal and constructive, guilt, which is legal innocence,—a notion abhorrent to the principles of free government.

2 Juridical Soc. Papers, pp. 34, 35.

A statute which is unconstitutional in part is unconstitutional as a whole if the valid and invalid parts of the statute are inseparable. This court has refused to supply qualifications which the legislature has failed to express. (United States v. Fox, 95 U. S. 670, 24 L. ed. 538; Employers' Liability Cases [Howard v. Illinois C. R. Co.] 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141). In the present case there is, of course, no possibility of such a severance. Moreover, even if the act had been directed against corporations alone, the presumption of innocence shields a corporation to the

same extent that it shields an individual. (Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 119, 52 L. ed. 705, 712, 28 Sup. Ct. Rep. 493). Equal protection of the laws as well as due process of law is assured to corporations and individuals alike. (Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255). The rulings of the trial court involved the absolute denial of these rights. The conclusion follows that, if the language of the statute compelled the rulings, the statute is unconstitutional; and, if the statute did not warrant the rulings, then the judgment should be reversed for the erroneous construction of the statute.

To crimes the maxim *Omnis rati habitio retrotrahitur et mandato, equiparatur* is inapplicable.

Clark & M. Crimes, 2d ed. § 194 (i), p. 267; Morse v. State, 6 Conn. 9.

Intent is, in a certain sense, essential to the commission of any crime.

Armour Packing Co. v. United States, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

Although the offense charged in the case at bar perhaps belongs to that class in which the intent may be said to be "notional and constructive" (Brice, *Ultra Vires*, Green's Am. ed. 271), the offense, nevertheless, consists in "purposely" doing the thing prohibited by the statute, and is incomplete without proof of that element. In that sense and to that extent criminal intent is, of course, essential to the commission of the offense.

Armour Packing Co. v. United States, *supra*.

The trial proceeded upon the theory that criminal intent must be shown, and a judgment will not be affirmed upon a ground not taken at the trial.

Peck v. Heurich, 167 U. S. 624, 629, 42 L. ed. 302, 304, 17 Sup. Ct. Rep. 927.

The presumption of innocence prevails alike whether the defendant in a criminal prosecution be a corporation or an individual.

Interstate Commerce Commission v. Chicago G. W. R. Co. *supra*.

One is not liable *criminaliter* for the act of his agent, even though the act be done in the course, or even within the general scope, of his lawful employment, in the sense in which we use that phrase in applying *civiliter*, the doctrine of *respondeat superior*. The presumption of innocence excludes such a criminal responsibility. It is obvious that the learned trial court overlooked the fundamental distinction in this respect between criminal and civil liability.

R. v. Holbrook, L. R. 3 Q. B. Div. 63; R. v. Ramsay, 48 L. T. N. S. 734; People 53 L. ed.

v. McLaughlin, 150 N. Y. 391, 44 N. E. 1017; United States v. Halberstadt, Gilpin, 270, Fed. Cas. No. 15,276; McDonald v. Hearst, 95 Fed. 660; United States v. Beaty, Hempst. 495, Fed. Cas. No. 14,555; R. v. Huggins, 2 Strange, 885; United States v. Gooding, 12 Wheat. 460, 469, 6 L. ed. 693, 696.

A statute which makes the crime of A the crime of B, as a matter of law, is not due process of law, for it deprives B of the fundamental principle that the accused is presumed to be innocent until he is proven, beyond a reasonable doubt, to be guilty.

Wynchamer v. People, 13 N. Y. 446; Interstate Commerce Commission v. Chicago G. W. R. Co. 209 U. S. 108, 52 L. ed. 705, 28 Sup. Ct. Rep. 493; Le Louis, 2 Dodson, Adm. 257; Cummings v. Missouri, 4 Wall. 277, 328, 18 L. ed. 356, 364; Davis v. United States, 160 U. S. 469, 40 L. ed. 499, 16 Sup. Ct. Rep. 353; Mugler v. Kansas, 123 U. S. 623, 674, 31 L. ed. 205, 214, 8 Sup. Ct. Rep. 273; Cooley, Const. Lim. 7th ed. 1903, p. 436; State v. Divine, 98 N. C. 778, 4 S. E. 477; Sullivan v. Oneida, 61 Ill. 249; Clark & M. Crimes, 2d ed. § 194 (h), p. 267; Weinberg v. State, 25 Wis. 370; State v. Baltimore & O. R. Co. 15 W. Va. 362, 36 Am. Rep. 803; Satterfield v. Western U. Teleg. Co. 23 Ill. App. 446; Com. v. Briant, 142 Mass. 464, 56 Am. Rep. 707, 8 N. E. 338; Com. v. Putnam, 4 Gray, 16; Schreiber v. Sharpless, 6 Fed. 175.

A statute which makes fact A conclusive proof of fact B is invalid when proof of fact B is necessary to a given finding, as, for instance, the guilt of the defendant. Such a statute, in the last analysis, deals not with a rule of evidence, but with substantive law. The judicial function of applying the law involves, necessarily, the investigation of the facts; and to forbid investigation is to forbid the exercise of an indestructible judicial function.

Birdsong v. Brooks, 7 Ga. 88.

Even in a civil action it has been said that, if any question of fact or liability be conclusively presumed against him, this is not due process of law.

Zeigler v. South & North Ala. R. Co. 58 Ala. 594.

So, also, it has been said that those terms "law of the land" do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can the citizen suffer than to be deprived of his property, his liberty, and his life without crime?

Hoke v. Henderson, 15 N. C. (4 Dev. L.) 15; 25 Am. Dec. 677.

It has been held almost without exception

that a statute which creates a conclusive presumption as to a matter of fact is void.

Bielenberg v. Montana Union R. Co. 8 Mont. 277, 2 L.R.A. 813, 20 Pac. 314.

Would this clause of the Elkins act have been valid if limited to corporations?

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 108, 46 L. ed. 92, 108, 22 Sup. Ct. Rep. 30; *Boyd v. United States*, 116 U. S. 616, 635, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; *Duncan v. Missouri*, 152 U. S. 377, 382, 38 L. ed. 485, 487, 14 Sup. Ct. Rep. 570; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 559, 46 L. ed. 679, 689, 22 Sup. Ct. Rep. 431.

Classification based upon the dangerous character of the business is constitutional, but classification based merely on the character of the employer is not.

Louisville & N. R. Co. v. Railroad Commission, 19 Fed. 679; *Bedford Quarries Co. v. Bough*, 168 Ind. 671, 14 L.R.A.(N.S.) 418, 80 N. E. 529; *Ballard v. Mississippi Cotton Oil Co.* 81 Miss. 507, 62 L.R.A. 407, 95 Am. St. Rep. 476, 34 So. 533; *Niagara F. Ins. Co. v. Cornell*, 110 Fed. 825.

Will this court read into the act an exception of a class constitutionally exempt in order to save what remains?

Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 497, 52 L. ed. 308, 28 Sup. Ct. Rep. 141; *United States v. Reese*, 92 U. S. 214, 23 L. ed. 563; *United States v. Harris*, 106 U. S. 629, 27 L. ed. 290, 1 Sup. Ct. Rep. 601; *United States v. Juoy*, 198 U. S. 253, 262, 49 L. ed. 1040, 1043, 25 Sup. Ct. Rep. 644; *Illinois C. R. Co. v. McKendree*, 203 U. S. 514, 51 L. ed. 298, 27 Sup. Ct. Rep. 153; *Baldwin v. Franks*, 120 U. S. 678, 685-690, 30 L. ed. 766, 768-770, 7 Sup. Ct. Rep. 656, 763; *Poin Dexter v. Greenhow*, 114 U. S. 270, 304, 29 L. ed. 185, 197, 5 Sup. Ct. Rep. 903, 962; *Trade-Mark Cases*, 100 U. S. 82, 25 L. ed. 550; *Allen v. Louisiana*, 103 U. S. 80, 26 L. ed. 318; *Sprague v. Thompson*, 118 U. S. 90, 30 L. ed. 115, 6 Sup. Ct. Rep. 988; *Pollock v. Farmers' Loan & T. Co.* 158 U. S. 636, 39 L. ed. 1125, 15 Sup. Ct. Rep. 912.

The fundamental error underlying the theory of this indictment arises from a confusion of the relations existing between a corporation and the human beings by which it acts, and the relations existing between an individual principal and his agent.

The act of the master which renders him amenable to criminal discipline is a separate and distinct act from that of the servant. The servant is punishable because he

has done something unlawful. The master is punishable because he has done something else unlawful in causing or authorizing his servant to commit the act.

Wharton, *Crim. Law*, 10th ed. § 247; 2 *Juridical Soc. Papers*, 31; *Morawetz*, *Priv. Corp.* §§ 732, 733; *People v. Clark*, 8 N. Y. *Crim. Rep.* 215.

There is no such situation in case of a corporation. When a corporate officer, director, or employee does a wrongful act in the prosecution of the company's business, the act is never in fact that of the corporation, but is always that of its agent, separate and apart from which the corporation does nothing.

If the Elkins act permits the joinder under consideration, it is, to that extent, unconstitutional.

United States v. McKee, 4 Dill. 128, Fed. Cas. No. 15,688; *United States v. One Distillery*, 43 Fed. 846; *United States v. Olsen*, 57 Fed. 586.

The acts described and set forth in the indictment do not constitute a crime, since it is not averred that, by reason of the giving of the alleged rebates, any advantage was given or discrimination practised.

Gridley v. Northwestern Mut. L. Ins. Co. 14 Blatchf. 107, Fed. Cas. No. 5,808; *Armour Packing Co. v. United States*, 153 Fed. 20, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 144, 166, 42 L. ed. 414, 423, 18 Sup. Ct. Rep. 45; *Union P. R. Co. v. Goodridge*, 149 U. S. 680, 37 L. ed. 896, 13 Sup. Ct. Rep. 970; *United States v. Michigan C. R. Co.* 122 Fed. 544; *Judson*, *Interstate Commerce*, § 145, p. 182; *United States v. Hanley*, 71 Fed. 672.

Every fact which is an element in a prima facie case of guilt must be stated; otherwise there will be at least one thing which the accused person is entitled to know whereof he is not informed.

1 *Bishop*, *Crim. Proc.* § 519; *United States v. Mann*, 95 U. S. 583, 24 L. ed. 532.

Assuming, but by no means admitting, that proof upon the trial of the facts set forth in the indictment would presumptively establish illegal discrimination if such discrimination were alleged, and therefore put the defendant upon its defense, the difficulty is that no discrimination is alleged.

Blitz v. United States, 153 U. S. 308, 313, 38 L. ed. 725, 727, 14 Sup. Ct. Rep. 924; *United States v. Taylor*, 57 Fed. 391; *United States v. Carll*, 105 U. S. 611, 26 L. ed. 1135.

The defendant does not allege any wilful failure on the part of the defendant strictly to observe the tariffs filed and published as required by law.

1 Bishop, *Crim. Proc.* § 618; *Evans v. United States*, 153 U. S. 584, 38 L. ed. 830, 14 Sup. Ct. Rep. 934; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571.

A departure from the legal rates does not in itself constitute an offense under the Elkins act.

United States v. Camden Iron Works, 150 Fed. 218; *United States v. Kirby*, 7 Wall. 482, 486, 19 L. ed. 278, 280.

The allegations of the indictment and of each of the counts are so ambiguous and indefinite as to make it uncertain what is the exact offense or offenses intended to be charged.

1 Starkie, *Crim. Pl.* 2d ed. 68; *Ledbetter v. United States*, 170 U. S. 606, 610, 42 L. ed. 1162, 1163, 18 Sup. Ct. Rep. 774.

The facts set forth in the indictment and established by the evidence constituted but a single criminal transaction, and but a single penalty should have been imposed.

1 Wharton, *Crim. Law*, 10th ed. §§ 27, 931; *Re Snow*, 120 U. S. 275, 30 L. ed. 659, 7 Sup. Ct. Rep. 556; *Re Nielsen*, 131 U. S. 176, 33 L. ed. 118, 9 Sup. Ct. Rep. 672; *R. v. Firth*, L. R. 1 C. C. 172, 11 Cox, C. C. 234; *R. v. Bleasdale*, 2 Car. & K. 765; *R. v. Shepherd*, L. R. 1 C. C. 118; *Woods v. People*, 222 Ill. 299, 7 L.R.A.(N.S.) 520, 113 Am. St. Rep. 415, 78 N. E. 607, 6 A. & E. Ann. Cas. 736.

The principle underlying the rule which forbids the recovery for aggregated penalties under a penal statute unless the language of the statute clearly requires it is peculiarly applicable to strictly criminal prosecutions.

State v. Cooper, 13 N. J. L. 361, 25 Am. Dec. 490; *State v. Fayetteville*, 6 N. C. (2 Murph.) 371.

There is nothing in the Elkins act expressly authorizing the imposition of a distinct punishment for each separate payment, and, in the absence of such express authority, none will be presumed or assumed.

United States v. Boston & A. R. Co. 15 Fed. 209; *United States v. St. Louis & S. F. R. Co.* 107 Fed. 870.

The transaction upon which the present prosecution is based constituted but one violation of the statute.

State v. Eggesht, 41 Iowa, 574, 20 Am. Rep. 612.

No principle was more firmly implanted in the laws of England at the time the American colonies gained their independence than that corporations were not amenable to criminal prosecution.

Sutton's Hospital Case, 10 Coke, 32b; *Anonymous*, 12 Mod. 559.

Mere indictability is never the test of criminality, since there are cases in which an

indictment is prescribed merely as a civil remedy (*R. v. Robinson*, 2 Burr. 799; *R. v. Paget*, 3 Fost. & F. 29; *Bancroft v. Mitchell*, L. R. 2 Q. B. 549). On the other hand, a suit for a penalty, though civil in form, is really criminal in its nature (*Boyd v. United States*, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; *Lees v. United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163). So, a proceeding against a bankrupt for not obeying an order for the payment of a weekly sum for the support of his mother is in the nature of criminal process (*Bancroft v. Mitchell*, supra).

There were three ways by which, at common law, parties or districts liable to repair highways might be prosecuted for suffering them to decay; by indictment, information, and the presentment of a judge or justice of the peace.

3 Chitty, *Crim. Law*, 5th Am. ed. pp. 569, 575, ¶ 6.

We may accept as entirely accurate Blackstone's statement that a corporation cannot commit treason or felony or other crime in its corporate capacity, though its members may in their distinct individual capacities. Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporeal penalties, nor to attainder, forfeiture, or corruption of blood.

Bl. Com. chap. 18, § 12; *Kyd, Corp.* pp. 22, 56.

Corporations are not and cannot be made the subject of criminal prosecutions.

Merkel (*Holtz. Straf.* 2, 111); *Geib, Lehrbuch*, § 87; 1 Wharton, *Crim. Law*, 10th ed. § 92, p. 116, note. Punishment is inflicted primarily for the sake of justice.

1 Wharton, *Crim. Law*, 10th ed. § 10; *Hawk. P. C.* (author's preface).

Mr. Henry L. Stimson argued the cause, and, with Attorney General Bonaparte and Assistant Attorney General Ellis, filed a brief for defendant in error:

Several convictions of corporations for criminal offenses have been brought to this court within the last four years, and in most of those cases the judgments of conviction have been here affirmed. If the laws under which such corporations had been convicted were unconstitutional and void, and if the members of such corporations had been deprived by those criminal judgments of their property without due process of law, it would have been the duty of this court, even on its own motion, to set aside the judgments and dismiss the indictments.

Berea College v. Kentucky, 211 U. S. 45, ante, 81, 29 Sup. Ct. Rep. 33; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428; *Chicago, B. & Q. R. Co. v. United States*, 209 U. S. 90,

52 L. ed. 698, 28 Sup. Ct. Rep. 439; *Great Northern R. Co. v. United States*, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313; *Eastern Dredging Co. v. United States*, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *H. Hackfeld & Co. v. United States*, 197 U. S. 442, 49 L. ed. 826, 25 Sup. Ct. Rep. 456.

Furthermore, the important decision rendered by this court in *Hale v. Henkel*, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370, that the constitutional immunity against self-crimination does not shield a corporation, was pointless and unnecessary if a corporation, as now contended, enjoys complete constitutional immunity from all criminal prosecution.

Congress has the right specifically to extend its power over interstate commerce by the use of criminal penalties.

United States v. Fox, 95 U. S. 670, 672, 24 L. ed. 538, 539; *United States v. Hall*, 98 U. S. 357, 25 L. ed. 184; *Hale v. Henkel*, 201 U. S. 43, 75, 82, 50 L. ed. 652, 665, 668, 26 Sup. Ct. Rep. 370.

What an outcast and rejected doctrine the plaintiff in error now urges on this court is evidenced by the quotation approvingly cited from *State v. Great Works Mill. & Mfg. Co.* 20 Me. 41, 37 Am. Dec. 38, as authority for the proposition that a corporation can commit no crime. This case, after being repudiated in Vermont and New Jersey, was expressly overruled twenty-five years ago by the court which enunciated it (*State v. Portland*, 74 Me. 273, 43 Am. Rep. 586). And the variety and large number of offenses for which corporations have been held criminally liable crushingly demonstrates the fanciful and archaic contention of the plaintiff in error.

State v. Morris & E. R. Co. 23 N. J. L. 360 (creating a nuisance in erecting and building a public highway); *State v. Passaic County Agri. Soc.* 54 N. J. L. 260, 23 Atl. 680 (keeping a disorderly house); *United States v. John Kelso Co.* 86 Fed. 304 (violation of eight-hour law); *United States v. Alaska Packers' Asso.* 1 Alaska, 217 (taking salmon unlawfully); *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 Am. Rep. 803 (for Sabbath-breaking); *Com. v. Pulaski County Agri. & Mechanical Asso.* 92 Ky. 197, 17 S. W. 442 (permitting gaming on its fair grounds); *State v. Atchison*, 3 Lea, 729, 31 Am. Rep. 663 (criminal libel); *State v. First Nat. Bank*, 2 S. D. 568, 51 N. W. 587 (for taking usurious rates of interest); *United States v. Van Schaick*, 134 Fed. 602 (homicide, occasioned by an inadequate supply of life preservers); *United States v. MacAndrews & F. Co.* 149 Fed. 836 (violat-

ing Sherman anti-trust law against conspiracy in restraint of trade); *United States v. New York Herald Co.* 159 Fed. 296 (sending obscene matter through the mail).

The decision of this court in *Berea College v. Kentucky*, supra, completely disposes of the contention that the Elkins law is unconstitutional because it applies to individual carriers as well as corporate carriers.

The statute applies to all of the members of a similar class (corporations), and excludes from its application only a class (natural persons) which, in respect to the subject-matter of the statute, are wholly different. Such a classification is perfectly constitutional.

Field v. Barber Asphalt Paving Co. 194 U. S. 618, 621, 48 L. ed. 1142, 1153, 24 Sup. Ct. Rep. 784; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; *Dow v. Beideman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028. See also *Michigan C. R. Co. v. Powers*, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459 (sustaining a tax statute which treated as a separate class all railroad corporate property for purposes of taxation); *New York ex rel. Metropolitan Street R. Co. v. New York State Tax Comrs.* 199 U. S. 1, 47, 50 L. ed. 65, 79, 25 Sup. Ct. Rep. 705, 4 A. & E. Ann. Cas. 381.

A corporation can be held responsible for the wrongs committed by its agents, even where those wrongs necessarily involved malicious intent.

Salt Lake City v. Hollister, 118 U. S. 256, 260, 30 L. ed. 176, 177, 6 Sup. Ct. Rep. 1055; *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 109-111, 37 L. ed. 97, 102, 103, 13 Sup. Ct. Rep. 261; *Denver & R. G. R. Co. v. Harris*, 122 U. S. 597, 30 L. ed. 1146, 7 Sup. Ct. Rep. 1286; *Telegram Newspaper Co. v. Com.* 172 Mass. 297, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *United States v. MacAndrews & F. Co.* and *United States v. New York Herald Co.* supra; *Pharmaceutical Soc. v. London & P. Supply Asso.* L. R. 5 App. Cas. 869.

This is particularly true in a case like the one now before the court, where the offense itself does not involve turpitude or moral wrong. As this court has interpreted the Elkins law, the only intent required on the part of the offender is "purposely doing a thing prohibited by statute."

Armour Packing Co. v. United States, 209 U. S. 56, 85, 52 L. ed. 681, 696, 28 Sup. Ct. Rep. 428; *Eastern Dredging Co. v. United States*, 206 U. S. 246, 257, 51 L. ed. 1047, 1053, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589.

The Elkins act, instead of being an ar-

bitrary and unconstitutional use of power by Congress, is merely a statute declaring and enacting in the case of this class of offenses the rules of law which this court (no less subject than Congress to the due-process limitation) has established in other corporate cases.

Washington Gaslight Co. v. Lansden, 172 U. S. 534, 545, 43 L. ed. 543, 548, 19 Sup. Ct. Rep. 296.

Where two or more persons join in the commission of an offense they may be jointly indicted.

United States v. McGinnis, 1 Abb. (U. S.) 120, Fed. Cas. No. 15,678; State v. Lehman, 182 Mo. 424, 66 L.R.A. 490, 103 Am. St. Rep. 670, 81 S. W. 1118; 22 Cyc. Law & Proc. p. 373.

In criminal prosecutions which have been brought under this statute since its enactment, it has been the common and constant practice to indict at the same time the officers and agents, and their master, the corporation.

United States v. MacAndrews & F. Co. 149 Fed. 832.

In the following cases, as a matter of common law, apart from the statute, no difficulty was found in joining a corporation with its officers or agents, and no question was raised as to the propriety of such joinder.

State v. Atchison, *supra*; Banner Pub. Co. v. State, 16 Lea, 176, 57 Am. Rep. 216; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; Overland Cotton Mill Co. v. People, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924; Thomp. Corp. § 4495.

The plaintiff in error is in no position to question the constitutionality of the Elkins act in permitting such joinder.

United States v. Wilson, 7 Pet. 150, 160, 8 L. ed. 640, 643; Bishop, New Crim. Proc. § 81; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 160, 51 L. ed. 415, 422, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736.

The privileges and immunities possessed by the stockholders are not *ipso facto* those of the corporation.

Bank of Augusta v. Earle, 13 Pet. 519, 586, 10 L. ed. 274, 306; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hale v. Henkel, 201 U. S. 43, 50 L. ed. 652, 26 Sup. Ct. Rep. 370; Railroad Tax Cases, 8 Sawy. 238, 13 Fed. 746.

The whole argument of the plaintiff in error is based upon doctrines which have been entirely outgrown by the development of the modern corporation, and have long been obsolete.

State v. Morris & E. R. Co. 23 N. J. L. 369; Salt Lake City v. Hollister, 118 U. S. 256, 259, 30 L. ed. 176, 177, 6 Sup. Ct. Rep. 53 L. ed.

1055; Goodspeed v. East Haddam Bank, 22 Conn. 536, 58 Am. Dec. 439; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. ed. 73; R. v. Great North of England R. Co. 9 Q. B. 327; Chesnut Hill & S. H. Turnpike Co. v. Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675.

In committing the crime, the offending agent acts with all the momentum of the corporate fund and power behind him, and is just by so much a greater menace to society. It is no new doctrine of law that, under such circumstances, the fictitious personality which thus participates in the offense shall be made punishable therefor, even if its owner be wholly innocent of such participation. Among the earliest cases of this court are decisions holding a vessel and other property forfeitable *in rem* for acts in which they participated, even though their owners were wholly innocent.

Dobbins's Distillery v. United States, 96 U. S. 395-401, 24 L. ed. 637-639; United States v. The Malek Adhel, 2 How. 210, 11 L. ed. 239.

None of the formal objections to the indictment are well taken.

United States v. Great Northern R. Co. 157 Fed. 288; United States v. Delaware, L. & W. R. Co. 152 Fed. 269; Armour Packing Co. v. United States, 209 U. S. 84, 52 L. ed. 695, 28 Sup. Ct. Rep. 428.

Each of the counts of the indictment charges a separate offense, and the sentence upon each count was proper and should be affirmed.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; United States v. Great Northern R. Co. 157 Fed. 291; Re Henry, 123 U. S. 372, 31 L. ed. 174, 8 Sup. Ct. Rep. 142; Re De Bara, 179 U. S. 316, 45 L. ed. 207, 21 Sup. Ct. Rep. 110; Bliss v. United States, 44 C. C. A. 324, 105 Fed. 508.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the circuit court of the United States for the southern district of New York, sued out by the New York Central & Hudson River Railroad Company, plaintiff in error. In the circuit court the railroad company and Fred L. Pomeroy, its assistant traffic manager, were convicted for the payment of rebates to the American Sugar Refining Company and others, upon shipments of sugar from the city of New York to the city of Detroit, Michigan. The indictment was upon seven counts and was returned against the company, its general traffic manager, and its assistant traffic manager. The first count, covering the offering of a rebate, was withdrawn from the jury

by the district attorney, and it is unnecessary to consider it. The second count charges the making and publishing of a through tariff rate upon sugar by certain railroad companies, including the plaintiff in error, fixing the rate at 23 cents per 100 pounds from New York city to Detroit, and charges the railroad company's general traffic manager and assistant traffic manager with entering into an unlawful agreement and arrangement with the shippers, the American Sugar Refining Company of New York and the American Sugar Refining Company of New Jersey, and the consignees of the sugar, W. H. Edgar & Son, of Detroit, whereby it was agreed that, for sugar shipped over the line, the full tariff rate being paid thereon, the railroad company should give a rebate of 5 cents for each 100 pounds. This count charges that during the months of April and May, 1904, shipments were made under this agreement, and the regular tariff rates paid thereon. On July 14 of that year a claim for a rebate in the sum of \$1,524.99 was presented by the agents of the shipper and consignees, and paid on the 31st day of August to Lowell M. Palmer, agent of the sugar company, for 490] the benefit of the shippers and *consignees. In each of the counts, except the sixth, the lawful rate is charged to have been 23 cents per 100 pounds. During the month of June, 1904, the same was reduced to 21 cents per 100 pounds, and the rebate agreed to and paid being 3 cents per 100 pounds. The second count covers the shipments of April and May, 1904; the third count the shipments for July and August, 1904; the fourth for September, 1904; the fifth for October, 1904; the sixth for June, 1904, and the seventh for April and May, 1904. In each of these counts there is an allegation of the payment of the published rate, the presentation of the claim for the rebate, and the statement of a specific sum allowed and paid on account thereof.

Upon the trial there was a conviction upon all of the six counts, two to seven inclusive. The assistant traffic manager was sentenced to pay a fine of \$1,000 upon each of the counts; the present plaintiff in error to pay a fine of \$18,000 on each count, making a fine of \$108,000 in all.

The facts are practically undisputed. They are mainly established by stipulation, or by letters passing between the traffic managers and the agent of the sugar refining companies. It was shown that the established, filed, and published rate between New York and Detroit was 23 cents per 100 pounds on sugar, except during the month of June, 1904, when it was 21 cents per 100 pounds.

The sugar refining companies were en-

gaged in selling and shipping their products in Brooklyn and Jersey City, and W. H. Edgar & Son were engaged in business in Detroit, Michigan, where they were dealers in sugar. By letters between Palmer, in charge of the traffic of the sugar refining companies and of procuring rates for the shipment of sugar, and the general and assistant traffic managers of the railroad company, it was agreed that Edgar & Son should receive a rate of 18 cents per 100 pounds from New York to Detroit. It is unnecessary to quote from these letters, from which it is abundantly established that this concession was given to Edgar & Son to prevent them from resorting to transportation by the water route between New *York[491 and Detroit, thereby depriving the roads interested of the business, and to assist Edgar & Son in meeting the severe competition with other shippers and dealers. The shipments were made accordingly and claims of rebate made on the basis of a reduction of 5 cents a hundred pounds from the published rates. These claims were sent to the assistant freight traffic manager of the railroad company by Palmer, the agent of the sugar companies, and then sent to one Wilson, the general manager of the New York Central and Fast Freight Lines at Buffalo, New York. Wilson returned to the assistant traffic manager of the railroad company a cashier's draft for the amount of the claim. This draft was then sent to the agent of the sugar companies, and his receipt taken. It was stipulated that these drafts were ultimately paid from the funds of the railroad company.

Numerous objections and exceptions were taken at every stage of the trial to the validity of the indictment and the proceedings thereunder. The principal attack in this court is upon the constitutional validity of certain features of the Elkins act. 32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880. That act, among other things, provides:

"(1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation; and, upon conviction thereof, it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment, shall, in every case, be also deemed **492**]*to be the act, omission, or failure of such carrier, as well as that of the person."

It is contended that these provisions of the law are unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The argument is that to thus punish the corporation is in reality to punish the innocent stockholders, and to deprive them of their property without opportunity to be heard, consequently without due process of law. And it is further contended that these provisions of the statute deprive the corporation of the presumption of innocence,—a presumption which is part of due process in criminal prosecutions. It is urged that, as there is no authority shown by the board of directors or the stockholders for the criminal acts of the agents of the company, in contracting for and giving rebates, they could not be lawfully charged against the corporation. As no action of the board of directors could legally authorize a crime, and as, indeed, the stockholders could not do so, the arguments come to this: that, owing to the nature and character of its organization and the extent of its power and authority, a corporation cannot commit a crime of the nature charged in this case.

Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief Justice Holt (Anonymous, 12 Mod. 559) that "a corporation is not indictable, although the particular members of it are." In Blackstone's Commentaries, chapter 18, § 12, we find it stated: "A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may, in their distinct individual capacities." The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, § 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: "Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of **493**]the corporation as are the *things done. If, for example, the invisible, intangible essence or air which we term a corporation can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously." **53 L. ed.**

Without citing the state cases holding the same view, we may note Telegram Newspaper Co. v. Com. 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, 52 N. E. 445, in which it was held that a corporation was subject to punishment for criminal contempt; and the court, speaking by Mr. Chief Justice Field, said: "We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong." It is held in England that corporations may be criminally prosecuted for acts of misfeasance as well as nonfeasance. *R. v. Great North of England R. Co.* 9 Q. B. 315.

It is now well established that, in actions for tort, the corporation may be held responsible for damages for the acts of its agent within the scope of his employment. *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 109, 111, 37 L. ed. 97, 102, 103, 13 Sup. Ct. Rep. 261.

And this is the rule when the act is done by the agent in the course of his employment, although done wantonly or recklessly or against the express orders of the principal. In such cases the liability is not imputed because the principal actually participates in the malice or fraud, but because the act is done for the benefit of the principal, while the agent is acting within the scope of his employment in the business of the principal, and justice requires that the latter shall be held responsible for damages to the individual who has suffered by such conduct. *Lothrop v. Adams*, 133 Mass. 471, 43 Am. Rep. 528.

A corporation is held responsible for acts not within the agent's corporate powers strictly construed, but which the *agent[**494**] has assumed to perform for the corporation when employing the corporate powers actually authorized, and in such cases there need be no written authority under seal or vote of the corporation in order to constitute the agency or to authorize the act. *Washington Gaslight Co. v. Lansden*, 172 U. S. 534, 544, 43 L. ed. 543, 547, 19 Sup. Ct. Rep. 296.

In this case we are to consider the criminal responsibility of a corporation for an act done while an authorized agent of the company is exercising the authority conferred upon him. It was admitted by the defendant at the trial that, at the time mentioned in the indictment, the general freight traffic manager and the assistant

freight traffic manager were authorized to establish rates at which freight should be carried over the line of the New York Central & Hudson River Company, and were authorized to unite with other companies in the establishing, filing, and publishing of through rates, including the through rate or rates between New York and Detroit referred to in the indictment. Thus, the subject-matter of making and fixing rates was within the scope of the authority and employment of the agents of the company, whose acts in this connection are sought to be charged upon the company. Thus clothed with authority, the agents were bound to respect the regulation of interstate commerce enacted by Congress, requiring the filing and publication of rates and punishing departures therefrom. Applying the principle governing civil liability, we go only a step farther in holding that the act of the agent, while exercising the authority delegated to him to make rates for transportation, may be controlled, in the interest of public policy, by imputing his act to his employer and imposing penalties upon the corporation for which he is acting in the premises.

It is true that there are some crimes which, in their nature, cannot be committed by corporations. But there is a large class of offenses, of which rebating under the Federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may 495] not be held responsible for and *charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz, *Priv. Corp.* § 733; Green's *Brice, Ultra Vires*, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices, forbidden in the interest of public policy.

It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins law, making corporations criminally liable.

This statute does not embrace things impossible to be done by a corporation; its objects are to prevent favoritism, and to secure equal rights to all in interstate trans-

portation, and one legal rate, to be published and posted and accessible to all alike. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 399, 50 L. ed. 524, 26 Sup. Ct. Rep. 272; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

We see no valid objection in law, and every reason in public policy, why the corporation, which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject-matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to *give them immunity from all pun- 496 ishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses aimed at.

There can be no question of the power of Congress to regulate interstate commerce, to prevent favoritism, and to secure equal rights to all engaged in interstate trade. It would be a distinct step backward to hold that Congress cannot control those who are conducting this interstate commerce by holding them responsible for the intent and purposes of the agents to whom they have delegated the power to act in the premises.

It is contended that the Elkins law is unconstitutional, in that it applies to individual carriers as well as those of a corporate character, and attributes the act of the agent to all common carriers, thereby making the crime of one person that of another, thus depriving the latter of due process of law and of the presumption of innocence which the law raises in his favor. This contention rests upon the last paragraph of § 1 of the Elkins act, which is as follows:

"In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, acting within the scope of his employment shall, in every case, be also deemed to be the act, omission, or failure of such carrier as well as that of the person."

We think the answer to this proposition is

obvious; the plaintiff in error is a corporation, and the provision as to its responsibility for acts of its agents is specifically stated in the first paragraph of the section. There is no individual in this case complaining of the unconstitutionality of the act, if objectionable on that ground, and the case does not come within that class of cases in which unconstitutional provisions are so interblended with valid ones that the whole act must fall, notwithstanding its constitutionality is challenged by one who might be legally brought within its provisions. *Employers' Liability Cases* (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141. It may be doubted whether there are any individual carriers engaged in interstate commerce, and every act is to be construed so as to maintain its constitutionality if possible. There can be no question that Congress would have applied these provisions to corporation carriers, whether individuals were included or not. In this view the act is valid as to corporations. *Berea College v. Kentucky*. 211 U. S. 45, 55, ante, 81, 29 Sup. Ct. Rep. 33.

It is contended that the court should have sustained the objection to the indictment upon the ground that the corporation and its agents could not be legally joined therein; but we think a fair construction of the act permits both the corporation and the agent to be joined in one indictment for the commission of the offense. The purpose of the act was to make the act one of the corporation as well as the agent, and to include both within the prohibitions and restrictions of the statute, and this seems to be the accepted practice. *Thomp. Corp.* § 4495.

Objections were made as to the sufficiency of the indictment, based upon its want of particularity in describing the offense intended to be charged. Section 1025 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 720) provides that no judgment upon an indictment shall be affected by reason of any defect or imperfection in matter of form which shall not tend to the prejudice of the defendant; and, unless the substantial rights of the accused were prejudiced by the refusal to require a more specific statement of the manner in which the offense was committed, there can be no reversal. *Connors v. United States*, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951; *Armour Packing Co. v. United States*, 209 U. S. 56, 84, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428. An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar

of any subsequent prosecution for the same offense.

It is insisted that, if any criminal offense was committed at all, it was a single and continuing one against the railroad company, because of the agreement evidenced by the letters which preceded the transportation, and under the terms of which the shipments were made. We cannot agree to this contention. The statute makes it an offense to give or receive a rebate whereby goods are transported in interstate commerce at less than the published rate; in the present case the jury found the railroad company guilty of rebating as charged. We are not dealing with a case where there was an agreement to carry the goods in the first place at a concession from the established rate, and wherein the railroad company never received the full legal rate. In this case, upon each of the numerous shipments, the full legal rate was paid, and, upon claims being presented at short intervals, the amount of the stipulated rebate was remitted by check to the shipper. We think the offense was complete when the railroad company thus paid the stipulated rebate to the shipper.

It is further contended that the court below erred in its reference to the absence of the witness Embleton, and the nonproduction of books in which entries were made concerning the transactions in question. It appears that Embleton was a clerk in the employ of Wilson, and had charge of the books in which these transactions were entered; that he did not appear at the trial, having left because of sickness, nor were the books produced. The comment objected to was made in connection with this paragraph of the charge:

"On this question of intent also, gentlemen, it is competent for you to take into consideration the method in which these transactions were carried on. The letter from Palmer to Guilford was headed 'private and confidential.' It will be proper for you to take into consideration the fact, if you believe the evidence in the case, that the method of making these payments, instead of being by a direct check drawn at Buffalo by or on behalf of this defendant, was by purchasing a draft drawn by the Bank of Buffalo upon the Chemical Bank, in favor of Mr. Palmer; and you may take into consideration upon that question the evidence in this case, that the original claims presented by Palmer to Pomeroy, and sent by Pomeroy to Wilson, have been destroyed; and the fact that when Embleton, the man in charge of the shipments, left the employment there, a book containing entries in reference to these claims disap-

peared, and that Mr. Wilson testified in this case that he did not know where it was.

"Now, it is for you to say, gentlemen, whether these occurrences and these facts are consistent with innocence or with guilt; because if a man carries on an act, or any person does anything which, upon its face, is apparently unlawful, and he does it in a furtive and secret manner, showing that his intention while he does the act is to do it in such a way as to conceal it, the jury may draw the inference from that fact, if they see fit—they are not obliged to, but they may if they see fit—that the intention with which the act was done was to perform an illegal or a criminal act."

We do not perceive any prejudicial error in this charge. It simply amounted to permitting the jury to consider the circumstances enumerated as bearing upon the guilty purposes of the parties charged in the indictment. It left to the jury to attach such weight as they saw fit to the circumstances of Embleton's absence and the non-production of the books. It is to be noted in this connection that the judge, in the latter portion of his charge, at the request of the defendant, said: "There is no evidence that the defendant corporation or those who controlled its corporate action destroyed or failed to produce upon the trial any paper for which the government has asked."

We have noted all the assignments of error which involve questions of a substantial character.

We find no error in the proceedings of the Circuit Court, and its judgment is affirmed.

Mr. Justice Moody took no part in this case.

500]*NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY, Plff. in Err.,

v.

UNITED STATES.

(See S. C. Reporter's ed. 500-509.)

Statutes — prospective or retrospective operation — Elkins act.

1. The payment of a rebate after the passage of the Elkins act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), but upon shipments of property transported prior to that enactment, is comprehended by its provi-

NOTE.—On statutes as prospective or retrospective in their operation—see notes to *Stewart v. Vandervort*, 12 L.R.A. 50; *Franklin County Grammar School v. Bailey*, 10 L.R.A. 407; *Otoe County v. Baldwin*, 28 L. ed. U. S. 331; and *Barnitz v. Beverly*, 41 L. ed. U. S. 94.

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sions that it shall be unlawful to offer, grant, or give, or to solicit, accept, or receive, any rebate in respect to property in interstate commerce transportation, whereby any such property shall be transported at less than the published rates.

[For other cases, see Statutes, II. v. in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — defective indictment.

2. Only substantial defects in an indictment are available to reverse a judgment of conviction on a writ of error.

[For other cases, see Appeal and Error, VIII. m, 2, in Digest Sup. Ct. 1908.]

Appeal — prejudicial error — instructions.

3. A further charge to the jury upon their return into court, which, standing alone, might permit a conviction for violating the interstate commerce act under an indictment framed under the Elkins act of February 19, 1903, is not ground for reversal if the whole charge, taken together, submits to the jury as a basis of conviction only the acts which occurred after the passage of the Elkins act.

[For other cases, see Appeal and Error, 5071-5126, in Digest Sup. Ct. 1908.]

[No. 69.]

Argued December 14, 15, 16, 1908. Decided February 23, 1909.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a conviction of a carrier for giving rebates in violation of the Elkins act. Affirmed.

See same case below on demurrer, 146 Fed. 298.

The facts are stated in the opinion.

Messrs. Austen G. Fox and John D. Lindsay argued the cause, and, with Mr. Albert H. Harris, filed a brief for plaintiff in error:

Ordinarily a statute must be given a prospective effect.

United States v. American Sugar Ref. Co. 202 U. S. 563, 579, 50 L. ed. 1149, 1153, 26 Sup. Ct. Rep. 717; *United States Fidelity & G. Co. v. United States*, 209 U. S. 306, 52 L. ed. 804, 23 Sup. Ct. Rep. 537; *Chew Heong v. United States*, 112 U. S. 536, 559, 28 L. ed. 770, 778, 5 Sup. Ct. Rep. 255; *Murray v. Gibson*, 15 How. 421, 14 L. ed. 755; *United States v. Bryan*, 9 Cranch, 374, 3 L. ed. 764; *People ex rel. Ryan v. Green*, 58 N. Y. 295; *State, Alden, Prosecutrix v. Newark*, 40 N. J. L. 92.

If the indictment is to be treated as an attempt to charge the giving of a rebate in violation of the Elkins act, it is fatally defective for lack of an agreement of unlawful advantage or discrimination.

United States v. Hanley, 71 Fed. 672.

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In any view, the indictment is bad either for duplicity or for ambiguity.

State v. Smith, 61 Me. 386; *Rice v. Standard Oil Co.* 134 Fed. 465; 1 Starkie, Crim. Pl. 1st ed. 73; *Ledbetter v. United States*, 170 U. S. 606, 610, 42 L. ed. 1162, 1163, 18 Sup. Ct. Rep. 774.

Mr. Henry L. Stimson argued the cause, and, with Attorney General Bonaparte and Assistant Attorney General Ellis, filed a brief for defendant in error:

Under the law as it stood before the Elkins act, the agreement of July 24th, 1902, was unlawful, and its fulfilment a crime on the part of the agents of the carrier.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802; *Hawley v. Kansas & T. Coal Co.* 48 Kan. 598, 30 Pac. 14; *Fitzgerald v. Grand Trunk R. Co.* 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

The avowed purpose of the Elkins act was to make the existing law more effective.

Armour Packing Co. v. United States, 209 U. S. 56, 72, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; *Interstate Commerce Commission v. Reichmann*, 145 Fed. 240.

It is quite immaterial whether Congress has in this law created three distinct but precisely similar crimes, each of which a given state of facts satisfies; or whether Congress has attempted to create but a single crime denounced under three distinct descriptions.

Crair v. United States, 162 U. S. 625, 636, 40 L. ed. 1097, 1099, 16 Sup. Ct. Rep. 952; *Kellogg v. United States*, 61 C. C. A. 229, 126 Fed. 323.

Provided that the charges stated in the indictment are sufficient within the rules of pleading to constitute a crime and sufficiently to apprise the defendant as to what he has to meet, it is immaterial how the offense is labeled.

Williams v. United States, 168 U. S. 382, 42 L. ed. 509, 18 Sup. Ct. Rep. 92.

The record shows an offense under the first sentence of the Elkins act.

United States v. Hanley, 71 Fed. 675; *United States v. Great Northern R. Co.* 157 Fed. 288.

The use of the word "shall" does not necessarily import a new and substantive enactment in the statute.

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R. v. Christchurch, 12 Q. B. 149; *People v. Hawker*, 152 N. Y. 234, 46 N. E. 607, affirmed in 170 U. S. 189, 42 L. ed. 1002, 18 Sup. Ct. Rep. 573; *Com. v. Dracut*, 8 Gray, 455; *Forbes v. State*, 2 Penn. (Del.) 203, 43 Atl. 626; *Fitzpatrick v. Simonson Bros. Mfg. Co.* 86 Minn. 140, 90 N. W. 378; *United States v. Maurice*, 2 Brock. 96, Fed. Cas. No. 15,747.

The act, under the government's construction, is not in any sense retroactive or *ex post facto*.

United States v. Great Northern R. Co. 157 Fed. 290.

The objection as to duplicity was never taken either by demurrer or at the trial. It is therefore waived, even if it did exist.

Connors v. United States, 158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951; *Morgan v. United States*, 78 C. C. A. 323, 148 Fed. 189.

Each count of the indictment clearly and plainly sets out the offense charged in terms more full and more precise than would be required under the rule laid down by this court in the *Armour Case*, 209 U. S. 84, 52 L. ed. 695, 28 Sup. Ct. Rep. 428.

Mr. Justice Day delivered the opinion of the court:

This case was argued and submitted with No. 57, just decided. [212 U. S. 481, ante, 613, 29 Sup. Ct. Rep. 304]. In the circuit court of the United States for the southern district of New York the plaintiff in error was convicted by the verdict of a jury, and sentenced under the Elkins act (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880) to pay a fine of \$18,000. The indictment consisted of two counts. The first charges the establishment and *publi-**[501]** cation of the tariff rate upon sugar over the line of the plaintiff in error and other railroads, from the city of New York to the city of Cleveland, Ohio, at the rate of 21 cents per hundred pounds; that on November 20, 1902, the railroad company entered into an unlawful agreement with the shipper, the American Sugar Refining Company, whereby its sugar should be shipped over said lines, and, the lawful tariff being paid thereon, the railroad company would give a rebate to the shipper of 6 cents for each hundred pounds of sugar transported to Cleveland, Ohio, for reconsignment to points beyond, and a rebate of 4 cents for each one hundred pounds transported to Cleveland for local delivery. The agreement further stipulated that the shipper should present its claim for rebate under the agreement aforesaid, and the same should be paid by the railroad company, thereby reducing the published tariff by 6 cents, or 4 cents for each hundred pounds of sugar, according to the

destination thereof. The carriage of sugar under the arrangement was charged, payment of the published tariff rates, and the presentation of claims for rebates is also alleged, and it is charged that on April 3, 1903, the railroad company paid to the American Sugar Refining Company \$26,141.81 by way of rebate in respect of the transportation of sugar under the agreement.

The second count is substantially the same as the first, except the allegation of the preliminary arrangement to pay the rebates is omitted. The record discloses that the plaintiff in error and other railroad companies, during the time covered in the indictment, had established and were operating a fast freight line from the city of New York to the city of Cleveland; that the published rate for the transportation of sugar over said route from New York to Cleveland was 21 cents per hundred pounds; that Nathan Guilford and Fred L. Pomeroy, the general freight traffic manager and the assistant freight traffic manager, respectively, of the defendant, were authorized to establish rates at which freight was to be carried, and to unite with other companies in establishing, filing, and publishing a list 502]*of through rates. The record also discloses that the American Sugar Refining Company was a New Jersey corporation engaged in refining sugar in Brooklyn and Jersey City; that it made large shipments to Cleveland as well as to other parts of the country; that the sales department of the company, which routed the sugar sold to different parts of the country and transported over different railroads, acted according to instructions received from one Lowell M. Palmer, who was in charge of the handling of the railroad business of the company, and furnished the sales department with freight rates and arrangement of routes for the shipments. It also appears that on the 24th day of July, 1902, with an assistant named Riley, Palmer met Pomeroy at his office, and a memorandum was thereupon made, evidencing an agreement between the parties as follows:

Memorandum made July 24, 1902.

Present—

Mr. L. M. Palmer, Mr. T. P. Riley, Mr. F. L. Pomeroy.

Sugar shipments to Cleveland and beyond:

1st. Shipments to be billed from New York, regular tariff rate, 21 cents per 100 pounds.

2d. Mr. L. M. Palmer to be allowed as lighterage in regular monthly settlements, 4½ cents per 100 pounds.

3d. Mr. L. M. Palmer to present no claims for cartage or transfer on sugar consigned

under the arrangement to the American Sugar Refining Company, Merwin street, Cleveland.

4th. The New York Central to make recalculation against Mr. L. M. Palmer for a refund of 1½ cents per 100 pounds, account lighterage allowed him in regular billing. This amount to be handed to the New York Central by Mr. L. M. Palmer in cash.

5th. Mr. L. M. Palmer to make a special claim under personal cover to F. L. Pomeroy against the New York Central for overcharge on such shipments of sugar to Cleveland as are covered by the first clause of this memorandum on the basis of 6 cents per 100 pounds.

*6th. This arrangement to apply to [503 all sugar billed to Merwin street warehouse, whether delivered locally in Cleveland or reconsigned beyond Cleveland. The question of exactly what the net basis is to be on shipments under this arrangement delivered locally in Cleveland to remain in abeyance until Mr. Guilford's return, for submission to him as to his understanding of the arrangement. In any event, the difference in the rate between sugar delivered locally and reconsigned not to exceed 2 cents per 100 pounds.

Afterwards, by an exchange of letters between Palmer and Guilford, 4 cents a hundred pounds was fixed as the rebate to be allowed on sugars delivered in the city of Cleveland, and 6 cents upon shipments reconsigned beyond the city of Cleveland. Between July 24, 1902, and December 6, 1902, the American Sugar Refining Company shipped a large amount of sugar from New York to Cleveland, paying thereon the full tariff rate of 21 cents per one hundred pounds. Thereafter claims were made up under the direction of Palmer against the New York Central & Hudson River Railroad Company, purporting to be for overcharges, and which were made upon the basis agreed upon in the memorandum aforesaid, and no evidence was introduced in the case showing that these rebates had any legitimate ground to rest upon. These claims were allowed and paid as hereinafter stated.

Objections as to the constitutionality of the Elkins act were made in this case, and, as they are disposed of in the opinion announced in No. 57, just decided [212 U. S. 481, ante, 613, 29 Sup. Ct. Rep. 304], the conclusions therein stated need not be repeated. The point principally urged for a reversal of the judgment in this case turns upon the construction of the Elkins act, having reference to the fact that the property concerning which the agreement for a rebate was made was transported prior to the taking effect of the Elkins act, February 19, 1903.

In this case the agreement was made July 24, 1902, and the goods were actually transported before the act went into effect. The payment of the rebate was made on April 2, 1903, after the act went into effect. As 504] we have *already had occasion to hold in No. 57, supra, where the legal tariff rate was, in fact, paid by the shipper to the carrier, the rebating was not complete until the money was actually refunded. The legal and published rate was the one which the shipper was obliged to pay, and no arrangement for any different rate could have been enforced at any time against the carrier. *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. ed. 1011, 26 Sup. Ct. Rep. 628; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

Before considering the terms of the Elkins act it is to be noted that the arrangement for the rebate was an illegal act, for which the agents of the carrier might have been criminally punished in accordance with the terms of the interstate commerce act then in force. 25 Stat. at L. 855, chap. 382, §§ 6, 10, U. S. Comp. Stat. 1901, p. 3158. The Elkins act amended the former law by providing punishment in criminal proceedings against the corporation as well as its agents for the offense of making illegal rebates from the published tariff rates. There was then no vested right in the shipper or the carrier to have the illegal agreement consummated by the payment of the rebate arranged for. In this attitude, and with the purpose of making the law more effectual, it was amended by the Elkins act so as to bring corporations within the provisions of the law, and to make offenses under it punishable by criminal proceedings against corporations.

The Elkins act provides:

"And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practised." 32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880.

It is the contention of the plaintiff in error 505] that the language *of this statute addresses itself to the future, and it asks the application of the well-known rule that statutes are presumed to be prospective in their 53 L. ed.

operation, and contends that this act has no reference to property transported in interstate commerce at less than the published rates at any time before the act went into effect. Reading the latter part of the sentence, "whereby any such property shall, by any device whatever, be transported at a less rate," etc., the act would seem to have reference to future transportations only. But, in an earlier part of the same sentence, it has been provided that it shall be unlawful to offer, grant, or give, to solicit, accept, or receive any rebate in respect to property in interstate commerce transportation "whereby any such property shall be transported at a less rate than that named in the tariffs," etc. Taking the sentence altogether, it is apparent that its purpose is to punish the giving of a rebate, in respect of transportation of property in interstate commerce, which shall have the effect to give or receive such transportation at less than the published rates.

Manifestly the act does not refer alone to the transportation of the property, although that is an essential element of the offense, but the thing aimed at is the giving or receiving of a rebate whereby the property shall be transported at less than the rates named in the published tariffs. It is the transaction of giving or receiving the rebate, etc., with the effect that the goods of the shipper thus preferred shall be transported at a reduction from the published rates, which is penalized.

As we have had occasion to say in No. 57, 212 U. S. 481, 613, 29 Sup. Ct. Rep. 304, the giving of the rebate is complete and the offense committed when a part of the legal rate already paid has been refunded. The word *shall* refers to the happening of the event,—the giving of the illegal rebate,—and was not introduced into the statute for the purpose of making future transportation illegal. No new legislation was required to make transportation under such an agreement illegal. The object of the statute was to punish rebates given or received after the passage of the act in respect to property, *the subject of interstate[506] transportation, and to make the carrier corporation criminally liable therefor.

We think that the circuit court was right in holding that this section of the law applied to the rebate paid in April, 1903, after the taking effect of the Elkins act.

Objections were taken to the indictment, but we think that it sets forth with sufficient definiteness the elements of the offense of which it was intended to charge the plaintiff in error. At this stage of the proceedings only substantial defects in the indictment are available to reverse the judgment of conviction. *Connors v. United States*,

158 U. S. 408, 411, 39 L. ed. 1033, 1034, 15 Sup. Ct. Rep. 951.

Error is alleged to have been committed in what the court said to the jury upon their return into court after the charge. The record upon this subject is as follows:

The court thereupon charged the jury further as follows:

Gentlemen, I have received this paper from the foreman of the jury: "Does the payment of rebate after the passage of the Elkins act on shipments made before the passage of the act constitute a crime under the law?"

To that I reply that it does, provided the payment was made with a criminal intent. That criminal intent does not mean with any wicked intent. The payment of rebates is not morally a crime. It was made a misdemeanor by statutes, and if a corporation or officer of a corporation pays a rebate with an intent thereby to make the payment in violation of the provisions of the statute prohibiting it, he does it with a criminal intent.

There are three provisions in this act under either one of which, if you find that the evidence supports the charge, you may convict. If you find, upon the evidence in this case, that Mr. Guilford or Mr. Pomeroy was guilty of charging, demanding, collecting, or receiving from the American Sugar Company a less compensation for the transportation of the sugar mentioned in the indictment than the rate specified in the schedule filed with the commission, you may find the defendant guilty.

Under another provision of this act, if 507] you find that this *defendant has been guilty of a wilful failure to strictly observe the tariff filed, specifying, the rates for the transportation of sugar, you may find them guilty. Or, if you find that this corporation has offered, granted, or given any rebate, concession, or discrimination upon the property transported in this case, "whereby any such property shall, by any device whatever, be transported at a less rate than is fixed in the schedule," you may find the defendant guilty, provided in each of these cases you find the criminal intent when the act was done, by which is meant an intention to do an act which violates this law. You may retire, gentlemen.

Mr. Lindsay: I would like to call your Honor's attention to the fact that you instructed the jury they might find the defendant guilty if they "offered." There is no charge in this indictment of offering.

The Court: I did not say offer, I think.

Mr. Lindsay: Your Honor used the word offer.

The Court: I withdraw that expression if I used it. I did not intend to use it.

Mr. Lindsay: I also ask your Honor in this connection to charge as this indictment is framed under the Elkins law they cannot convict the defendant upon this indictment for anything which transpired before the going into effect of the Elkins act.

The Court: Undoubtedly the payment of the rebate must have taken place after the passage of the act. The fact that the property was transported before the passage of the act does not bar a conviction in this case.

It is contended that the effect of this charge was to permit the defendant to be convicted of violating the act of 1887 [24 Stat. at L. 380, chap. 104] as amended in 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158), while the charge in the indictment, framed under the Elkins act, was intended to reach an offense committed after it went into effect, and to cover the unlawful rebate alleged to have been paid in April, 1903, after the taking effect of that act. But we think this part of the record should be read in connection with the charge of the court to the jury, in which the court gave a history of the previous *act[508 to regulate commerce, under § 6 of which it is provided, that it shall be unlawful for such common carrier to charge, demand, collect, or receive from any person or persons a greater or less compensation for the transportation of persons or property, or for any services in connection therewith, between any points as to which a joint rate, fare, or charge is named thereon than is specified in the schedule filed with the Commission in force at the time, and referred in that connection to the amendatory character of the Elkins act and the provisions thereof making the act, omission, or failure of the officer, agent, etc., within the scope of his employment, the act, omission, or failure of the carrier as well as such person. This part of the charge was apparently by way of introduction to the charge covering the specific requirements of the Elkins act. The judge in his charge summarized and commented upon the facts proved or admitted in the case, and, in concluding, said:

"Now, gentlemen, no evidence has been offered on behalf of the defendant in the case, and I understand from the argument of counsel that the defendant's defense in the case is the denial of any criminal intent. Gentlemen, intent is essential to the establishment of any charge of crime. Of course, there may be legitimate overcharges; there may be repayments for money paid to a railroad company that are perfectly innocent and proper. Very frequently it occurs

that some error or mistake or claim of injury arises when goods are being shipped, and that sort of thing gives rise to reclamation and claims of that sort, and the question for you to decide in this case is what was the intent with which that check for \$26,000 and odd was paid? Was it paid as a pure rebate as described in this Elkins act and in the interstate commerce act, or was it paid for some legitimate and proper overcharge or cause? That is the simple question in this case for you to determine, and that question I leave for you to pass upon on the consideration of all the evidence in the case."

This charge, taken in connection with what occurred when the jury returned, and the 509]colloquy which followed between *court and counsel, does not, we think, leave in doubt that the court submitted to the jury as a basis of conviction only the acts which occurred after the passage of the Elkins act. The acts amounting to a violation of that law were specifically charged in the indictment and admitted or proved at the trial.

The charge, taken together, submitted the question of the intent of the defendant to do, through the acts of its agents, authorized by it, the things denounced in the statute. The charge was as favorable as the plaintiff in error was entitled to, and we find no substantial error in the proceedings.

Judgment affirmed.

Mr. Justice Moody took no part in the decision of this case.

UNITED STATES, Plff. in Err.,
v.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

(See S. C. Reporter's ed. 509-516.)

Carriers — rebates from joint tariff — liability of carrier not publishing or filing.

A carrier which gives rebates from a joint rate on file with the Interstate Commerce Commission may, although it did not itself publish and file the rate, be convicted of violating the Elkins act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), which, *inter alia*, provides that the published rate shall be conclusively deemed, in any prosecution under the act, to be the legal rate as against the carrier who files the same or "participates in any rates so filed or published," and that any departure from such rate shall be deemed to be an offense under the act.

[For other cases, see Carriers, III. e, in Digest Sup. Ct. 1908.]

[No. 285.]

Argued December 16, 1908. Decided February 23, 1909.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment sustaining a demurrer to an indictment charging a carrier with giving rebates in violation of the Elkins act. Reversed.

See same case below, 157 Fed. 293.

The facts are stated in the opinion.

Mr. Henry L. Stimson argued the cause, and, with Assistant Attorney General Ellis, filed a brief for plaintiff in error:

The very method of rebating herein charged was prevalent prior to 1903; was called to the attention of Congress by the Interstate Commerce Commission; provisions were inserted into the Elkins law for the avowed purpose of stopping the practice, and the enactment of these provisions constitutes a construction of the law to the effect that it covers the precise offense here charged.

Annual Report of I. C. C. 1894, p. 32; 6 I. C. C. Rep. 272; Annual Report of I. C. C. 1898, p. 7; 1902, pp. 28, 29; Report of I. C. C. 1897, p. 149; Johnson v. United States, 18 L.R.A.(N.S.) 1194, 163 Fed. 32; New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 391, 50 L. ed. 515, 521, 26 Sup. Ct. Rep. 272; Armour Packing Co. v. United States, 209 U. S. 56, 72, 52 L. ed. 681, 691, 28 Sup. Ct. Rep. 428; Interstate Commerce Commission v. Reichmann, 145 Fed. 240.

The provisions of the 1st section of the Elkins law expressly cover and make criminal the transactions set out in this indictment; and other independent clauses of that act, not noticed by the court below, also penalize the offense.

Interstate Commerce Commission v. Reichmann, 145 Fed. 235.

If a statutory rule of evidence declares that, when a carrier participates in a rate, that rate becomes binding on the carrier beyond any possibility of rebuttal or defense, how does the situation differ from a rule of substantive law?

Wigmore, Ev. § 2492; Holmes, Common Law, p 134.

If an offense is well pleaded, it need not be the offense which the pleader had in mind.

Williams v. United States, 168 U. S. 382, 42 L. ed. 509, 18 Sup. Ct. Rep. 92; Wechsler v. United States, 86 C. C. A. 37, 158 Fed. 579.

Section 10 of the old law requires that the acts of the agent shall be "wilfully" done or "willingly" suffered. This requirement is further met by the indictment. It charges

that Guilford deliberately entered into an agreement for the purpose of causing these goods to be transported "at a less rate than the lawful rate named in the tariff," and that he deliberately and intentionally carried out this unlawful agreement, with the result contemplated thereby.

Armour Packing Co. v. United States, 209 U. S. 56, 85, 52 L. ed. 681, 696, 28 Sup. Ct. Rep. 428; *Ellis v. United States*, 206 U. S. 246, 257, 51 L. ed. 1047, 1053, 27 Sup. Ct. Rep. 600, 11 A. & E. Ann. Cas. 589; *Van Gesner v. United States*, 82 C. C. A. 180, 153 Fed. 54.

The government's view of the construction of this law is in accord with that expressed by this court in the *Cisco Oil Mill Case*, and has been supported by all reported opinions of lower courts, while the view of the court below, if carried to its logical conclusion, would produce results expressly condemned by this court in the *Cisco Case*, and necessarily contrary to its decisions in the *Armour* and *Burlington Cases*.

Texas & P. R. Co. v. Cisco Oil Mill, 204 U. S. 449, 451, 51 L. ed. 562, 563, 27 Sup. Ct. Rep. 358; *United States v. Wood*, 145 Fed. 409; *Camden Iron Works v. United States*, 85 C. C. A. 585, 158 Fed. 565; *Chicago, B. & Q. R. Co. v. United States*, 209 U. S. 90, 52 L. ed. 698, 28 Sup. Ct. Rep. 439; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

The court cannot infer that Congress contemplated passing a defective statute. On the contrary, it must infer that the *Hepburn* law was passed in reliance upon the construction placed upon the *Elkins* law by the decisions of Judges *Holland* and *Landis*.

Lauder v. Stone, 187 U. S. 281, 47 L. ed. 178, 23 Sup. Ct. Rep. 79; *Spencer v. Philadelphia Smelting & Ref. Co.* 124 Fed. 1003; *Robertson v. Downing*, 127 U. S. 607, 612, 32 L. ed. 269, 270, 8 Sup. Ct. Rep. 1328.

There is no merit in the contention that it is not alleged that the sum charged to have been paid by way of rebate and concession was paid unlawfully or with criminal intent.

Armour Packing Co. v. United States; *Ellis v. United States*; and *Van Gesner v. United States*,—*supra*.

Mr. Austen G. Fox, argued the cause, and, with Messrs. *John D. Lindsay* and *Albert H. Harris*, filed a brief for defendant in error:

Even though it were true that the method of rebating charged by this indictment was prevalent prior to 1903, was reported to Congress by the Interstate Commerce Commission, and that provisions were inserted

in the *Elkins* act for the avowed purpose of stopping the practice, the failure of the framer of the statute to effect this purpose cannot be overcome by any judicial addition to its language.

Broom's Legal Maxims, 56; *Hobbs v. McLean*, 117 U. S. 567, 579, 29 L. ed. 940, 945, 6 Sup. Ct. Rep. 870; *United States v. Gold-berg*, 168 U. S. 95, 102, 42 L. ed. 394, 398, 18 Sup. Ct. Rep. 3; *Swift v. Luce*, 27 Me. 285; *Gardner v. Collins*, 2 Pet. 58, 93, 7 L. ed. 347, 359; *R. v. Barham*, 8 Barn. & C. 999; *Hadden v. The Collector* (*Hadden v. Barney*) 5 Wall. 107, 111, 112, 18 L. ed. 518-520; *United States v. Trans-Missouri Freight Asso.* 166 U. S. 318, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *Aldridge v. Williams*, 3 How. 9, 11 L. ed. 469; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730.

Will the court construe a statute which creates a new offense so as to include offenses which are not plainly and unmistakably within the language which Congress has used?

Endlich, Interpretation of Statutes, 1888, Am. ed. § 333; *Smith v. Townsend*, 148 U. S. 490, 497, 37 L. ed. 533, 535, 13 Sup. Ct. Rep. 634; *Maxwell, Interpretation of Statutes*, 4th ed. p. 397; *Proctor v. Manwaring*, 3 Barn. & Ald. 145; *London County Council v. Aylesbury Dairy Co.* [1898] 1 Q. B. 106; *United States v. Palmer*, 3 Wheat. 610, 4 L. ed. 471.

A statute which creates a new liability, unknown to the common law, is to be strictly construed, and is not to be extended beyond the clear import of its terms.

Northern P. R. Co. v. Whalen, 149 U. S. 157, 37 L. ed. 686, 13 Sup. Ct. Rep. 822.

There can be no constructive offense, and if there be any fair doubt whether the statute embraces the case of the accused, that doubt must be resolved in favor of the accused.

United States v. Clayton, 2 Dill. 219, Fed. Cas. No. 14,814; *United States v. Biggs*, 157 Fed. 270.

This rule applies particularly to statutes which create crimes.

United States v. Whittier, 5 Dill. 39, Fed. Cas. No. 16,688; *Bolles v. Outing Co.* 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94; *United States v. Sheldon*, 2 Wheat. 119, 4 L. ed. 199; *United States v. Morris*, 14 Pet. 664, 10 L. ed. 543; *United States v. Clayton*, 2 Dill. 226, Fed. Cas. No. 14,814; *United States v. Reese*, 5 Dill. 413; *United States v. Wiltberger*, 5 Wheat. 76, 95, 5 L. ed. 37, 42.

Mr. Justice Day delivered the opinion of the court:

This proceeding is here under the act of

March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), permitting the government to bring to this court a case where the court below sustains a demurrer to the indictment, in which the judgment involves the construction of a Federal statute upon which the indictment is founded. The indictment to which the demurrer was sustained in this case charges that the Missouri Pacific Railway Company, the Cleveland, Cincinnati, Chicago, & St. Louis Railroad Company, the Lake Shore & Michigan Southern Railway Company, and the New York Central & Hudson River Railroad Company established a joint tariff of rates, fares, and charges which was filed with the Interstate Commerce Commission by the Missouri & Pacific Railway Company, in which the rate set forth and enforced **513]***from Poplar Bluff, Missouri, to New York upon cooerage materials was 35 cents for each 100 pounds. It is then charged that in January, 1898, the defendant's traffic manager, Nathan Guilford, and Lowell M. Palmer, president of and agent for the Brooklyn Cooerage Company, entered into an unlawful agreement and arrangement for the shipping of cooerage material over the through line and route aforesaid from Poplar Bluff, Missouri, to New York city, providing that, for the said transportation, the Brooklyn Cooerage Company should pay to the aforesaid common carriers the lawful published rates and charges; that thereafter the defendant, the New York Central & Hudson River Railroad Company, should pay to the said Palmer, as agent for the cooerage company, the sum of 5½ cents for each 100 pounds of said cooerage material so transported, thereby reducing the lawful tariff in that amount, with the result that such cooerage material should and would be transported at a less rate than that named in the published tariffs. The indictment then charged a delivery to the Missouri & Pacific Railroad Company at Poplar Bluff for shipment to New York of cooerage material, which was accordingly shipped to New York by the connecting carriers aforesaid, and over the continuous line and route so established. The indictment charges the payment of certain sums by the defendant to Palmer for the benefit of the cooerage company for rebates and concessions in respect to the carriage of said cooerage material. Different counts in the indictment cover specifically different payments.

The effect of these transactions is charged to be that the defendant did thereby unlawfully and wilfully give a rebate and concession in violation of the act to regulate commerce, whereby the property was transported by said corporation at a less rate than

that named in the tariffs aforesaid, published and filed by such common carrier, as required by said act to regulate commerce and the acts amendatory thereof and supplemental thereto.

We need not repeat the discussion had as to the objections *to the Elkins act (32[514 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), which were considered in Nos. 57, and 69, 212 U. S. 481, 500, ante, 613, 624, 29 Sup. Ct. Rep. 304, 309. The court below sustained the demurrer upon the ground that the defendant company, the New York Central & Hudson River Railroad Company, is not averred to have filed with the Interstate Commerce Commission the through rate at which the transportation was had, but, as charged in the indictment, the same was filed by the initial common carrier, the Missouri & Pacific Company. 157 Fed. 293. The question then is, Can a carrier be prosecuted under the Elkins act for the offense charged in this indictment where it is a party to a joint rate, but has not filed and published the same? The charge in the indictment is not for the failure of the New York Central & Hudson River Railroad Company to publish the joint tariff, if it were required to do so by the act, but is for the giving of a rebate or concession; and it is contended that the 1st section of the Elkins act makes it unlawful to give or receive any rebate, etc., "whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practised." The argument is that, inasmuch as the tariff was filed and published by the Missouri Pacific Company, and not by the defendant railroad company, it could not be prosecuted for the offense alleged in the indictment. By § 1 of the act of 1889 (25 Stat. at L. 855, chap. 382, U. S. Comp. Stat. 1901, p. 3158) it is required, concerning the filing of tariffs:

"And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said Commission."

It is said to have been the practice that such joint tariffs should be filed by the initial carrier. In any event, it was contended and was held by the circuit court that inasmuch as the *Elkins act referred[515 only to the tariffs "published and filed by such carrier," and the rebates in this case

had been given by a carrier who did not publish and file the rate, the latter company did not come within the terms of the act. We find, however, that § 1 of the Elkins act, in which the language quoted is used, also contains the following language:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereto, or participates in any rates so filed or published, that rate, as against such carrier, its officers or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this act."

The learned judge of the circuit court treated this provision as one relating to evidence, and not as establishing a substantive offense. But we think this is giving too narrow a construction to the terms of the statute and fails to give effect to the language used. We recognize the rule which is laid down in the cases cited by counsel for the defendant in error, that criminal statutes are not to be enlarged by construction, and that a crime must be clearly defined in the terms of the act before it can be held to be embraced within its provisions. But, while this is true, criminal statutes, like other acts of legislation, are to receive a reasonable construction, with a view to effecting the purpose of their enactment, and we think it entirely clear that the concluding part of § 1 of the Elkins act, which we have above quoted, brings all of the carriers who have participated in any rate filed or published within the terms of the act; as much so as if the tariff had been actually published and filed by such participating carrier. For the statute specifically provides that the published rate shall be conclusively deemed, in any prosecution under the act, to be the legal rate as against the carrier who files the same, or "participates in any rates so filed and published;" and the section further provides 516] that any "departure from such rate, which would include rates either published or participated in, shall be deemed to be an offense under the act. This part of the 1st section of the Elkins act was evidently enacted with a view to meeting the very situation developed in this case, wherein a joint rate has been established, binding upon all who are parties thereto, and has been filed by one of the participating carriers.

We think the learned judge was in error in holding that offenses of the character charged in this indictment could be prosecuted only as against the carrier actually

filing and publishing the joint rate. The judgment of the Circuit Court is reversed.

Mr. Justice Moody took no part in the decision of this case.

DENNIS W. MULLAN, Appt.,
v.

UNITED STATES.

(See S. C. Reporter's ed. 516-521.)

Courts-martial — jurisdiction — waiver of objection.

1. A court-martial convened at the request of a naval officer to investigate charges against him is not without jurisdiction because such officer was required, as a condition precedent, to waive the protection of U. S. Rev. Stat. § 1624, art. 60, U. S. Comp. Stat. 1901, p. 1119, by consenting to the admission in evidence of the record of the testimony introduced before a prior court of inquiry, with the right to call additional witnesses.

[Jurisdiction of courts-martial, see Courts-Martial, II. a, in Digest Sup. Ct. 1908.]

Courts-martial — review of judgment by civil court.

2. Civil courts are not courts of error to review the proceedings and sentences of courts-martial, where they are legally organized and have jurisdiction of the offense and of the person of the accused, and have complied with the statutory requirements governing their proceedings.

[For other cases, see Courts-Martial, 42-51, in Digest Sup. Ct. 1908.]

Courts-martial — sentence — mitigation.

3. Reducing the sentence of a court-martial, which dismissed a naval officer from the service, to suspension for five years on one-half sea pay, with a reduction in rank to the foot of the list of officers of his grade, is a mitigation of the sentence, within the meaning of the provision of U. S. Rev. Stat. § 1624, art. 54, U. S. Comp. Stat. 1901, p. 1119, that every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to "remit or mitigate," but not to "commute," the sentence of any such court which he is authorized to approve and confirm.

[Sentence of court-martial, see Courts-Martial, II. b, in Digest Sup. Ct. 1908.]

[No. 82.]

Argued January 20, 1909. Decided February 23, 1909.

APPEAL from the Court of Claims to review a judgment dismissing the petition of a naval officer to recover the difference between half sea pay and waiting orders pay during his suspension from rank

NOTE.—On naval courts-martial generally—see note to Wilkes v. Dinsman, 12 L. ed. U. S. 618.

and duty under an order of the President, confirming a sentence of a court-martial. Affirmed.

See same case below, 42 Ct. Cl. 157.

The facts are stated in the opinion.

Mr. W. E. Richardson argued the cause, and, with Messrs. J. H. Ralston and F. L. Siddons, filed a brief for appellant:

The effect of an agreement made by the head of an executive department, whereby an employee, for no additional consideration, waived a statutory right, was considered by the Supreme Court in the case of *Glavey v. United States*, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891, and held to be against public policy and void.

Congress, by prescribing the manner of proceedings extending to dismissal of officers who can and are willing to render valuable service, has made a provision which protects not only the officer, but the people of the United States; and it is not competent for anyone to waive that provision except the people of the United States, speaking through their legislative body.

McClaghry v. Deming, 186 U. S. 49, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786; *Clavey v. United States*, 182 U. S. 595, 45 L. ed. 1247, 21 Sup. Ct. Rep. 891; *Miller v. United States*, 103 Fed. 415; *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838.

There can be no such thing as a *de facto* court-martial.

Hickman v. Jones, 9 Wall. 197, 19 L. ed. 551; *Hildreth v. M'Intire*, 1 J. J. Marsh. 206, 19 Am. Dec. 61; *Perkins v. Corbin*, 45 Ala. 103, 6 Am. Rep. 698; *Tompson v. Mankin*, 26 Ark. 586, 7 Am. Rep. 628; *Snider v. Snider*, 3 W. Va. 200.

Commutation of a sentence is a change of one punishment known to the law for another and different punishment also known to the law. The substitution of a less for a greater punishment by authority of law.

Ex parte Janes, 1 Nev. 321; *Lee v. Murphy*, 22 Gratt. 789, 12 Am. Rep. 563.

To commute is defined "to exchange for one penalty or punishment another less severe."

Rich v. Chamberlain, 107 Mich. 381, 65 N. W. 235. See also *Ex parte Parker*, 106 Mo. 551, 17 S. W. 658; *Ex parte Collins*, 94 Mo. 22, 6 S. W. 345; *State ex rel. Bishop v. State Bd. of Corrections*, 16 Utah, 478, 52 Pac. 1090; *Young v. Young*, 61 Tex. 191; *State ex rel. Atty. Gen. v. Peters*, 43 Ohio St. 629, 4 N. E. 81.

Assistant Attorney General John Q. Thompson argued the cause, and, with Mr. George M. Anderson, filed a brief for appellee:

A person may, by his acts or omission to 53 L. ed.

act, waive a right which he might otherwise have under the Constitution of the United States as well as under a statute.

Pierce v. Somerset R. Co. 171 U. S. 641-648, 43 L. ed. 316-319, 19 Sup. Ct. Rep. 64; *Leonard v. Vicksburg, S. & P. R. Co.* 198 U. S. 422, 49 L. ed. 1111, 25 Sup. Ct. Rep. 750; *Fitzpatrick v. United States*, 178 U. S. 304, 44 L. ed. 1078, 20 Sup. Ct. Rep. 944; *Sawyer v. United States*, 202 U. S. 165, 50 L. ed. 979, 26 Sup. Ct. Rep. 575, 6 A. & E. Ann. Cas. 269; *Bishop v. United States*, 197 U. S. 340, 49 L. ed. 783, 25 Sup. Ct. Rep. 440; *Schick v. United States*, 195 U. S. 71, 72, 49 L. ed. 102, 103, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585; *Tombs v. Rochester & S. R. Co.* 18 Barb. 585; *Phyfe v. Eimer*, 45 N. Y. 104; *White v. Connecticut Mut. L. Ins. Co.* 4 Dill. 183, Fed. Cas. No. 17,545; *Beecher v. Marquette & P. Rolling Mill Co.* 45 Mich. 108, 7 N. W. 695.

Civil courts are precluded from setting aside or reviewing the proceedings and sentences of courts-martial where it affirmatively appears that they were legally constituted and had jurisdiction of the offense charged, the person of the accused, and complied with the statutory regulations governing their proceedings.

Dynes v. Hoover, 20 How. 65, 15 L. ed. 838; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Smith v. Whitney*, 116 U. S. 167, 29 L. ed. 601, 6 Sup. Ct. Rep. 570; *Johnson v. Sayre*, 158 U. S. 109, 39 L. ed. 914, 15 Sup. Ct. Rep. 773; *Swaim v. United States*, 165 U. S. 553, 41 L. ed. 823, 17 Sup. Ct. Rep. 448; *Carter v. McClaghry*, 183 U. S. 365, 46 L. ed. 236, 22 Sup. Ct. Rep. 181; *McClaghry v. Deming*, 186 U. S. 49, 46 L. ed. 1049, 22 Sup. Ct. Rep. 786.

Mr. Justice Day delivered the opinion of the court:

This appeal is prosecuted to reverse the judgment of the court of claims, dismissing the petition of Dennis W. Mullan, appellant. Full findings of facts were made in the court of claims, and, upon consideration, the claim of the petitioner was dismissed. 42 Ct. Cl. 157. From the findings of fact made by the court it appears that Dennis W. Mullan was a commander, serving as commandant, at the Navy yard at Pensacola, where he served from July 30, 1896, till March 7, 1897. Charges having been preferred against him, at his request a court of inquiry was convened to investigate them. The court of inquiry, after a full investigation and trial, reported adversely to the appellant. At that time he was subject to examination for promotion to the grade of captain, and, unless he could acquit himself of the charges preferred, he would be liable under § 1447 of the Re-

vised Statutes of the United States (act of 1882, 22 Stat. at L. 286, chap. 391, U. S. Comp. Stat. 1901, p. 1021) to be discharged from the service without more than one year's pay. In this condition of affairs the appellant made application to the Secretary of the Navy for a court-martial to try him upon the charges to be formulated from the finding of the court of inquiry. Correspondence ensued between the Secretary of the Navy and the appellant, fully set forth in the report of this case in the court of claims. 42 Ct. Cl. 159 *et seq.* The Secretary of the Navy, in answer to appellant's request, proposed to call a court-martial *at Washington for trial upon such charges as the Department might designate, provided the record of the court of inquiry should be admitted as evidence, each party to have the privilege of introducing other evidence. The appellant advised the Secretary that he would agree to such court-martial, it being understood that the privilege of introducing other witnesses should embrace the right to recall witnesses who had previously testified before the court of inquiry, and to take depositions upon written interrogatories. The Secretary of the Navy refused to permit the recalling of witnesses who had testified before the court of inquiry, or to permit testimony to be taken by interrogatories, but permitted the calling of other witnesses. Thereupon the appellant notified the Department that he acceded to the conditions stated in the Secretary's letter. The court-martial was ordered by the Secretary of the Navy to try the appellant upon the charges of drunkenness and drunkenness on duty. The evidence submitted at the court-martial consisted of the records of the court of inquiry, together with one witness called in addition thereto. The court-martial found the appellant guilty of both charges, and sentenced him to be dismissed from the Navy; on June 30, 1897, the Secretary of the Navy approved this sentence. The same was submitted to the President, who, on July 8, 1897, made the following order in the premises:

"The sentence in the foregoing case of Commander Dennis W. Mullan, U. S. Navy, is confirmed, but is mitigated as follows: To be reduced in rank, so that his name shall be placed at the foot of the list of commanders in the Navy, and to be suspended from rank and duty, on one-half sea pay, for a period of five years, during which time he shall retain his place at the foot of said list."

The appellant protested against the legality of the proceedings. At the trial before the court-martial no objection was offered by the appellant or his attorneys to the introduction of the evidence. On July 11,

1901, the unexpired period of the sentence was remitted by order of the President. The suit was *begun in the court of claims[519 to recover the difference between "one-half sea pay" and "waiting orders pay," from July 8, 1897, when the President's order was made, as above recited, and July 11, 1901, when the President remitted the unexpired period of the sentence, the amount claimed being the sum of \$3,934.14.

It is contended by the appellant that the proceedings of the court-martial are null and void because of the manner in which that court was convened, upon requirement as a condition precedent that the appellant should submit to the introduction of the record of the testimony introduced before the court of inquiry, with the right to call additional witnesses, as hereinbefore stated. This contention is based upon article 60 of § 1624 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 1119), which provides as follows:

"Art. 60. The proceedings of courts of inquiry shall be authenticated by the signature of the president of the court and of the judge advocate, and shall, in all cases not capital, nor extending to the dismissal of a commissioned or warrant officer, be evidence before a court-martial, provided oral testimony cannot be obtained."

It is contended that, inasmuch as this case did not come within the statutory provisions permitting the evidence before a court-martial to be used, as such right is limited to cases not extending to the dismissal of a commissioned or warrant officer, and a capital case, the court-martial was not properly organized, and its proceedings were null and void. It is insisted that this provision of the law is to enable the accused, in cases of this character, to meet his witnesses face to face, and is analogous to the constitutional right in criminal cases; and, being an enactment for the benefit of the service and the protection of those engaged therein, the appellant could not waive its provisions. But we are of opinion that this was a right which he might waive. In *Schick v. United States*, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585, it was held that a party might, in the case then before the court, waive the right to a trial by jury, and, in the course of the opinion, Mr. Justice Brewer, speaking for the court, said (p. 71):

"*Article 6 of the amendments, as we[520 have seen, gives the accused a right to a trial by jury. But the same article gives him the further right 'to be confronted with the witnesses against him . . . and to have the assistance of counsel.' Is it possible that an accused cannot admit, and be bound by the admission, that a witness not present

would testify to certain facts? Can it be that, if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy."

The Secretary of the Navy was under no legal obligation to call a court-martial to inquire into the charges made against the accused. The court of inquiry was invoked, as was the court-martial, at the instance of the appellant. He had had a full trial before the court of inquiry, in which the record disclosed a large number of witnesses were called; he was represented by counsel; he was present in person; he had a full opportunity to cross-examine the witnesses and to make a defense. At the court-martial he was permitted to introduce additional witnesses, and had the benefit of one witness whose testimony was in his favor. We think there was nothing in the manner in which the court-martial was organized which deprived the accused of a substantial right in such manner as to oust its jurisdiction in the premises. The civil courts are not courts of error to review the proceedings and sentences of courts-martial where they are legally organized and have jurisdiction of the offense and of the person of the accused, and have complied with the statutory requirements governing their proceedings. *Dynes v. Hoover*, 20 How. 65, 15 L. ed. 838; *Ex parte Reed*, 100 U. S. 13, 25 L. ed. 538; *Swaim v. United States*, 165 U. S. 553, 41 L. ed. 823, 17 Sup. Ct. Rep. 448.

It is contended that the order of July 18, 1897, in which the President undertook to mitigate the sentence of the appellant—dismissal from the Navy—to reduction to one-half sea pay for the period of five years, with reduction in rank and suspension, 521]*as stated, was illegal and unauthorized, because of article 54, § 1624, of the Revised Statutes of the United States, which provides:

"Every officer who is authorized to convene a general court-martial shall have power, on revision of its proceedings, to remit or mitigate, but not to commute, the sentence of any such court which he is authorized to approve and confirm."

The court of claims was of opinion that this section did not apply to the action of the President of the United States. If it be conceded for this purpose that it is applicable to the President (§ 1624, arts. 38 and 53 of the Revised Statutes), we are of the opinion that the President's action did, in fact, mitigate the previous sentence of the court—

martial as approved by the Secretary of the Navy. It may be conceded that there is a technical difference between the commutation of a sentence and the mitigation thereof. The first is a change of a punishment to which a person has been condemned into one less severe, substituting a less for a greater punishment by authority of law. To mitigate a sentence is to reduce or lessen the amount of the penalty or punishment. 1 *Bouvier's Law Diet.* 374; 2 *Id.* 428.

When the President otherwise confirmed the sentence of the Navy Department from absolute discharge from the Navy to reduction in rank and duty for the period of five years on one-half sea pay, he did what in terms he undertook to do; and, by the lessening of the severe penalty of dismissal from the Navy, approved by the Department, reduced and diminished, and therefore mitigated, the sentence which he was authorized to approve and confirm against the appellant, or mitigate in his favor.

Judgment affirmed

*AMERICAN EXPRESS COMPANY, [522
Appt.,
v.

UNITED STATES. (No. 405.)

NATIONAL EXPRESS COMPANY, Appt.,
v.

UNITED STATES. (No. 406.)

UNITED STATES EXPRESS COMPANY,
Appt.,
v.

UNITED STATES. (No. 407.)

WELLS, FARGO, & COMPANY, Appt.,
v.

UNITED STATES. (No. 408.)

ADAMS EXPRESS COMPANY, Appt.,
v.

UNITED STATES. (No. 409.)

(See S. C. Reporter's ed. 522-535.)

Carriers — rebates — free transportation by express companies.

1. Express companies are prohibited from giving free transportation of personal packages to their officers and employees and members of their families, and to the officers of other transportation companies, and members of their families, in exchange for passes issued by the latter to the officers of the express companies, by the Elkins act of February 19, 1903 (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), as amended by the Hepburn act of June 29, 1906 (34 Stat. at L. 584, 587, chap. 3591,

NOTE.—On the office of a proviso in statutes—see note to *United States v. Dickson*, 10 L. ed. U. S. 689.

U. S. Comp. Stat. Supp. 1907, pp. 892, 898), which forbids all transportation of property at less than the published rates. [For other cases, see Carriers, III. c, in Digest Sup. Ct. 1908.]

Carriers — free transportation — Hepburn act — effect of proviso.

2. The proviso to the Hepburn act of June 29, 1906, § 1, following language appertaining solely to the carriage of passengers, that its provisions shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers and their families, or to prohibit any common carrier from carrying passengers free in certain cases, does not embrace free transportation by express companies, although, by the terms of that act, express companies are deemed common carriers.

[Provisos generally, see Statutes, II. t, in Digest Sup. Ct. 1908.]

[Nos. 405, 406, 407, 408, 409.]

Argued November 10, 11, 1908. Decided February 23, 1909.

APPEALS from the Circuit Court of the United States for the Northern District of Illinois to review decrees enjoining express companies from giving free transportation of personal packages to their officers and employees and members of their families, and to the officers of other transportation companies, and members of their families, in exchange for passes issued by the latter to the officers of the express companies. Affirmed.

See same case below, 161 Fed. 606.

The facts are stated in the opinion.

Mr. Lawrence Maxwell, Jr., argued the cause, and, with Messrs. Lewis Cass Ledyard, Frank H. Platt, Carl A. de Gersdorf, W. W. Green, and Charles W. Stockton filed a brief for appellants:

The reason for making exemptions in favor of the employees of common carriers, and members of their families, is obvious.

The *New World v. King*, 16 How. 469, 473, 14 L. ed. 1019, 1021.

The interchange of passes between the express companies and railroad companies is important to both.

Express Cases, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *Baltimore & O. S. W. R. Co. v. Voigt*, 176 U. S. 498, 44 L. ed. 560, 20 Sup. Ct. Rep. 385.

It is true that the usual office of a proviso is to qualify the generality of that which precedes, and to exclude from its operation that which would otherwise be included, but it is often used for another purpose, and in this case was evidently used as an introduction to an amendment offered after the bill was reported, for the purpose of extending the privilege of interchanging em-

ployees, passes to all common carriers subject to the act.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 181, 32 L. ed. 377, 380, 9 Sup. Ct. Rep. 47; *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 36, 37, 48 L. ed. 860, 865, 866, 24 Sup. Ct. Rep. 563; *Chesapeake & P. Teleph. Co. v. Manning*, 186 U. S. 238, 242, 46 L. ed. 1144, 1146, 22 Sup. Ct. Rep. 881; *Baggaley v. Pittsburg & L. S. Iron Co.* 33 C. C. A. 202, 62 U. S. App. 683, 90 Fed. 636.

Section 22 of the act to regulate commerce is only illustrative, and not exclusive.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 278, 36 L. ed. 699, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Express companies were first brought under the interstate commerce act by the amendments of June 29, 1906.

Southern Indiana Exp. Co. v. United States Exp. Co. 88 Fed. 662, affirmed in 35 C. C. A. 172, 92 Fed. 1022.

The interstate commerce act does not purport to regulate all common carriers; nor the carriers that are subject to the act in all of their relations. Section 6 declares "that wherever the word 'carrier' occurs in this act, it shall be held to mean 'common carrier.'" But the service which the express companies perform for the holders of employee's passes is not that of common carrier, because it is gratuitous, and the holder is required to assume all risk of loss or damage from whatever cause, to the property carried.

Schouler, Bailments, 3d ed. § 343; *Northern P. R. Co. v. Adams*, 192 U. S. 440, 48 L. ed. 513, 24 Sup. Ct. Rep. 408; *Baltimore & O. S. W. R. Co. v. Voigt*, supra; *Quimby v. Boston & M. R. Co.* 150 Mass. 365, 5 L.R.A. 846, 23 N. E. 205.

Section 3 of the Elkins act is a copy of the undue preference clause of the English railway and canal traffic act of 1854, § 2, which has been held to apply only where there is some sort of competition between the parties complaining and those to whom an undue or unreasonable preference or advantage is claimed to have been given.

Hozier v. Caledonia R. Co. 1 Ry. & Canal Traffic Cas. 27; *Lees v. Lancashire & Y. R. Co.* 1 Ry. & Canal Traffic Cas. 352, 366.

It is only unfair and unjust discrimination that the statute is aimed at.

United States v. Chicago & N. W. R. Co. 62 C. C. A. 465, 127 Fed. 785; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 218, 40 L. ed. 940, 947, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666; *Platt v. LeCocq*, 150 Fed. 391.

The spirit as well as the letter of a statute must be respected.

Durousseau v. United States, 6 Cranch, 307, 314, 3 L. ed. 232, 234; *The Habana*, 175 U. S. 677, 685, 44 L. ed. 320, 323, 20 Sup. Ct. Rep. 290; *Glover v. United States*, 164 U. S. 297, 41 L. ed. 440, 17 Sup. Ct. Rep. 95.

Subject to the two leading prohibitions that their charges shall not be unjust or unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or disadvantage to persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at the common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are regarded as sound, and adopted in other trades and pursuits.

Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184, 197, 40 L. ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Southern P. Co. v. Interstate Commerce Commission*, 200 U. S. 554, 50 L. ed. 593, 26 Sup. Ct. Rep. 330; *Interstate Commerce Commission v. Chicago G. W. R. Co.* 209 U. S. 119, 52 L. ed. 712, 28 Sup. Ct. Rep. 493; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 3 Inters. Com. Rep. 192, 43 Fed. 37, aff'd in 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Attorney General Bonaparte and Solicitor General Hoyt argued the cause and filed a brief for appellee:

The transportation by the express companies of property under franks, as disclosed in these cases, constitutes an unjust discrimination, and subjects other shippers to an unreasonable prejudice, within the meaning of §§ 2 and 3 of the interstate commerce act.

Re Persons Free or at Reduced Rates by B. & M. R. Co. 5 I. C. C. Rep. 77; *Harvey v. Louisville & N. R. Co.* 5 I. C. C. Rep. 153; *Ex parte Koehler*, 1 Inters. Com. Rep. 317, 31 Fed. 321.

The portions of §§ 2 and 3 of the interstate commerce act relating to unjust discrimination and unreasonable disadvantage were modeled from the English tariff act, and in construing them our courts have followed the interpretation of the English courts.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844; *Interstate Commerce Commission v. Alabama Midland R. Co.* 168 U. S. 53 L. ed.

S. 144, 42 L. ed. 414, 18 Sup. Ct. Rep. 45; *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666. See also *Re Persons Free or at Reduced Rates by B. & M. R. Co.* 5 I. C. C. Rep. 79.

Construing similar sections of the English act, the English courts have held with great unanimity that the differences in circumstances and conditions are those relating to the carriage of goods and the nature and character of the service rendered by the shipper, not to the business motive of either the shipper or carrier.

Great Western R. Co. v. Sutton, L. R. 4 H. L. 226; *Denaby Main Colliery Co. v. Manchester, S. & L. R. Co.* L. R. 11 App. Cas. 97.

When a carrier has once established a rate pursuant to the interstate commerce act, and has published and filed it, there must be no departure from that rate in favor of any shipper.

Texas & P. R. Co. v. Mugg, 202 U. S. 242, 50 L. ed. 1101, 26 Sup. Ct. Rep. 628; *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 445, 51 L. ed. 553, 560, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075; *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

Statutes like this must be interpreted in the light of the history of the legislation and the purpose of Congress.

Church of Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511; *Buttfield v. Stranahan*, 192 U. S. 470, 475, 48 L. ed. 525, 526, 24 Sup. Ct. Rep. 349.

The prohibition in the Elkins act is directed at discriminations of all kinds.

Armour Packing Co. v. United States, 209 U. S. 56, 71, 52 L. ed. 681, 690, 28 Sup. Ct. Rep. 428.

Where the legislative body has, with apparent intention, made a change in the language used, due significance must be given to the change in the application of the statute.

Washington Market Co. v. Hoffman, 101 U. S. 113, 115, 25 L. ed. 782, 783; *Rhodes v. Iowa*, 170 U. S. 412, 423, 42 L. ed. 1088, 1095, 18 Sup. Ct. Rep. 664; *Mercantile Nat. Bank v. New York*, 121 U. S. 138, 155, 30 L. ed. 895, 901, 7 Sup. Ct. Rep. 826; *Early v. Doe*, 16 How. 610, 616, 14 L. ed. 1079, 1081; *Allen v. Louisiana*, 103 U. S. 80, 85, 26 L. ed. 318, 320; *Caha v. United States*, 152 U. S. 211, 214, 38 L. ed. 415, 416, 14 Sup. Ct. Rep. 513; *United States v. Stowell*, 133 U. S. 1, 13, 33 L. ed. 555, 558, 10 Sup. Ct. Rep. 244; *Heydenfeldt v. Dancy Gold & S. Min. Co.* 93 U. S. 634, 640, 23 L. ed. 995, 996; *Postmaster General v. Early*, 12 Wheat. 136, 148, 6 L. ed. 577, 582.

The terms "undue discrimination" and "undue or unreasonable preference or advantage," used in the original interstate commerce act, have been before Congress for consideration many times. One of the most serious defects in the law grew out of the fact that criminal prosecutions could not be based successfully upon statutes defining with such uncertainty the offense prohibited.

Chicago & N. W. R. Co. v. Dey, 1 L.R.A. 744, 2 Inters. Com. Rep. 325, 35 Fed. 866; *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 919.

The word "discrimination," as used in the Elkins act, covers discriminations of every kind; and, in a proceeding against a carrier for granting a discrimination, it is not necessary for the government to show as a part of its case that the discrimination was an unjust one. To place any such construction upon the Elkins act is to leave the law substantially as it was prior to the passage of that act, and to deny that its obvious purpose and effect was, as pointed out by this court in the case of *Texas & P. R. Co. v. Abilene Cotton Oil Co.* 204 U. S. 426, 447, 51 L. ed. 553, 561, 27 Sup. Ct. Rep. 350, 9 A. & E. Ann. Cas. 1075, to strengthen and make more effective the provisions of the original act.

Interstate Commerce Commission v. Baltimore & O. R. Co. 145 U. S. 263, 278, 26 L. ed. 699, 704, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

If we assume that Congress intended to give to the word "pass" the meaning in which it is ordinarily used, it is impossible to interpret the proviso in question so as to include the transportation of property.

Webster's Unabridged Dict.; Century Dict.; Webster's International Dict.; Standard Dict.

A proviso in a statute is intended to qualify what is affirmed by the body of the act. It takes out of the operation of the enactment what would otherwise be within it. The office of a proviso generally is either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of it as extending to acts not intended to be brought within its purview. The proviso must be interpreted in the light of that to which it is an exception, and must not be given a broader meaning than such prior portion, unless no other construction is possible.

Potter's Dwarrr. Stat. p. 118; 2 *Lewis's Sutherland, Stat. Constr.* §§ 351, 352; *Sutton v. People*, 145 Ill. 279, 34 N. E. 420; *Huddleston v. Francis*, 124 Ill. 198, 16 N. E. 243; *United States v. Dickson*, 15 Pet. 141, 164, 10 L. ed. 689, 698; *Minis v. United States*, 15 Pet. 423, 445, 10 L. ed. 791, 799; *Dollar*

Sav. Bank v. United States, 19 Wall. 227, 235, 22 L. ed. 80, 81; *White v. United States*, 191 U. S. 545, 551, 48 L. ed. 295, 297, 24 Sup. Ct. Rep. 171; *Re Exchange of Free Transportation*, 12 Inters. Com. Rep. 39.

The principle of construction above stated is unquestionably a general rule, to be applied to all statutes.

United States v. Lacher, 134 U. S. 624, 628, 33 L. ed. 1080, 1083, 10 Sup. Ct. Rep. 625; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436.

Exception to the general rule is to be permitted only when the subject covered by the proviso has no relation whatever to that which precedes; it has been merely tacked on to the act by the legislature without its having any bearing whatever on the subject-matter of the act.

Georgia R. & Bkg. Co. v. Smith, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47.

The transportation involved in these cases falls within the scope of the provisions of the interstate commerce acts.

Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 619, 47 L. ed. 333, 335, 23 Sup. Ct. Rep. 214; *Adair v. United States*, 208 U. S. 161, 176, 52 L. ed. 436, 443, 28 Sup. Ct. Rep. 277.

Mr. Justice Day delivered the opinion of the court:

These cases are appeals from the circuit court of the United States for the northern district of Illinois, and were submitted upon oral argument and printed record and briefs in No. 405. They involve the same question and hence will be disposed of together. The petition was filed in the circuit court under the 3d section of the Elkins act (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1907, p. 880), providing for the institution of such suit whenever the Interstate Commerce Commission shall have reasonable grounds for believing that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is granting any discrimination forbidden by law.

An injunction was issued restraining the express companies from "issuing any frank or other document for the free transportation of property to the following persons, to wit: the officers, agents, attorneys, and employees of said defendant and their respective families; the officers and employees of other express companies and their respective families; the officers and employees of any railroad or any other common carrier subject to the act to regulate commerce and its amendments, and their respective families; or to any of said persons; and from transporting *and forwarding for said per-[529

sons above named or any of them, without demanding and receiving the lawful rate of payment therefor, any shipments of property subject to the provisions of said interstate commerce act and its amendments."

The facts are not seriously in dispute and were stipulated at the trial, and show that it has been the custom of express companies for many years to issue franks such as are embraced in the injunction. These franks were not issued except to officers and employees of the companies and their families, and to the officers and employees of other express companies and transportation companies and members of their families, in exchange for passes issued by the latter companies to the officers and employees of the express companies. The franks provided that they should not be used for business packages or for transportation of extra heavy weight, money, bonds, jewelry, live stock, or business consignments, and only for the personal packages of the holder of such frank, he being required to assume all risk of loss or damage, from whatever cause, to property carried under the frank.

The question is, Does the interstate commerce law prohibit express companies from giving free transportation of personal packages to their officers and employees and members of their families, and to the officers of other transportation companies and members of their families, in exchange for passes issued by the latter to the officers of the express companies? The circuit court held the affirmative of this proposition.

It is the contention of the government that such transportation is forbidden by § 2 of the act of 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3155), forbidding the transportation of property or passengers subject to the provisions of the act for any person for a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, than it charges, demands, collects, or receives from any other person for doing for him the like service, and by § 3 of the same act (24 Stat. at L. 380, chap. 104, U. S. Comp. Stat. 1901, p. 3155), which makes it unlawful to give any undue preference or advantage to any particular persons or *locality, and by the provisions of the Elkins act hereafter quoted.

Without considering whether the case at bar is covered by the section of the interstate commerce act referred to, an injunction is authorized under § 3 of the Elkins act, where a common carrier is engaged in the carriage of passengers or freight at less than the published rate on file, and we shall limit our attention to certain provisions of the Elkins law in this connection. Section 1 of the Elkins act provides (as amended 53 L. ed.

by the Hepburn act, June 29, 1906, 34 Stat. at L. 584, 587, chap. 3591, U. S. Comp. Stat. Supp. 1907, pp. 892, 898):

"The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense.

"It shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall, by any device whatever, be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereof, or whereby any other advantage is given or discrimination is practised.

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to *depart therefrom, shall[531 be deemed to be an offense under this section of this act."

Section 6 of the interstate commerce act, as amended by the same law, provides:

"Nor shall any carrier charge or demand, or collect or receive, a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs, than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property except such as are specified in such tariffs: Provided, That whenever the word 'carrier' occurs in this act it shall be held to mean 'common carrier.'"

The amendment to the interstate com-

merce act by the act of June 29, 1906 (34 Stat. at L. 584), chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), brought express companies within the terms of the act. The express companies were therefore obliged to file and publish their rates for the transportation of property under § 6 of the interstate commerce act as amended, and it is admitted in the record that they have done so.

The provisions of the Elkins act to which we have referred have been the subject of consideration in recent cases before this court. *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; *Armour Packing Co. v. United States*, 209 U. S. 56-71, 52 L. ed. 681-691, 28 Sup. Ct. Rep. 428. It is unnecessary to repeat the discussion had in those cases as to the prior legislation and the reasons of public policy which led up to the enactment of the sections of the Elkins act above quoted. It is enough to say that it was the purpose of this law to require the publication and posting of tariff rates, open to public inspection, and at the service of all shippers alike; to prohibit and punish secret departures from the published rates, and to prevent and punish rebating, preferences, and all acts of 532] undue discrimination. *As was said by Mr. Justice White, speaking for the court in *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, supra:

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

In view of the interpretation thus given to the act, we think it cannot be doubted that the transportation of property, such as shown in this case, upon franks issued by the express companies, is within the terms of the act. It permits those who hold these franks to obtain the transportation of such property as is covered thereby without compensation; or, if the transportation has been paid, it is refunded to the shipper upon the presentation of the frank. Within the terms used in the Elkins act, such transportation enables one class of persons to obtain transportation at a different and less rate than that named in the published rates.

It is contended that such transportation is not within the terms of the act, as it was not the purpose of Congress to regulate in these provisions gratuitous transportation, but the purpose was to prevent discriminations, rebating, and so forth, where prop-

erty has been carried by a common carrier for hire; that it is a departure from the rates charged for that class of transportation which is the evil to be remedied, and the only one covered by the terms of the act. But the power of Congress over interstate transportation embraces all manner of carriage of that character,—whether gratuitous or otherwise,—and, in the absence of express exceptions, we think it was the intention of Congress to prevent a departure from the published rates and schedules in any manner whatsoever. If this be not so, a wide door is opened to favoritism in the carriage of property, in the instances mentioned, free of charge.

*If it is lawful, in view of the provi- [533 sions of the interstate commerce act, to issue franks of the character under consideration in this case, then this right must be founded upon some exception incorporated in the act; and it is the contention of the learned counsel for the appellant that such exception is found in the proviso in § 1 of the Hepburn act. This section is given in part in the margin.†

*As originally reported, this act did [534 not apply to express companies. The section was originally framed with the intention of making a provision for railroad carriers. It is contended that the proviso brings common carriers within the exception of the act, and therefore necessarily includes the express companies. There is no doubt that a proviso has not infrequently been the means of introducing into a law independent legislation, notwithstanding it is the true office of a proviso to restrict the sense or make clear that which has gone before and which might be doubtful because of the generality of the language used. *United States v. Dickson*, 15 Pet. 141, 163, 10 L. ed. 689, 698. This court has had occasion to hold more than once that language used in provisos shows the legislative intention to bring in new matter rather than to limit or explain that which has gone before. *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174, 32 L. ed. 377, 9 Sup. Ct. Rep. 47; *Interstate Commerce Commission v. Baird*, 194 U. S.

†The term "common carriers" as used in this act shall include express companies and sleeping car companies.

No common carrier subject to the provisions of this act shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men's Christian Associations, inmates

25, 36, 37, 48 L. ed. 860, 865, 866, 24 Sup. Ct. Rep. 563.

While, therefore, a proviso may sometimes be construed as extending rather than limiting legislation, each statute must depend upon its own terms, and a proviso will be given such construction as is consistent with the legislation under construction.

Turning to § 1 of the Hepburn act, it is apparent that all that immediately precedes the proviso appertains to the carriage of passengers, for common carriers are forbidden to issue or give any free ticket, free pass, or free transportation *for passengers*, except to its employees, etc. Until we come to the proviso, the act is clearly thus limited. It is then enacted that this provision, that is, the previous part of the enactment, which refers only to the transportation of passengers, shall not be construed to prohibit the interchange of *passes* for the officers, agents, and employees of common carriers and their families, or to prohibit any common carrier from *carrying passengers* free in certain cases.

While it is true the language here used 535] has reference to common *carriers, and, by the terms of the Hepburn act, express companies are within that description, yet the proviso is as clearly limited to the carriage of passengers and the interchange of passes for officers, agents, and employees of common carriers and their families, as is the body of the section itself.

It is contended that this section, if limited to the carriage of passengers, was unnecessary in view of the concluding part of § 22 of the act of Feb. 4, 1887, 24 Stat. at L. 387, chap. 104 as amended by acts of March 2, 1889 [25 Stat. at L. 862, chap. 382] and February 8, 1895 [28 Stat. at L. 643, chap. 61, U. S. Comp. Stat. 1901, p. 3171], which provides: "Nothing in this act shall be construed to prevent railroads from giving free carriage to their own of-

ficers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees;" etc.

But we are to consider the language which Congress has used in passing a given law, and, when the language is plain and explicit, our only province is to give effect to the act as plainly expressed in its terms. We are clearly of the opinion that, without doing violence to the language used in § 1,—including the proviso—its terms cannot be held to include the transportation of goods.

It is very likely that there is no substantial reason why Congress should not extend to express companies, their officers, agents, and employees, corresponding privileges for free carriage of goods with those which are given to the officers, agents, and employees of railroad companies in respect to transportation of persons; but, if the law is defective in this respect, the remedy must be applied by Congress, and not by the courts.

We find no error in the decrees of the Circuit Court, and the same are affirmed.

*TEXAS & PACIFIC RAILWAY[536
COMPANY, Plff. in Err.,

v.

JONAS S. BOURMAN.

(See S. C. Reporter's ed. 536-542.)'

Master and servant — who are fellow servants — section hand and section foreman or engineer.

1. A railway engineer and a section foreman are both fellow servants of a section hand, so that the latter cannot recover from the railway company for injuries resulting from their negligence.

[For other cases, see Master and Servant, 136-140, in Digest Sup. Ct. 1908.]

of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute, and homeless persons, and to such persons when transported by charitable societies or hospitals, and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge, and boards of managers of such homes; to necessary caretakers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to railway mail service employees, postoffice inspectors, customs inspectors, and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in 53 L. ed.

which the common carrier is interested, persons injured in wrecks, and physicians and nurses attending such persons: Provided. That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor, and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty.

Appeal — prejudicial error — refusing requested instructions.

2. The refusal to instruct the jury as requested, that a railway engineer and a section foreman are both fellow servants of a section hand injured in attempting to alight from a moving train, and that, if such injury was caused by the negligence of either, the railway company is not liable, is reversible error, where the jury may well have based its verdict for plaintiff on the carelessness either of the section foreman or engineer.

[For other cases, see Appeal and Error, 5127-5135, in Digest Sup. Ct. 1908.]

[No. 56.]

Argued January 6, 7, 1909. Decided February 23, 1909.

IN ERROR to the United States Circuit Court of Appeals for the Fifth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Louisiana, in favor of plaintiff, in an action to recover damages for personal injuries alleged to be due to defendant's negligence. Reversed.

See same case below, 160 Fed. 452.

The facts are stated in the opinion.

Mr. Charles Payne Fenner argued the cause, and, with Mr. William Wirt Howe, filed a brief for plaintiff in error;

A section laborer and a locomotive engineer are fellow servants.

Louisville & N. R. Co. v. Stuber, 54 L.R.A. 696, 48 C. C. A. 149, 108 Fed. 934; Thom v. Pittard, 10 C. C. A. 352, 8 U. S. App. 597, 62 Fed. 232; Northern P. R. Co. v. Charless, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; Baltimore & O. R. Co. v. Camp, 13 C. C. A. 233, 31 U. S. App. 213, 65 Fed. 952; Martin v. Chicago & A. R. Co. 65 Fed. 384; Coulson v. Leonard, 77 Fed. 538.

Mr. Aldis B. Browne argued the cause, and, with Messrs. A. E. Livaudais, Albert Voorhies, Oliver S. Livaudais, and Alex-

NOTE.—As to who are fellow servants generally—see notes to *Sofield v. Guggenheim Smelting Co.* 50 L.R.A. 417; *Dixon v. Chicago & A. R. Co.* 18 L.R.A. 793; *Hough v. Texas & P. R. Co.* 25 L. ed. U. S. 612; *Coyne v. Union P. R. Co.* 33 L. ed. U. S. 651; *Quebec S. S. Co. v. Merchant*, 33 L. ed. U. S. 656; *Baltimore & O. R. Co. v. Baugh*, 37 L. ed. U. S. 773; *Central R. Co. v. Keegan*, 40 L. ed. U. S. 418; *Flippin v. Kimball*, 31 C. C. A. 286; and *Northern P. R. Co. v. Smith*, 8 C. C. A. 668.

As to railway engineer as fellow servant with other employees—see note to *Northern P. R. Co. v. Hambly*, 38 L. ed. U. S. 1009.

ander Britton, filed a brief for defendant in error:

It is difficult to imagine under what construction of the fellow-servant doctrine the defendant in error, Bourman, a laborer, could be considered a fellow servant of the person who had employed him and had the authority to discharge him.

Illinois C. R. Co. v. Josey, 110 Ky. 342, 54 L.R.A. 78, 96 Am. St. Rep. 455, 61 S. W. 703; *Wenona Coal Co. v. Holmquist*, 152 Ill. 590, 38 N. E. 946; *Patton v. Western North Carolina R. Co.* 96 N. C. 455, 1 S. E. 863.

Even admitting that the accident complained of was due to the fault or neglect of the foreman, conductor, or engineer, or to either of them, belonging to the company, having the train in charge, this case comes under the exception where the company cannot avoid responsibility, for the reason that they themselves participated in the negligence and contributed to the accident.

Quebec S. S. Co. v. Merchant, 133 U. S. 375, 33 L. ed. 656, 10 Sup. Ct. Rep. 397; *Brown v. Ohio & M. R. Co.* 138 Ind. 648, 37 N. E. 717, 38 N. E. 176; *McGinn v. McCormick*, 109 La. 402, 33 So. 382; *Hunn v. Michigan C. R. Co.* 78 Mich. 513, 7 L.R.A. 506, 44 N. W. 502; *Northern P. R. Co. v. Charless*, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; *Towns v. Vicksburg, S. & P. R. Co.* 37 La. Ann. 630, 55 Am. Rep. 508; *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377, 28 L. ed. 787, 5 Sup. Ct. Rep. 184; *Ellis v. New York, L. E. & W. R. Co.* 95 N. Y. 546.

The defendant, Bourman, cannot be said to have been guilty of negligence in leaving the train in the manner shown by the evidence, nor can he be held accountable for having done so, for the reason that in so doing, he was following the instructions of his superior, the vice principal of the company, his employer; and, to be made guilty of negligence in obeying said order, it must be shown that he voluntarily and unnecessarily exposed himself to the danger.

Potts v. Shreveport Belt R. Co. 110 La. 1, 98 Am. St. Rep. 452, 34 So. 103; *Ballard v. Chicago, R. I. & P. R. Co.* 51 Mo. App. 453; *Northern P. R. Co. v. Egeland*, 5 C. C. A. 471, 12 U. S. App. 271, 56 Fed. 200.

It was the duty of the master to establish rules, which, if observed, would afford reasonable protection to the employees in the performance of their respective duties. Failure to do so is negligence; and for injuries to an employee resulting from such failure of duty the master is liable.

4 Am. & Eng. Enc. Law, pp. 101, 120.

Mr. Justice **Moody** delivered the opinion of the court:

The defendant in error, hereafter called the plaintiff, brought an action in the circuit court of the United States against the plaintiff in error, hereafter called the defendant, to recover damages for injuries alleged to have been suffered through the defendant's negligence. The plaintiff had a verdict, which was affirmed by the circuit court of appeals, and, under existing statutes regulating the jurisdiction of this court, the defendant, because it is incorporated under a law of the United States, has a further appeal, and brings the judgment here by writ of error.

The facts of the case are few and simple. The plaintiff was a section hand employed by the defendant, and working under direction of a foreman named Hadnott. The plaintiff, with others, had been employed under Hadnott's direction in clearing up a wreck near a flag station on the defendant's road. When the work was finished the men were taken aboard an express 539]*passenger train, known as the Cannon Ball, to be conveyed to Waggaman, a regular station on the road, where they lived. The express ordinarily did not stop at Waggaman, but simply slowed down to take on the mail. The conductor, however, directed the engineer to stop on this occasion and let the section hands off, and the train did in fact stop at Waggaman, though whether as the result of the order or of the injury to the plaintiff was in dispute. As the train approached Waggaman the men were standing on the steps of the car, ready to alight, and the train was slackening its speed. The plaintiff was on the lower step. What happened is shown by the plaintiff's testimony. He said:

"I stood all the time on the platform. The train blew for the station. When she blew we all got on the steps with our tools in our hands. She was slackening up speed. I was on the lower step, holding on to the rod of the step. That was the way to get off when we was to get off at the depot. The foreman said: 'Boys, throw your tools off, and let us get off.' That was before she got to the station; and when she slackened up, she slackened up slow enough for anybody to get off, and when I went to get off she jerked; and I grabbed, and the engineer put more speed to the engine, and that threw me down and I could not let go, and she dragged me along until I got weak in the arms, and let go. She was running slow and she slackened up speed, and then she let go again and she made a jerk. After she slackened she started up again. I held on until I lost my grip and could not hold on any more. I fell, going under, and the wheel

run over my leg. The conductor hallowed to the engineer to back up the train. He said: 'He ought to be satisfied.'"

On cross-examination he testified as follows:

Q. Did he (the foreman) speak to you?

A. No, sir; he did not.

Q. He said nothing to you at all?

A. When we were on the way coming we were all speaking, but when the train slackened up—when they blew the whistle for the train to stop at the depot, he told us, "Boys, get your tools, we will get off."

*Q. That was while she was slack-[540 ing up?

A. Yes, sir.

Q. You say that you jumped when the train slowed at the depot?

A. Yes, sir.

Q. That was before it stopped?

A. She was not going to stop there at all.

Q. You did not know that, that is, before she stopped?

A. Well, she did not stop at all.

Q. You jumped while the train was moving?

A. Yes, sir.

Q. Then you say that the train started up suddenly?

A. Yes, sir; at the time I was getting off, she jerked before I jumped loose.

Q. Do you think it would have been the same, that you would have been hurt if the train had not started again?

A. No, sir; I do not think it would.

The petition, which was very inartificially drawn, does not clearly state the ground upon which the plaintiff sought to hold the defendant liable. It states generally that "said misfortune" was "due to the fault and negligence of the said defendants;" that the plaintiff was "entitled to a safe transport" to Waggaman; and that the "train being about to pass the station, your petitioner had no further alternative than, when ordered by his foreman, to jump from the moving train, which just then increased its speed."

The answer denied the allegations of the petition, and averred that, if the plaintiff was injured, it was by his own voluntary act in jumping from the train, or through the negligence of one or the other of his fellow servants,—the section foreman or the conductor and engineer of the train.

But, passing the question of pleadings, upon which nothing seems to have turned below, we consider the case as it appears from the evidence. Since the plaintiff jumped from the train in obedience to a suggestion, if not an order, of his immediate superior, the section foreman, the jury

might have found that the plaintiff reasonably thought he could rely upon the judgment of the section foreman, and that, under the circumstances, the plaintiff's act was not so obviously reckless and dangerous 541]*as to constitute contributory negligence Northern P. R. Co. v. Egeland, 163 U. S. 93, 41 L. ed. 82, 16 Sup. Ct. Rep. 975. It becomes necessary, then, to consider the negligence of the defendant. The evidence discloses two possible grounds upon which a recovery might be rested; first, carelessness of the section foreman in directing the plaintiff to jump when he did; second, carelessness of the engineer in suddenly starting up the train after it had slowed down. These two possible causes of the plaintiff's injury were distinctly before the jury, and the defendant had the right to appropriate instructions upon the issues thus raised. The jury may well have based its verdict on either the carelessness of the section foreman or the carelessness of the engineer. Indeed, it is difficult to see any other theory upon which the verdict was rendered. It may be, as thought by the circuit court of appeals, that the instructions to the jury were academically correct, so far as they went, but they omitted to cover vitally important aspects of the case and were therefore insufficient.

The presiding judge refused to instruct the jury as requested by the defendant, that the engineer and the section foreman were, respectively, fellow servants of the plaintiff, and that, if the injury occurred through the negligence of either, the plaintiff was not entitled to recover. We think these instructions should have been given. Both the engineer and the section foreman were fellow servants of the plaintiff; and, if the plaintiff's injury was caused by the negligence of either, the law, as it many times has been declared by this court, will not permit a recovery. *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 37 L. ed. 772, 13 Sup. Ct. Rep. 914; *Northern P. R. Co. v. Hambly*, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; *Central R. Co. v. Keegan*, 160 U. S. 259, 40 L. ed. 418, 16 Sup. Ct. Rep. 269; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Northern P. R. Co. v. Charless*, 162 U. S. 359, 40 L. ed. 999, 16 Sup. Ct. Rep. 848; *Martin v. Atchison, T. & S. F. R. Co.* 166 U. S. 399, 41 L. ed. 1051, 17 Sup. Ct. Rep. 603; *Alaska Treadwell Gold Min. Co. v. Whelan*, 168 U. S. 86, 42 L. ed. 390, 18 Sup. Ct. Rep. 40; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. ed. 181, 20 Sup. Ct. Rep. 85; *Northern P. R. Co. v. Dixon*, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683.

The case of *Northern P. R. Co. v. Egeland*,

supra, which evidently was misunderstood in the court below, is not *in any[542 way inconsistent with the foregoing cases. The fellow-servant doctrine was not there considered by the court. The plaintiff in that case was a section hand, who received injuries by jumping from a moving train in obedience to the order of the conductor. The only question before this court was whether the act of the plaintiff was, in itself, as matter of law, contributory negligence, and it was held that, under the circumstances disclosed in the evidence, it was proper to submit the question of contributory negligence to the jury. It does not appear in that case what was the negligence for which the plaintiffs sought to hold the defendant responsible. In the trial court the defendant made two requests: First, that no negligence on the part of the defendant was shown; and, second, that the plaintiff was guilty of such contributory negligence that he could not recover. The defendant saw fit to bring to this court only the question of contributory negligence; and the opinion of the court expressly stated that the discussion would be confined to that question alone. An examination of the case, as it was exhibited to the circuit court of appeals, discloses that contributory negligence was the only question passed upon by that court. 5 C. C. A. 471, 12 U. S. App. 271, 56 Fed. 200.

Judgment reversed.

TOY TOY, Appt.,
v.

C. B. HOPKINS, United States Marshal for the Western District of Washington.

(See S. C. Reporter's ed. 542-549.)

Habeas corpus — as substitute for writ of error.

Habeas corpus will not be issued as a substitute for a writ of error on behalf of one convicted in a Federal circuit court under an indictment charging the murder of one Indian by another, upon an Indian reservation, on the ground that such court was without jurisdiction because in fact the accused was a citizen of the United States, and the place of the crime, by reason of allotment and patent, had ceased to be a part of the reservation.

[For other cases, see *Habeas Corpus*, I. b, 3, in Digest Sup. Ct. 1908.]

[No. 49.]

NOTE. — On habeas corpus in the Federal courts—see notes to *Re Reinitz*, 4 L.R.A. 236; *State ex rel. Cochran v. Winters*, 10 L.R.A. 616; *Re Huse*, 25 C. C. A. 4; and *Tinsley v. Anderson*, 43 L. ed. U. S. 91.

Argued December 9, 1908. Decided February 23, 1909.

APPEAL from the Circuit Court of the United States for the Western District of Washington to review a decree denying an application for habeas corpus on behalf of a person convicted under an indictment charging the murder of one Indian by another, on an Indian reservation. Affirmed.

The facts are stated in the opinion.

Mr. A. E. Crane argued the cause, and, with Mr. F. T. Woodburn, filed a brief for appellant:

A void judgment may be impeached in a collateral action.

Re Heff, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506; Re Cuddy, 131 U. S. 280, 286, 33 L. ed. 154, 157, 9 Sup. Ct. Rep. 103; Kilbourn v. Thompson, 103 U. S. 168, 197, 198, 26 L. ed. 377, 390; Basso v. United States, 40 Ct. Cl. 202; Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 839; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Perry v. St. Joseph & W. R. Co. 29 Kan. 423; Griffith v. Frazier, 8 Cranch, 23, 3 L. ed. 475; Scott v. McNeal, 154 U. S. 34, 38 L. ed. 896, 14 Sup. Ct. Rep. 1108; Thompson v. Tolmie, 2 Pet. 157, 163, 7 L. ed. 381, 383; Wise v. Withers, 3 Cranch, 331, 337, 2 L. ed. 457, 459; Rose v. Himely, 4 Cranch, 241, 268, 2 L. ed. 608, 617; Cooper v. Newell, 173 U. S. 555, 43 L. ed. 808, 19 Sup. Ct. Rep. 506; Dow v. Johnson, 100 U. S. 158, 25 L. ed. 632.

If the circuit court had no jurisdiction of the subject-matter of the action, the acts and conduct of the petitioner could not give it jurisdiction. Jurisdiction can only be conferred by the sovereign authority which organizes the court. A void judgment cannot be the basis of an estoppel.

State v. Jennings, 24 Kan. 654; Gruner v. United States, 11 How. 163, 13 L. ed. 617; McKinnon v. Hall, 10 Colo. App. 291, 50 Pac. 1052; Cooper v. Reynolds, 10 Wall. 316, 19 L. ed. 932; Dicks v. Hatch, 10 Iowa, 380; Springer v. Shavender, 118 N. C. 33, 33 L.R.A. 775, 54 Am. St. Rep. 708, 23 S. E. 976; Savage v. Sternberg, 19 Wash. 679, 67 Am. St. Rep. 751, 54 Pac. 611.

A judgment rendered by a court which has no jurisdiction of the subject-matter is void, and can be impeached in any action in which it is drawn in question, although not reversed.

Elliott v. Peirsol, 1 Pet. 328, 7 L. ed. 164; Wilcox v. Jackson, 13 Pet. 511, 10 L. ed. 270; Dicks v. Hatch, 10 Iowa, 384; Murray v. American Surety Co. 17 C. C. A. 138, 44 U. S. App. 43, 70 Fed. 341; Re Nielsen, 131 U. S. 176, 182, 33 L. ed. 118, 120, 9 Sup. Ct. Rep. 672.

The petitioner's failure to appeal would not give the court jurisdiction of the offense or make the judgment valid.

Elliott v. Peirsol and Wilcox v. Jackson, supra; Hickey v. Stewart, 3 How. 751, 762, 11 L. ed. 814, 819; Williamson v. Berry, 8 How. 495, 543, 12 L. ed. 1170, 1190; Latham v. Edgerton, 9 Cow. 229.

The jurisdiction of a court can never depend upon its own decision upon the merits of a case brought before it.

Basso v. United States, 40 Ct. Cl. 213; Perry v. St. Joseph & W. R. Co. supra; Thompson v. Whitman, 18 Wall. 457, 21 L. ed. 897; Griffith v. Frazier, 8 Cranch, 23, 3 L. ed. 475; Wise v. Withers, 3 Cranch, 331, 2 L. ed. 457; Rose v. Himely, 4 Cranch, 241, 2 L. ed. 608; Dow v. Johnson, 100 U. S. 158, 25 L. ed. 632; Re Mayfield, 141 U. S. 107, 35 L. ed. 635, 11 Sup. Ct. Rep. 939; Re Cuddy, 131 U. S. 280, 33 L. ed. 154, 9 Sup. Ct. Rep. 703.

If it be once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force.

Old Wayne Mut. Life Asso. v. McDonough, 204 U. S. 16, 51 L. ed. 348, 27 Sup. Ct. Rep. 236.

Solicitor General Hoyt argued the cause and filed a brief for appellee:

The writ of habeas corpus cannot be made to perform the functions of a writ of error.

Re Eckart, 166 U. S. 481, 485, 41 L. ed. 1085, 1087, 17 Sup. Ct. Rep. 638; Dimmick v. Tompkins, 194 U. S. 540, 552, 48 L. ed. 1110, 1115, 24 Sup. Ct. Rep. 780; Riggins v. United States, 199 U. S. 547, 548, 50 L. ed. 303, 304, 26 Sup. Ct. Rep. 147; Valentina v. Mercer, 201 U. S. 131, 138, 50 L. ed. 693, 695, 26 Sup. Ct. Rep. 368; Felts v. Murphy, 201 U. S. 123, 129, 50 L. ed. 689, 692, 26 Sup. Ct. Rep. 366; Re Lincoln, 202 U. S. 178, 182, 50 L. ed. 984, 986, 26 Sup. Ct. Rep. 602.

The various proceedings instituted to secure the liberty of this appellant hardly reveal bona fides, and, as there is nothing in this record to disclose that there were any special circumstances which justified a departure from the regular course of judicial procedure (Riggins v. United States, 199 U. S. 547, 551, 50 L. ed. 303, 305, 26 Sup. Ct. Rep. 147), this appeal should be dismissed or the judgment below affirmed.

The general rule is that a void judgment may not be impeached collaterally. There

are, it is true, certain exceptions, if there was no jurisdiction and the judgment was void. But those exceptions are not unlimited.

United States v. Chandler-Dunbar Water Power Co. 209 U. S. 447, 52 L. ed. 881, 28 Sup. Ct. Rep. 579; Louisiana v. Garfield, 211 U. S. 70, ante, 92, 29 Sup. Ct. Rep. 31.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

Toy Toy and Columbia George, both Indians of the Umatilla tribe, were jointly indicted in a state court in Oregon for the crime of murder in the first degree, committed on an Indian woman on the United States Indian reservation in Umatilla county, Oregon; were separately tried and convicted, and each sentenced to death. Columbia George appealed from the judgment of conviction on the ground, among others, that the state court was without jurisdiction, inasmuch as the crime was committed by Indians upon an Indian, on an Indian reservation, and that it was therefore within the exclusive jurisdiction of the Federal courts. In a careful opinion by Wolverton, J., the supreme court of the state of Oregon upheld this contention, and, reversing the judgment of the trial court, ordered the discharge **547***of the defendant. State v. Columbia George, 39 Or. 127, 65 Pac. 604. Thereupon defendants were indicted under § 5339 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3627) in the circuit court of the United States for the district of Oregon, regularly tried and convicted of murder (without capital punishment), and sentenced to imprisonment for the term of their natural lives.

At October term, 1905, application was made to this court for leave to file a petition for the writ of habeas corpus, which was denied March 5, 1906, 201 U. S. 641, 50 L. ed. 901, 26 Sup. Ct. Rep. 759. Thereafter a petition for writ of habeas corpus on behalf of Toy Toy only was filed in the circuit court of the United States for the western district of Washington. That court denied the petition, and the case is now before this court on appeal.

The indictment in this case charged Columbia George and Toy Toy, Indians, with the murder of Annie Edna, an Indian woman, upon the Umatilla reservation, within the state and district of Oregon.

On the face of the record the United States circuit court for the district of Oregon, in which these Indians were last tried and convicted, had jurisdiction of the offense and of the defendants. They were tried, found guilty, and sentenced to the penitentiary for life. Five years thereafter Toy Toy applied for the writ of habeas cor-

pus, and alleged that the indictment, arraignment, trial, judgment, sentence, and commitment were wholly null and void for want of jurisdiction over subject-matter and person. The petition alleged:

"That the place where said Annie Edna was killed was a tract of land which had once been a part of the Umatilla Indian reservation, in the state of Oregon, but that long prior to and at the time of the death of the said Annie Edna the said tract of land had been allotted to one Tatzhammer, and a patent for the said land had been duly issued to her by the United States, as a member of the Umatilla tribe of Indians. And that the said premises whereon said Annie Edna was killed, by reason of said allotment and patent, ceased to be Indian country, and ceased to be a part of the said Umatilla Indian reservation *in Oregon. That on the 16th day of **548** September, 1899, your petitioner, who was, prior thereto, a member of the Umatilla tribe of Indians, received an allotment of land from what had theretofore been a part of the Umatilla Indian reservation in Oregon, and received from the United States a preliminary patent for said allotment, and by reason of said allotment and patent of land, and by virtue of the act of Congress approved February 8, 1887 [24 Stat. at L. 388, chap. 119], your petitioner became, and, at the time of the killing of the said Annie Edna, on the 24th day of August, 1900, was, and at all times since has been, a citizen of the United States and of the state of Oregon, and subject to its laws.

"Your petitioner further states that he was born within the territorial limits of the United States, and that, at the time of the killing of the said Annie Edna, your petitioner had voluntarily taken up, within the limits of the United States, his residence, separate and apart from the Umatilla tribe of Indians, and had adopted the habits of civilized life, and that, for all of the reasons heretofore given, the act of Congress of March 3, 1885, is unconstitutional and void when applied to the facts herein set out."

If such were the facts, and they made out a want of jurisdiction under the applicable statutes, which, on the merits, we do not hold, the circuit court, nevertheless, was authorized to hear and pass upon those questions in the first instance, and its decision was open to review in the appellate court by writ of error. But it could not be attacked collaterally as absolutely void, and habeas corpus cannot be availed of as a writ of error.

"It is rarely that things are wholly void and without force and effect as to all persons and for all purposes, and incapable of being made otherwise. Things are void-

able which are valid and effectual until they are avoided by some act; while things are often said to be void which are without validity until confirmed. 8 Bacon, Abr., 'Void' and 'Voidable;' *Ewell v. Daggs*, 108 U. S. 143, 27 L. ed. 682, 2 Sup. Ct. Rep. 408;" *Weeks v. Bridgman*, 159 U. S. 541, 547, 40 L. ed. 253, 255, 16 Sup. Ct. Rep. 72, 74; *Louisville Trust Co. v. Cominger*, 184 U. S. 18, 25, 46 L. ed. 413, 416, 22 Sup. Ct. Rep. 293, 296. In the latter case we said, among other things:

549] "Jurisdiction as to the subject-matter may be limited in various ways, as to civil and criminal cases; cases at common law or in equity or in admiralty; probate cases, or cases under special statutes; to particular classes of persons; to proceedings in particular modes; and so on. In many cases jurisdiction may depend on the ascertainment of facts involving the merits; and in that sense the court exercises

jurisdiction in disposing of the preliminary inquiry, although the result may be that it finds that it cannot go farther. And where, in a case like that before us, the court erroneously retains jurisdiction to adjudicate the merits, its action can be corrected on review."

And see *United States v. Shipp*, 203 U. S. 573, 51 L. ed. 323, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265.

We are of opinion that the circuit court was right in denying the application for the writ of habeas corpus, and that its final order must be affirmed.

It is true that the writ was granted in the case of *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506, but the explanation of that case, given in the case of *Re Lincoln*, 202 U. S. 178, 50 L. ed. 984, 26 Sup. Ct. Rep. 602, deprives it of any weight here.

Final order affirmed.

MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

551]*HERMAN BILIK, Appellant, v. CHRISTOPHER STRASSHEIM, Sheriff of Cook County, Ill. [No. 445.]

Appeal—from circuit court—habeas corpus—certificate of probable cause.

Appeal from the Circuit Court of the United States for the Northern District of Illinois to review a decree dismissing the petition for a Writ of Habeas Corpus to inquire into a detention by virtue of a judgment and sentence of the Criminal Court of Cook County, in the state of Illinois.

Messrs. E. C. Lindley and James J. Barbour, for appellee, moved to dismiss because of the absence of the certificate of probable cause for the appeal, required by the act of Congress of March 19, 1908.

Mr. S. S. Gregory, for appellant, suggested that the order of the Circuit Court staying all proceedings in the state court until final determination of the appeal, and until further order of the Circuit Court, was the equivalent of such certificate.

October 19, 1908. Dismissed for want of jurisdiction.

552]*ST. LOUIS SOUTHWESTERN RAILWAY COMPANY OF TEXAS, Plaintiff in Error, v. CITY OF TYLER, TEX. et al. [No. 159.]

Error to state court—Federal question—decision on non-Federal ground.

In Error to the Supreme Court of the State of Texas, to review a decree which, reversing in part a decree of the Court of Civil Appeals of that state, which had affirmed a decree of the District Court for Smith County, ordered the specific performance of an agreement to maintain railway general offices and machine shops in the city of Tyler, and enjoined their threatened removal over defendant's objection that, by reason of its purchase under a foreclosure decree of a Federal court, it held its property free from any contract obligation of that character.

See same case below, 99 Tex. 491, 91 S. W. 1; on rehearing, 93 S. W. 997.

53 L. ed.

Messrs. Newton Webster Finley, Hiram Glass, and E. B. Perkins for plaintiff in error.

Messrs. Cone Johnson, Horace Chilton, Ben D. Cain, and James M. Edwards for defendants in error.

October 26, 1908. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. Eustis v. Bolles, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; Moran v. Horsky, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856; Johnson v. Risk, 137 U. S. 300-307, 34 L. ed. 683-686, 11 Sup. Ct. Rep. 111; Chicago & A. R. Co. v. Wiggins Ferry Co. 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300.

UNITED STATES AND THE CHEROKEE NATION, Appellants, v. JOHN J. HEMPHILL and Kenneth S. Murchison. [No. 529.]

Appeal—from court of claims—on behalf of government.

Appeal from the Court of Claims to review an award for professional services and expenses incurred in the matter of the enrolment of persons claiming right by intermarriage in the Cherokee nations.

*The Attorney General, Assistant Attorney General John Q. Thompson, and Messrs. George M. Anderson and William W. Hastings for appellants.

Messrs. John J. Hemphill and Kenneth S. Murchison for appellees.

November 2, 1908. *Per Curiam*: Appeal dismissed for want of jurisdiction. 34 Stat. at L. 340, chap. 3504; Ex parte Atocha (Ex parte United States) 17 Wall. 439, 21 L. ed. 696; Rev. Stat. § 707, U. S. Comp. Stat. 1901, p. 574.

ADOLPHUS COULSON, Plaintiff in Error, v. GOVERNMENT OF THE CANAL ZONE. [No. 187.]

Error to Supreme Court of Canal Zone—jurisdiction.

In Error to the Supreme Court of the Canal Zone of the Isthmus of Panama to review a judgment which affirmed a conviction of murder in the Circuit Court of the Second Judicial Circuit of the Canal Zone.

Messrs. Moorfield Storey, P. P. Hillerman, and Franklin E. Brooks for the plaintiff in error.

The Attorney General and the Solicitor General for the defendant in error.

November 9, 1908. Writ of Error dismissed for want of jurisdiction.

EX PARTE: IN THE MATTER OF ADOLPHUS COULSON, Petitioner. [No. —, Original.]

Motion for leave to file a petition for Writs of Habeas Corpus and Certiorari.

Mr. Moorfield Storey for petitioner.

554] *The Solicitor General, in opposition.

November 9, 1908. Denied.

EX PARTE: IN THE MATTER OF CARL HARDBAT, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a writ of habeas corpus.

Mr. Frederick S. Tyler for petitioner.

November 16, 1908. Denied.

EX PARTE: IN THE MATTER OF THE CHESAPEAKE & OHIO RAILWAY COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a writ of mandamus.

Messrs. F. B. Enslow, J. L. Baumgardner, and Herbert Fitzpatrick for petitioner.

Mr. Edward W. Knight, in opposition.

November 16, 1908. Denied.

555]*EX PARTE ALBERT T. PATRICK, Complainant, Appellant. [No. 491.]

Appeal—from circuit court—habeas corpus—certificate of probable cause.

Appeal from the Circuit Court of the United States for the Southern District of New York to review a decree dismissing the petition for a writ of habeas corpus to inquire into a detention by virtue of a conviction of murder in the Supreme Court of the State of New York in and for the County of New York.

Messrs. Albert T. Patrick and William L. McDonsals for appellant.

Mr. Robert C. Taylor, by special leave of court, for the state of New York.

November 16, 1908. Appeal dismissed for want of jurisdiction. Act of March 10,

1908, 35 Stat. at L. 40, chap. 76; Bilik v. Strassheim, decided October 19, 1908 (212 U. S. 551, ante, 649, 29 Sup. Ct. Rep. 684). Application for writ of habeas corpus denied.

WATER, LIGHT, & GAS COMPANY, Appellant, v. CITY OF HUTCHINSON et al. [No. 21.]

Municipal corporations—powers—grant of exclusive franchise.

Appeal from the Circuit Court of the United States for the District of Kansas to review a decree dismissing on demurrer a bill to enjoin a municipality from interfering with an alleged exclusive lighting franchise.

Messrs. John F. Dillon, Harry Hubbard, Frank Doster, H. Whiteside, and *How—[556 and S. Lewis for appellant.

Messrs. A. C. Malloy and Max Pam for appellees.

November 16, 1908. Affirmed with costs, on authority of *Water, Light, & Gas Co. v. Hutchinson*, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135.

WESTERN LOAN & SAVINGS COMPANY, Plaintiff in Error, v. COLORADO SMELTING & MINING COMPANY. [No. 581.]

Federal courts—proper district for suit—waiver.

In Error to the Circuit Court of the United States for the District of Montana to review a judgment dismissing, for want of jurisdiction, a suit between corporations of different states because neither was a resident of the district.

Mr. John A. Shelton for plaintiff in error.

No appearance for defendant in error.

November 16, 1908. Judgment reversed with costs, and cause remanded on authority of *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720.

RAFAEL *ENRIQUEZ, Adm'r, etc., Plain-[557 tiff in Error, v. A. S. WATSON & Co., LIMITED. [No. 5.]

Appeal—amount in controversy—case involving real property—lease.

In Error to the Supreme Court of the Philippine Islands to review a judgment which reversed a judgment of the Court of First Instance of the City of Manila, ejecting defendants from certain premises for nonpayment of rent, and ordering judgment against them in the sum of 29,200 pesos (\$14,600) for the use and occupation of the premises, and directed the entry of judgment in favor of defendants.

See same case below, 6 Philippine, 84.

Messrs. A. B. Browne, Alexander Britton, and William A. Kindcaid for defendant in error:

The jurisdictional amount is not involved. To calculate the alleged balance of rent down to the date of the judgment below and, on that basis, assert the jurisdictional amount existing here, is in direct contradiction of the settled rule. *Hollander v. Fecheimer*, 162 U. S. 326; *New England Mortgage Co. v. Gay*, 145 U. S. 123.

Messrs. J. H. Ralston and F. L. Siddons for plaintiff in error:

The judgment below is an absolute adjudication with reference to all the rents which might have accrued up to this date, and not merely something to be invoked, as establishing the law of the case in the event of a suit for rents to accrue after the date of the action.

November 16, 1908. Dismissed for want of jurisdiction.

AMERICAN SURETY COMPANY OF NEW YORK,
Plaintiff in Error, v. **AKRON SAVINGS BANK COMPANY et al.** [No. 19.]
Subrogation—of surety—to government's right of priority.

In Error to the Supreme Court of the State of Ohio to review a judgment which affirmed a judgment of the Circuit Court of Summit County, in that state, affirming a judgment of the Court of Common Pleas of that county adverse to the contention that the obligation of an insolvent savings bank, designated as the depository of the funds of a bankrupt estate, to the surety on its bond, made payable to the United States, was a preferred claim, as being a debt due to the United States, which the surety had paid.

See same case below, 74 Ohio St. 465, 78 N. E. 1116.

Messrs. Frederic D. McKenney, J. Spalding Flannery, and H. C. Wilcox for plaintiff in error.

Mr. John C. Gittings for defendants in error.

November 30, 1908. *Per Curiam*: Judgment affirmed with costs without opinion.

558]*PHOENIX CONSTRUCTION COMPANY, Appellant, v. STEAMER POUGHKEEPSIE, etc. [No. 401.]

Admiralty jurisdiction—maritime tort.

Appeal from the District Court of the United States for the Southern District of New York to review a decree dismissing, for want of jurisdiction, a libel *in rem* against a vessel for injuries inflicted by such vessel upon certain borings made in the Hudson river for the purpose of locating a tunnel aqueduct under the bed of such river.

See same case below, 162 Fed. 494.

53 L. ed.

Mr. E. Crosby Kindleberger for appellant.
Mr. J. Parker Kirlin for appellees.

November 30, 1908. *Per Curiam*: Decree affirmed with costs. *Cleveland Terminal & Valley R. Co. v. Cleveland S. S. Co.* 208 U. S. 316, 52 L. ed. 508, 28 Sup. Ct. Rep. 414; *The Troy*, 208 U. S. 321, 52 L. ed. 512, 28 Sup. Ct. Rep. 416.

SARAH Z. ABRAMS, Appellant, v. ELIZABETH WHITE et al. [No. 176.]

Direct appeal—from circuit court—jurisdiction below.

Appeal from the Circuit Court of the United States for the District of Idaho to review a decree dismissing, for want of jurisdiction, a bill to set aside the proceedings in the Probate Court of Nez Percé County, in that state, and certain deeds and conveyances based upon the orders and decrees of such court.

Mr. Frank E. Fogg for appellant.

Messrs. A. B. Browne and Alexander Britton for appellees.

November 30, 1908. *Per Curiam*: Appeal dismissed for want of jurisdiction. *Kansas City Northwestern R. Co. v. Zimmerman*, 210 U. S. 336, 52 L. ed. 1084, 28 Sup. Ct. Rep. 730.

M. E. *THORNTON et al., Plaintiffs in Error, v. MAYOR AND BOARD OF ALDERMEN OF THE CITY OF NATCHEZ et al. [No. 462.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancery Court of Adams County, in that state, sustaining a demurrer to and dismissing a bill in a suit to enforce a resulting trust in which the complainants invoked the protection of the contract and due process of law clauses of the Federal Constitution.

See same case below, 88 Miss. 1, 41 So. 498.

Mr. Wade R. Young for plaintiffs in error.

Mr. Robert H. Thompson for defendants in error.

November 30, 1908. *Per Curiam*: Writ of error dismissed for want of jurisdiction. *Thornton v. Natchez*, 88 Miss. 1, 41 So. 498; *Thornton v. Natchez*, 63 C. C. A. 526, 129 Fed. 86, 87; Writ of Certiorari denied in 197 U. S. 620, 49 L. ed. 909, 25 Sup. Ct. Rep. 797; *Harrison v. Myer*, 92 U. S. 116, 23 L. ed. 606; *Moran v. Horsky*, 178 U. S. 205, 44 L. ed. 1038, 20 Sup. Ct. Rep. 856; *New Orleans Waterworks Co. v. Louisiana Sugar Ref. Co.* 125 U. S. 18, 31 L. ed. 607, 8 Sup. Ct. Rep. 741; *St. Paul Gaslight Co. v. St. Paul*, 181 U. S. 142, 148, 45 L. ed. 788, 791, 21 Sup. Ct. Rep. 575; *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; *Winona & St. P. R. Co. v.*

Plainview, 143 U. S. 371, 390, 36 L. ed. 191, 199, 12 Sup. Ct. Rep. 530; Hammond v. Johnston, 142 U. S. 73, 35 L. ed. 941, 12 Sup. Ct. Rep. 141.

ALEXANDER D. SHAW et al., etc., Appellants, v. UNITED STATES. [No. 426.]

Direct appeal from circuit court—Federal questions.

Appeal from the Circuit Court of the United States for the Southern District of New York to review a decree which affirmed a decision of the Board of United States General Appraisers, affirming the action of a collector of customs in refusing an allowance for a shortage in an importation of wine from Spain in excess of normal leakage. Objections raised below were that the proviso to § 296 of the tariff act of July 24, 1897, if forbidding such allowance, violated the uniformity clause of U. S. Const. art. 1, § 8, and that the operation of such proviso was suspended by the reciprocal commercial agreement between Spain and the United States, proclaimed Aug. 27, 1906.

See same case below, 158 Fed. 648.

Messrs. Edward S. Hatch and Walter F. Welch for appellants.

The Attorney General and the Solicitor General for appellee.

November 30, 1908. *Per Curiam*: Appeal dismissed for want of jurisdiction. Alexander D. Shaw & Co. v. United States, 141 Fed. 469, 75 C. C. A. 291, 144 Fed. 329, 203 U. S. 591, 51 L. ed. 331, 27 Sup. Ct. Rep. 779; American Sugar Ref. Co. v. United States, No. 3 of this term, decided to-day. (211 U. S. 155, ante, 129, 29 Sup. Ct. Rep. 89.)

PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error, v. GEORGE W. LIGTHEISER [No. 141]; PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error, v. THOMAS COLLINS [No. 142], PITTSBURGH, CINCINNATI, CHICAGO, & ST. LOUIS RAILWAY COMPANY, Plaintiff in Error, v. WILLIAM R. ROSS [No. 178].

Error to state court—want of merit in Federal questions—validity of statute abolishing fellow-servant rule.

Three Writs of Error to the Supreme Court of the State of Indiana to review judgments which affirmed judgments of the Cass and Howard Circuit Courts of that state in favor of railway employees in actions to recover damages for personal injuries due to the negligence of fellow servants, in which the repugnancy to the Federal Constitution of the Indiana employers' liability act, abolishing the fellow-servant

rule in favor of railway employees, was asserted.

See same case below, No. 141, 168 Ind. 438, 78 N. E. 1033; No. 142, 168 Ind. 467, 80 N. E. 415; No. 178, 169 Ind. 3, 80 N. E. 845.

Mr. Allen Zollars for plaintiff in error.

Mr. Stewart T. McConnell for defendants in error.

December 7, 1908. **Per Curiam*: [561] Writs of Error severally dismissed for want of jurisdiction. Tullis v. Lake Erie & W. R. Co. 175 U. S. 348, 44 L. ed. 192, 20 Sup. Ct. Rep. 136; Pittsburgh, C. C. & St. L. R. Co. v. Lighthouse, 168 Ind. 438, 78 N. E. 1033; Pittsburgh, C. C. & St. L. R. Co. v. Collins, 168 Ind. 467, 80 N. E. 415; Pittsburgh, C. C. & St. L. R. Co. v. Ross, 169 Ind. 3, 80 N. E. 845.

EX PARTE: IN THE MATTER OF J. A. JONES, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Mandamus.

Mr. S. P. Jones for petitioner.

December 14, 1908. Denied.

W. A. GAINES & COMPANY, Plaintiff in Error, v. C. A. KNECHT & SON. [No. 52.] Appeal—final judgment—trademark cases.

In Error to the Court of Appeals of the District of Columbia to review a judgment which affirmed the decision of the Commissioner of Patents in proceedings arising under an application for a trademark, and ordered that "this decision and the proceedings in this court be certified to the Commissioner of Patents, as required by law."

See same case below, 27 App. D. C. 530.

*Messrs. James L. Hopkins, Daniel W. Lindsey, Alfred A. Eicks, and William Nevarre Cromwell for plaintiff in error.

Mr. Arthur E. Wallace for defendant in error.

December 14, 1908. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. Frasc v. Moore, 211 U. S. 1, ante, 65, 29 Sup. Ct. Rep. 6. See act of February 20, 1905, for the registration of trademarks, 33 Stat. at L. 724, chap. 592, §§ 9, 16-19 et passim, U. S. Comp. Stat. Supp. 190 p. 1008.

E. E. CLEVINGER, Trustee in Bankruptcy etc., Appellant, v. ALLEN CHANEY [No. 221]; E. E. CLEVINGER, Trustee in Bankruptcy, etc., Appellant, v. JAMES D. LYLE [No. 222]; E. E. CLEVINGER, Trustee in Bankruptcy, etc., Appellant, v. EMILY M. NICHOLS [No. 223].

Appeal—from circuit court of appeals—bankruptcy case.

Three appeals from the United States Circuit Court of Appeals for the Sixth Circuit

to review decrees which affirmed decrees of the District Court for the Southern District of Ohio, allowing certain claims against a bankrupt estate.

See same case below, 84 C. C. A. 561, 157 Fed. 57.

Messrs. E. E. Clevenger and Cook Danford for appellant.

Mr. A. H. Mitchell for appellees.

December 14, 1908. *Per Curiam*: Appeals dismissed for want of jurisdiction. Applications for Certiorari denied. Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

563]*CHICAGO & ALTON RAILWAY COMPANY, Petitioner, v. UNITED STATES [No. 238]; JOHN N. FAITHORN, Petitioner, v. UNITED STATES [No. 239]; FRED A. WANN, Petitioner, v. UNITED STATES [No. 240].

Carriers—rebates—refund for use of shipper's tracks.

Three Writs of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review judgments which affirmed convictions in the District Court for the Eastern District of Illinois for giving rebates in violation of the Elkins act by refunding \$1 per car from the published rates, to a particular shipper, as payment for the use of such shipper's private tracks.

See same case below, 84 C. C. A. 324, 156 Fed. 558.

Messrs. F. S. Winston, Robert Mather, John Barton Payne, S. H. Strawn, Ralph M. Shaw, and Blackburn Esterline for petitioners.

The Attorney General and the Solicitor General for respondent.

January 4, 1909. Judgments affirmed by a divided court, and causes remanded to the District Court of the United States for the Northern District of Illinois.

564]*CLAY CENTER ELECTRIC LIGHT & POWER COMPANY, Plaintiff in Error, v. CITY OF CLAY CENTER et al. [No. 630.]

Error to state court—Federal question—when raised in time.

In Error to the Supreme Court of the State of Kansas to review a judgment which reversed a judgment of the Circuit Court of Clay County, in that state, in favor of plaintiff in a suit for the specific performance of a contract. The highest state court refused to consider the Federal question alleged to be involved because it was first raised by petition for rehearing in that court.

See same case below (Kan.) 97 Pac. 377, 800.

Mr. C. C. Coleman for plaintiff in error.

Mr. A. E. Crane for defendants in error.

January 11, 1909. *Per Curiam*: Writ 53 L. ed.

of Error dismissed for want of jurisdiction. F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; Capital Nat. Bank v. First Nat. Bk. 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; White v. Bird, 45 Kan. 759, 26 Pac. 463.

UNITED STATES, Plaintiff in Error, v. ROBERT POWELL. [No. 63.]

Civil rights—power of Congress to protect against individual interference.

In Error to the Circuit Court of the United States for the Northern District of Alabama to review a judgment sustaining a demurrer to an indictment charging individual citizens with conspiring to injure a negro citizen by denying him, because of his race, a trial by jury upon a pending indictment charging him with murder.

See same case below, 151 Fed. 648.

*The Attorney General and Assistant Attorney General Fowler for plaintiff in error.

No appearance for defendant in error.

January 11, 1909. *Per Curiam*: The judgment is affirmed on the authority of Hodges v. United States, 203 U. S. 1, 51 L. ed. 65, 27 Sup. Ct. Rep. 6. (Mr. Justice Moody did not sit.)

SPOKANE VALLEY LAND & WATER COMPANY, Plaintiff in Error, v. R. MADISON and Anna C. Madison, His Wife [No. 202]; SPOKANE VALLEY LAND & WATER COMPANY, Plaintiff in Error, v. R. MADISON and Anna Madison [No. 231.]

Error to state court—Federal question.

Two Writs of Error to the Supreme Court of the State of Washington. The first, to review a judgment which affirmed an order of the Superior Court for Spokane County, in that state, enjoining the use of a dam in such a way as to interfere with plaintiff's riparian rights; the second, to review a judgment which affirmed a judgment of the Superior Court of Spokane County, awarding damages in proceedings to condemn such riparian rights. The state court, in the second of the two cases, refused to consider the Federal question asserted to be involved because such question could have been, but was not, presented in the earlier case, which was between the same parties and related to the same subject-matter.

See same case below, No. 202, 40 Wash. 414, 6 L.R.A.(N.S.) 257, 82 Pac. 718; No. 231, 46 Wash. 640, 91 Pac. 1.

Mr. Albert Allen for plaintiff in error.

Mr. S. C. Hyde for defendants in error.

January 25, 1909. *Per Curiam*: Writs of Error dismissed for want of jurisdiction. Hardin v. Shedd, 190 U. S. 508, 47 L. ed.

1156, 23 Sup. Ct. Rep. 685; Mutual L. Ins. 566]Co. v. *McGrew, 188 U. S. 291, 47 L. ed. 480, 23 Sup. Ct. Rep. 375; Hulbert v. Chicago, 202 U. S. 275, 50 L. ed. 1026, 26 Sup. Ct. Rep. 617; Madson v. Spokane Valley Land & Water Co. 40 Wash. 414, 6 L.R.A.(N.S.) 257, 82 Pac. 718, 46 Wash. 640, 91 Pac. 1.

SAM FRESHMAN, Plaintiff in Error, v. UNITED STATES. [No. 298.]

Error to district court—Federal question—finding indictment on evidence wrongfully obtained.

In Error to the District Court of the United States for the Northern District of Texas to review a conviction in a criminal case in which a motion to quash the indictment, because found upon the private papers of the accused, improperly obtained, was overruled.

Messrs. F. M. Etheridge and J. M. McCormick for plaintiff in error.

The Attorney General and the Solicitor General for defendant in error.

January 25, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. Adams v. New York, 192 U. S. 585, 48 L. ed. 575, 24 Sup. Ct. Rep. 372; Radford v. United States, 63 C. C. A. 491, 129 Fed. 49; McGregor v. United States, 134 Fed. 187.

GOON SHUNG, alias NG SHUNG, Plaintiff in Error, v. UNITED STATES. [No. 85.]
Aliens—Chinese exclusion.

In Error to the District Court of the United States for the District of Massachusetts to review an order which, affirming an order of a United States Commissioner, ordered the deportation of a person found to be a Chinese laborer, unlawfully within the United States.

Messrs. Thomas J. Barry and Harry J. Jaquith for plaintiff in error.

The Attorney General and the Solicitor General for defendant in error.

January 25, 1909. *Per Curiam*: Judgment affirmed. Act of September 13, 1888, 25 Stat. at L. 476, chap. 1015, § 13, U. S. Comp. Stat. 1901, p. 1312; act of May 5, 1892, 27 Stat. at L. 25, chap. 60, §§ 3, 6, U. S. Comp. Stat. 1901, p. 1319; act of November 3, 1893, 28 Stat. at L. 7, chap. 14, § 1, U. S. Comp. Stat. 1901, p. 1321; treaty of 1904, 33 Stat. at L. 2215; act of April 27, 1904, 33 Stat. at L. 394, chap. 1630; United States v. Lee Yen Tai, 185 U. S. 213, 46 L. ed. 878, 22 Sup. Ct. Rep. 629; Chin Bak Kan v. United States, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; Liu Hop Fong v. United States, 209 U. S. 453, 52 L. ed. 888, 28 Sup. Ct. Rep. 576; Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016.

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THEODORE R. CONVERSE, Receiver, etc., Plaintiff in Error, v. AETNA NATIONAL BANK [No. 75]; THEODORE R. CONVERSE, Receiver, etc., Plaintiff in Error, v. FIRST NATIONAL BANK OF SUFFIELD [No. 76].
Corporations—enforcing stockholders' liability in other jurisdictions—conclusiveness of assessment—impairing contract obligations.

Two Writs of Error to the Supreme Court of Errors of the State of Connecticut to review judgments which affirmed judgments of the Superior Court of Hartford County, in that state, refusing to enforce the liability of stockholders in a Minnesota corporation, prescribed by Minnesota General Laws 1892, chap. 272, on the ground that the proceedings in Minnesota were not conclusive upon the shareholders in Connecticut, and that the Minnesota statute was invalid under the Federal Constitution, as impairing contract obligations.

See same case below, 79 Conn. 603, 65 Atl. 1064, 1065.

*Messrs. William Waldo Hyde and [568 Charles Welles Gross for plaintiff in error.

Messrs. Gardiner Greene, Frank T. Browne, and Charles E. Serles for defendants in error.

January 25, 1909. *Per Curiam*: Judgments reversed with costs, on the authority of Bernheimer v. Converse, 206 U. S. 516, 51 L. ed. 1163, 27 Sup. Ct. Rep. 755, and cases remanded for further proceedings in conformity to law.

RAMON VALDES, Plaintiff in Error, v. VENTURA MUNICH [No. 457]; RAMON VALDES, Plaintiff in Error, v. O. M. WOOD [No. 473]; RAMON VALDES, Plaintiff in Error, v. MARIA VENEGA PERIANES [No. 474].
Error to Porto Rico district court—jurisdictional amount.

Three Writs of Error to the District Court of the United States for Porto Rico to review judgments in favor of plaintiffs in negligence actions brought against a subject of Spain, who claimed the right, under the treaty of Paris, to plead his citizenship and object to the jurisdiction. The amount of recovery in each case was less than \$5,000.

See same case below on petition for Writ of Error, No. 457, 4 Porto Rico Fed. Rep. 99; No. 473, 3 Porto Rico Fed. Rep. 503.

Messrs. F. Kingsbury Curtis, John G. Carlisle, and Henry A. Stickney for plaintiff in error.

Mr. Willis Sweet for defendants in error.

February 1, 1909. *Per Curiam*: Writs of Error dismissed for want of jurisdictional amounts. Act of April 12, 1900, chap. 191, 31 Stat. at L. 77, §§ 34, 35; Act of March

212 U. S.

2, 1901, chap. 812, 31 Stat. at L. 953, § 3; Royal Ins. Co. v. Martin, 192 U. S. 149, 159, 48 L. ed. 385, 388, 24 Sup. Ct. Rep. 247; Ortega v. Lara, 202 U. S. 339, 50 L. ed. 1055, 26 Sup. Ct. Rep. 707; Perez v. Fernandez, 202 U. S. 80, 50 L. ed. 942, 26 Sup. Ct. Rep. 561; Garrozi v. Dastas, 204 U. S. 64, 73, 51 L. ed. 369, 376, 27 Sup. Ct. Rep. 224.

EX PARTE: IN THE MATTER OF THE DOWAGIAC MANUFACTURING COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Mandamus.

Messrs. Fred L. Chappell, Morison R. Waite, and Edmund Wetmore for petitioner. February 1, 1909. Denied.

570] WILLIAM *NOTLEY et al., Plaintiffs in Error, v. CECIL BROWN and Anthony Lidgate, Proponents of the Will of Charles Notley, Deceased et al. [No. 361.] Error to Hawaii Supreme Court—judgment quashing Writ of Error.

In Error to the Supreme Court of the Territory of Hawaii to review a judgment quashing a Writ of Error from that court to the Circuit Court for the Fourth Circuit in that Territory in a contest over the probate of a will.

See same case below, 17 Haw. 455.

Messrs. Robert M. Morse, William M. Richardson, and Robbins B. Anderson for plaintiffs in error.

Messrs. A. B. Browne, Alexander Britton, and W. L. Stanley for defendants in error.

February 1, 1909. *Per Curiam*: Writs of Error dismissed. Harrington v. Holler (Crawford v. Haller) 111 U. S. 796, 28 L. ed. 602, 4 Sup. Ct. Rep. 697; Knickerbocker Ins. Co. v. Comstock, 16 Wall. 258, 21 L. ed. 493; Notley v. Brown, 208 U. S. 429, 52 L. ed. 559, 28 Sup. Ct. Rep. 385.

ROBERT A. GRAHAM, Petitioner, v. OREGON RAILROAD & NAVIGATION COMPANY. [No. 403.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 88 C. C. A. 308, 161 Fed. 262.

Messrs. Thomas B. Rambaut and C. LaRue Munson for petitioner.

Mr. Maxwell Evarts for respondent.

October 19, 1908. Denied.

53 L. ed.

*CHARLES GRING, Petitioner, v. CHESAPEAKE & DELAWARE CANAL COMPANY. [No. 404.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 86 C. C. A. 530, 159 Fed. 662.

Messrs. Robert H. Smith and Jacob France for petitioner.

Mr. Andrew C. Gray for respondent.

October 19, 1908. Denied.

SOUTHERN RAILWAY COMPANY, Petitioner, v. LEMON TOWNSEND. [No. 411.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. W. A. Henderson and Milton Humes for petitioner.

No appearance for respondent.

October 19, 1908. Denied.

RICHARD B. SHEPARD, Petitioner, v. UNITED STATES. [No. 414.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 87 C. C. A. 486, 160 Fed. 584.

Messrs. Jesse B. Roote and Frank S. Bright for petitioner.

The Attorney General and the Solicitor General for respondent.

October 19, 1908. Denied.

ERIC P. SWENSON et al., Petitioners, v. JOHN W. CUNNINGHAM et al. [No. 415.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 85 C. C. A. 146, 157 Fed. 753.

Mr. Albert S. Burleson for petitioners.

Mr. Henry Sayles for respondents.

October 19, 1908. Denied.

WALTER S. SCOTT et al., Petitioners, v. AUGUSTUS L. ABBOTT, Trustee, etc. [No. 417.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 87 C. C. A. 475, 160 Fed. 573.

Messrs. Joseph S. Laurie *and Fred-[572] erick N. Judson for petitioners.

Messrs. Lee W. Grant, B. Schnurmacher, Leo Rasseieur, and B. P. Kennedy for the respondent.

October 19, 1908. Denied.

UNITED STATES, Petitioner, v. ISAAC STEPHENSON et al., as Executors and Trustees, etc. [No. 418.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

The Attorney General and the Solicitor General for petitioner.

Mr. Alfred L. Cary for respondents.

October 19, 1908. Denied.

GEORGE F. DUNBAR et al., Petitioners, v. DAVID H. CASCADEN. [No. 419.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 84 C. C. A. 566, 157 Fed. 62.

Messrs. J. C. Campbell and W. H. Metson for petitioners.

Mr. Hayden Johnson for respondent.

October 19, 1908. Denied.

ALABAMA NATIONAL BANK OF BIRMINGHAM et al., Petitioners, v. MASSASOIT-POCASSET NATIONAL BANK OF FALL RIVER, MASS. [No. 420.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 85 C. C. A. 654, 158 Fed. 1019.

Mr. John B. Knox for petitioners.

Mr. Richard W. Walker for respondent.

October 19, 1908. Denied.

W. A. GAINES & Co., Petitioner, v. MAX KAHN, Administrator, etc., et al. [No. 455.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 88 C. C. A. 437, 161 Fed. 495.

Messrs. John G. Carlisle, Daniel W. Lind-573]say, and J. L. *Hopkins for petitioner.

Messrs. Jacob Klein and Warwick M. Hough for respondents.

October 19, 1908. Denied.

H. FRANKLIN SCHLEGEL, Committee, etc., Petitioner, v. UNION STOCKYARDS BANK OF BUFFALO, N. Y., et al. [No. 464.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 86 C. C. A. 245, 159 Fed. 55.

Mr. Guy E. Farquhar for petitioner.

Mr. John A. Van Arsdale for respondents.

October 19, 1908. Denied.

JAMES MCCAULLEY, etc., Petitioner, v. AMERICAN DREDGING COMPANY et al. [No. 541.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 88 C. C. A. 423, 161 Fed. 481.

Mr. John F. Lewis for petitioner.

Messrs. Edward F. Pugh and Edward S. Dodge for respondents.

October 19, 1908. Denied.

ATLANTIC TRUST & DEPOSIT COMPANY, Petitioner, v. TOWN OF LAURINBURG, N. C. [No. 542.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 163 Fed. 690.

Mr. Floyd Hughes for petitioner.

Messrs. James E. Shepherd and Maxey L. John for respondent.

October 19, 1908. Denied.

JOHN W. AUCHINCLOSS et al., Petitioners, v. CONSTANTINE & PICKERING STEAMSHIP COMPANY, Owners, etc. [No. 548]; JOHN W. AUCHINCLOSS et al., Petitioners, v. CONSTANTINE & PICKERING STEAMSHIP COMPANY, Owners, etc. [No. 549]; JOHN W. AUCHINCLOSS et al., Petitioners, *v. W. MCLEAN et al., Owners, etc. [574 No. 550.]

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 88 C. C. A. 661, 161 Fed. 843.

Mr. George H. Emerson for the petitioners.

Mr. J. Parker Kirlin for respondents.

October 19, 1908. Denied.

BERRY BROS. LIMITED, Petitioner, v. STEAMSHIP ST. QUENTIN, etc. [No. 555.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 89 C. C. A. 573, 162 Fed. 883.

Mr. George H. Emerson for petitioner.

Messrs. J. Parker Kirlin and John M. Woolsey for respondents.

October 19, 1908. Denied.

HENRY P. SCOTT et al., Petitioners, v. QUEEN ANNE'S RAILROAD COMPANY et al. [No. 556.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 89 C. C. A. 536, 162 Fed. 828.

Messrs. Nicholas P. Bond and John G. Johnson for petitioners.

Messrs. John C. Rose and E. P. Keech, Jr., for respondents.

October 19, 1908. Denied.

RAINY LAKE RIVER BOOM CORPORATION, Petitioner, v. RAINY RIVER LUMBER COMPANY, LIMITED. [No. 557.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 89 C. C. A. 267, 162 Fed. 287.

Messrs. Halvor Steenerson, Charles Loring, and Samuel Herrick for petitioner.

Messrs. Chelsey J. Rockwood and A. Y. Merrill for respondent.

October 19, 1908. Denied.

DIAMOND RUBBER COMPANY OF NEW YORK, Petitioners, v. CONSOLIDATED RUBBER TIRE COMPANY et al. [No. 477.]

575] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles K. Offieff for petitioner.

Messrs. Charles W. Stapleton, T. W. Bakewell, and F. P. Fish for respondents.

October 19, 1908. Granted.

DR. MILES MEDICAL COMPANY, Petitioner, v. JOHN D. PARK & SONS COMPANY. [No. 547.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. Frank F. Reed for petitioner.

Messrs. Alton B. Parker and William J. Shroder for respondent.

October 19, 1908. Granted.

UNITED STATES, Petitioner, v. CARL S. CHAMBERLIN et al., Executors, etc. [No. 571.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

The Attorney General and the Solicitor General for petitioner.

Mr. Peter H. Holme for respondents.

October 19, 1908. Granted.

53 L. ed.

MAYER ZEIGER, Petitioner, v. PENNSYLVANIA RAILROAD COMPANY. [No. 572.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 86 C. C. A. 69, 158 Fed. 809.

Mr. A. S. Worthington for petitioner.

Mr. M. W. Acheson, Jr., for respondent.

October 26, 1908. Denied.

GEORGE D. BRYAN, Collector, etc., Petitioner, v. ROXANA S. KER, Executrix, etc. [No. 584.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The Attorney *General and the So-[576] licitor General for petitioner.

Messrs. J. P. K. Bryan and M. C. Butler for respondent.

November 2, 1908. Granted.

WINNISIMMET COMPANY, Petitioner, v. MARY L. DAVENPORT et al. [No. 512.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 89 C. C. A. 552, 162 Fed. 862.

Messrs. Edward E. Blodgett and Arthur P. Teele for petitioner.

Mr. William A. Davenport for respondents.

November 2, 1908. Denied.

WILLARD N. JONES et al., Petitioners, v. UNITED STATES. [No. 537.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 89 C. C. A. 303, 162 Fed. 417.

Messrs. Martin L. Pipes and Samuel B. Huston for petitioners.

The Attorney General and the Solicitor General for respondent.

November 2, 1908. Denied.

L. T. JOHNSTON, Petitioner, v. H. D. SEXTON et al. [No. 545.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 86 C. C. A. 260, 159 Fed. 70.

Mr. Edward C. Kramer for petitioner.

Mr. Charles P. Wise for respondents.

November 2, 1908. Denied.

GEORGE WESTINGHOUSE et al., Petitioners, v. PHILIP HEIN et al. [No. 546.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 87 C. C. A. 142, 159 Fed. 936.

Messrs. Thomas W. Bakewell, J. Snowden Bell, and Charles P. Abbey for petitioners.

Messrs. L. H. Bacon and Walter H. Chamberlin for respondents.

November 2, 1908. Denied.

577]*SARAH O. DEVOU, Petitioner, v. CITY OF CINCINNATI. [No. 590.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 89 C. C. A. 425, 162 Fed. 633.

Mr. Fred W. Keam for the petitioner.

Messrs. Geoffrey Goldsmith and Edward M. Ballard for respondent.

November 9, 1908. Denied.

BALTIMORE REFRIGERATING & HEATING COMPANY OF BALTIMORE CITY, Petitioner, v. FRANK G. WETZEL et al., etc. [No. 596.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 89 C. C. A. 117, 162 Fed. 117.

Messrs. Robert H. Smith and George Whitelock for petitioner.

Messrs. W. Calvin Chesnut and Charles Markell, Jr., for respondents.

November 9, 1908. Denied.

WALTER GRESHAM, Petitioner, v. ARABELLA D. HUNTINGTON et al. as Executors, etc. [No. 382.]

Petition for a writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. James B. Stubbs, T. D. Gresham, and Walter Gresham for petitioner.

Messrs. R. S. Lovett, Maxwell Evarts, and J. W. Terry for respondents.

November 16, 1908. Denied.

BUTLER BROS. SHOE COMPANY, Petitioner, v. UNITED STATES RUBBER COMPANY. [No. 582.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 84 C. C. A. 167, 156 Fed. 1.

Mr. Charles J. Hughes, Jr., for petitioner.

Mr. Henry T. Rogers for respondent.

November 16, 1908. Denied.

GENERAL FIREPROOFING COMPANY, Petitioner, v. EXPANDED METAL COMPANY. [No. 606.]

*Petition for a Writ of Certiorari [578 to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. George H. Christy and Thomas W. Bakewell for petitioner.

November 16, 1908. Granted.

KOMADA & Co., Petitioner, v. UNITED STATES. [No. 488.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Messrs. John M. Thurston, Thomas Fitch, J. J. Dunne, and W. Wickham Smith for petitioner.

The Attorney General, the Solicitor General, and J. C. McReynolds for respondent.

November 30, 1908. Granted.

E. M. DELK, Petitioner, v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY. [No. 597.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Frederic D. McKenney and Luther M. Walter for petitioner.

Mr. W. F. Evans for respondent.

November 30, 1908. Granted.

W. J. MURRAY et al., etc., Petitioners, v. WILSON DISTILLING COMPANY et al. [No. 625.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Messrs. W. F. Stevenson, B. L. Abney, J. Frazer Lyon, D. W. Rountree, T. B. Felder, C. L. Anderson, and Donald S. Matheson for petitioners.

Messrs. T. Moultrie Mordecai, Alfred S. Barnard, Frank Carter, and George B. Lester for respondents.

December 7, 1908. Granted.

CHICAGO, BURLINGTON, & QUINCY RAILWAY COMPANY, Petitioner, v. ERASTUS W. WILLARD, Administrator, *etc. [No. 627.] [579

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. Albert J. Hopkins for petitioner.

Messrs. Arthur J. Eddy and Emil C. Wetten for respondent.

December 7, 1908. Granted.

JOHN F. KLUMPP et al., etc. Petitioners, v. **C. WESLEY THOMAS.** [No. 632.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 89 C. C. A. 543, 162 Fed. 853.

Mr. Henry J. Webster for petitioners.

The Attorney General and the Solicitor General for respondent.

December 7, 1908. Denied.

GEORGE CLOUGH, Petitioner, v. GRAND TRUNK WESTERN RAILWAY COMPANY. [No. 454.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 11 L.R.A. (N.S.) 446, 85 C. C. A. 1, 155 Fed. 81.

Mr. H. H. Hatch for petitioner.

Mr. H. Geer for respondent.

December 14, 1908. Denied.

UNITED STATES, Petitioner, v. STANDARD OIL COMPANY, a Corporation Organized and Existing under the Laws of the State of Indiana. [No. 628.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 164 Fed. 376.

The Attorney General, the Solicitor General, and Messrs. Frank B. Kellogg, Edwin W. Sims, and James H. Wilkerson for petitioner.

Messrs. John S. Miller, Moritz Rosenthal, and Alfred D. Eddy for respondent.

January 4, 1909. Denied.

CHICAGO, ST. PAUL, MINNEAPOLIS, & OMAHA 580]*RY. Co. et al., Petitioners, v. UNITED STATES. [No. 634.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 162 Fed. 835.

Mr. Thomas Wilson for petitioners.

The Attorney General, the Solicitor General, and Assistant to the Attorney General Ellis for respondent.

January 4, 1909. Denied.

JOHN F. MONTGOMERY, Managing Owner, etc., et al., Petitioners, v. C. W. CHATFIELD, Master, etc. [No. 641.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 89 C. C. A. 572, 162 Fed. 882.

Messrs. Edward E. Blodgett, R. G. Bickford, and Frederick W. Eaton, for petitioners.

Messrs. Robert M. Hughes and James D. Dewell, Jr., for respondent.

January 4, 1909. Denied.

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DELAWARE SEAMLESS TUBE COMPANY et al., Petitioners, v. SHELBY STEEL TUBE COMPANY. [No. 650.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 88 C. C. A. 110, 160 Fed. 928.

Mr. Charles K. Offield for petitioners.

Messrs. Thomas M. Bakewell and L. S. Bacon for respondent.

January 4, 1909. Denied.

BURN LINE, LTD., Petitioners, v. UNITED STATES & AUSTRALASIA STEAMSHIP COMPANY. [No. 657.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 89 C. C. A. 278, 162 Fed. 298.

Messrs. J. Parker Kirlin and Charles R. Kickox for petitioner.

Mr. Harrington Putnam for respondent.

January 4, 1909. Denied.

***HENRY SCHODDE, Petitioner, v. TWIN-FALLS LAND & WATER COMPANY.** [No. 583.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. J. R. Webster for petitioner.

Mr. Edward B. Critchlow for respondent.

January 11, 1909. Granted.

JAMES HAMILTON LEWIS et al., Petitioners, v. ALTON WATER COMPANY. [No. 652.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 166 Fed. 840.

Messrs. Elijah N. Zoline and James Hamilton Lewis for petitioners.

Messrs. William Burry and Levi Davis for respondent.

January 11, 1909. Denied.

JOHN N. SHACKELFORD, Petitioner, v. ELWOOD D. FULTON. [No. 658.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

Mr. Robert G. Linn for petitioner.

No appearance for respondent.

January 11, 1909. Denied.

WILLIAMSBURG CITY FIRE INSURANCE COMPANY OF BROOKLYN, N. Y., Petitioner, v. LEON WILLARD, Doing Business under the Firm Name of Leon Willard & Company. [No. 645.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 164 Fed. 404.

Messrs. T. C. Van Ness and Joseph H. Choate for petitioner.

Mr. E. S. Pillsbury for respondent.

Messrs. Charles S. Wheeler and J. F. Bowie as *amici curiæ*.

January 18, 1909. Denied.

582]*GEORGE E. BABCOCK et al., Petitioners, v. ANNA M. DEMOTT et al. [No. 659.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 88 C. C. A. 64, 160 Fed. 882.

Mr. Milton Brown for petitioner.

No appearance for respondents.

January 18, 1909. Denied.

J. N. BEAN et al., Petitioners, v. W. A. MORRIS et al. [No. 664.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. Thomas J. Walsh for petitioners.

Messrs. N. W. McConnell, Andrew Wilson, and Noel W. Barksdale for respondents.

January 18, 1909. Granted.

WILLIAM CROZIER, Petitioner, v. FRIED KRUPP AKTIENGESSELLSCHAFT. [No. 675.]

Petition for a Writ of Certiorari to the Court of Appeals of the District of Columbia.

The Attorney General and the Solicitor General for petitioner.

Mr. William A. Jenner for respondent.

January 25, 1909. Granted.

JOSEPH N. CARPENTER et al., Petitioners, v. DAVID J. WINN. [No. 683.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. John R. Abney for petitioners.

Mr. John W. Boothby for respondent.

January 25, 1909. Granted.

J. A. SCRIVEN COMPANY, Petitioner, v. RICE-STIX DRY GOODS COMPANY [No. 679]; J. A. SCRIVEN COMPANY, Petitioner, v. PREMIUM MANUFACTURING COMPANY [No. 680]; J. A. SCRIVEN COMPANY, Petitioner, v. FERGUSON-MCKINNEY *DRY GOODS COMPANY. [No. 681.]

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 165 Fed. 639.

Mr. Arthur von Briesen for petitioner.

Messrs. Montague Lyon and Frederick W. Lehman for respondents in Nos. 679 and 680.

Mr. Samuel S. Watson for respondent in No. 681.

February 1, 1909. Denied.

TIMOTHY MCCARTHY et al., Petitioners, v. BUNKER HILL & SULLIVAN MINING & CONCENTRATING COMPANY et al. [No. 684].

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 164 Fed. 927.

Messrs. W. T. Stoll and W. C. Jones for petitioners.

Mr. C. W. Deale for respondents.

February 1, 1909. Denied.

HUGH R. HEALY, Petitioner, v. SUN COMPANY, Owner, etc. [No. 694.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 89 C. C. A. 300, 163 Fed. 48.

Messrs. William J. Wallace and Frederick M. Brown for petitioner.

Messrs. J. Parker Kirlin and Charles R. Hickox for respondent.

February 1, 1909. Denied.

JAMES RUDOLPH GARFIELD, Secretary, etc., Petitioner, v. UNITED STATES EX REL. HARVEY SPALDING [No. 698]; JAMES RUDOLPH GARFIELD, Secretary, etc., Petitioner, v. UNITED STATES EX REL. JAMES H. SPALDING [No. 699]; JAMES RUDOLPH GARFIELD, Secretary, etc., Petitioner, v. UNITED STATES EX REL. EDWIN W. SPALDING [No. 700].

Petitions for Writs of Certiorari to the Court of Appeals of the District of Columbia.

See same case below, 36 Wash. L. Rep. 793.

The Attorney General, the Solicitor General, and Assistant *Attorney General [584 Woodruff] for petitioner.

No appearance for respondent.

February 1, 1909. Denied.

WILLIAM BUCKLEY, Appellant, v. **J. W. TOMPKINS**, Warden of the State Prison of the State of California at San Quentin, Cal. [No. 576.]

Appeal from the Circuit Court of the United States for the Northern District of California.

October 13, 1908. Docketed and dismissed on motion of Mr. Frederick S. Tyler for the appellee.

C. F. AINSWORTH et al., Interveners, Appellants, v. **JOHN M. EVANS et al.** [No. 1.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. James H. Beal for appellants.

Mr. Walter Bennett for appellees.

October 13, 1908. Dismissed with costs on motion of counsel for the appellants.

AMERICAN FELT COMPANY, Plaintiff in Error, v. **GARRETT W. SCOLLARD**, Collector of Taxes of Boston, Mass. [No. 105.]

In Error to the Supreme Judicial Court of the State of Massachusetts.

See same case below, 194 Mass. 127, 80 N. E. 233.

Mr. Hollis R. Bailey for plaintiff in error.

Mr. Thomas M. Babson for defendant in error.

October 13, 1908. Dismissed per stipulation.

MICHAEL ENDERS et al., Plaintiffs in Error, v. **JOHN FRIDAY**, as Mayor of the City of Norfolk, Nebr., et al. [No. 132.]

In Error to the Supreme Court of the State of Nebraska.

Mr. William V. Allen for plaintiffs in error.

No appearance for defendants in error.

585] October 13, 1908. *Dismissed with costs on the authority of counsel for the plaintiffs in error.

J. P. LOONEY, Plaintiff in error, v. **STATE OF MISSOURI**. [No. 140.]

In Error to the Supreme Court of the State of Missouri.

Mr. Timothy J. Fell for plaintiff in error.

No appearance for defendant in error.

October 13, 1908. Dismissed with costs on the authority of counsel for the plaintiff in error.

JOHN F. SHOREY, Plaintiff in Error, v. **STATE OF OREGON**. [No. 161.]

In Error to the Supreme Court of the State of Oregon.

Mr. William T. Muir for plaintiff in error.

Mr. A. M. Crawford for defendant in error.

October 13, 1908. Dismissed with costs on the authority of counsel for the plaintiff in error.

FIRST NATIONAL BANK OF LEXINGTON, Plaintiff in Error, v. **S. W. HAGAR**, Auditor of Public Accounts, et al., etc. [No. 256.]

In Error to the Court of Appeals of the State of Kentucky.

Messrs. John T. Shelby, Joseph B. Hunt, and George R. Hunt for plaintiff in error.

Mr. James Breathitt for defendants in error.

October 13, 1908. Dismissed with costs on the authority of counsel for the plaintiff in error.

MACANDREWS & FORBES COMPANY, Plaintiff in Error, v. **UNITED STATES** [No. 209]; **J. S. YOUNG COMPANY**, Plaintiff in Error, v. **UNITED STATES** [No. 210].

In Error to the Circuit Court of the United States for the Southern District of New York.

See same case below on demurrer, 149 Fed. 823; on motion in arrest of judgment, 149 Fed. 836.

Messrs. Junius *Parker and DeLaney Nicholl for plaintiffs in error.

The Attorney General for defendant in error.

October 13, 1908. Dismissed on the authority of counsel for the plaintiffs in error.

HUNTER M. MERIWETHER et al., Plaintiffs in Error, v. **ANNIE B. WOOD et al.** [No. 18.]

In Error to the Supreme Court of the State of Kansas.

Mr. Frank Doster for plaintiffs in error.

No appearance for defendants in error.

October 22, 1908. Dismissed with costs on motion of counsel for the plaintiffs in error.

JOAQUIN CELIS, Plaintiff in Error, v. **UNITED STATES**. [Nos. 585, 586, 587, 588, and 589.]

In Error to the Supreme Court of the Philippine Islands.

October 26, 1908. Docketed and dismissed on motion of Mr. Solicitor General Hoyt, for the defendant in error.

JOHN J. HEMPHILL and Kenneth S. Murchison, Appellants, v. UNITED STATES and the Cherokee Nation. [No. 530.]

Appeal from the Court of Claims.

Mr. John J. Hemphill for appellants.

The Attorney General for appellees.

November 2, 1908. Appeal dismissed on motion of counsel for appellants.

GEORGE A. TREADWELL et al., Appellants, v. GEORGE O. MARRS. [No. 11.]

Appeal from the Supreme Court of the Territory of Arizona.

See same case below, 9 Ariz. 333, 83 Pac. 350.

Mr. Charles M. Demond for appellants.

Messrs. T. G. Norris and John M. Ross for appellee.

November 4, 1908. Dismissed with costs, pursuant to the Tenth Rule.

587]*UNITED STATES, Appellant, v. MOUNTAIN COPPER COMPANY, LIMITED. [No. 4.]

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 73 C. C. A. 621, 142 Fed. 625.

The Attorney General for appellant.

No appearance for appellee.

November 9, 1908. Dismissed per stipulation, on motion of Mr. Solicitor General Hoyt for the appellant.

JOSÉ MARIA UBARRI É YRAMATEGUI, Appellant, v. PABLO UBARRI É YRAMATEGUI et al. [No. 618.]

Appeal from the District Court of the United States for Porto Rico.

November 16, 1908. Docketed and dismissed with costs, on motion of Mr. John Maynard Harlan for the appellees.

ANGELO SCHNEIDER, Plaintiff in Error, v. AMERICAN BRIDGE COMPANY OF NEW YORK. [No. 619.]

In Error to the Court of Appeals of the District of Columbia.

November 16, 1908. Docketed and dismissed with costs, on motion of Mr. Reginald S. Huidekoper for the defendant in error.

SHERIDAN KIRK CONTRACT COMPANY, Plaintiff in Error v. UNITED STATES. [No. 46.]

In Error to the District Court of the United States for the Southern District of Ohio.

Mr. D. T. Watson for plaintiff in error.

The Attorney General for defendant in error.

December 3, 1908. Dismissed pursuant to the Tenth Rule.

JOHN S. HORD, Collector of Internal Revenue, *etc., Plaintiff in Error, v. J. CASANOVAS. [No. 444.]

In Error to the Supreme Court of the Philippine Islands.

The Attorney General for plaintiff in error.

No appearance for defendant in error.

December 14, 1908. Dismissed with costs, on motion of Mr. Solicitor General Hoyt for the plaintiff in error.

SAMUEL B. HARTMAN, Petitioner, v. JOHN D. PARK & SONS COMPANY. [No. 68.]

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24.

Mr. Frank F. Reed for petitioner.

Messrs. William J. Shroder and Alton B. Parker for respondent.

December 21, 1908. Dismissed with costs on motion of counsel for the petitioner.

BESSIE E. STEPP et al., Appellants, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY. [No. 79.]

Appeal from the Circuit Court of the United States for the Western District of Missouri.

Mr. William C. Scarritt for appellants.

Mr. M. A. Low for appellee.

January 4, 1909. Dismissed per stipulation.

CUMBERLAND TELEPHONE & TELEGRAPH COMPANY, Appellant, v. CITY OF LOUISVILLE, KENTUCKY. [No. 251.]

Appeal from the Circuit Court of the United States for the Western District of Kentucky.

Mr. David W. Fairleigh for appellant.

No appearance for appellee.

January 4, 1909. Dismissed with costs on motion of counsel for appellant.

H. V. MERCER et al., Trustees in Bankruptcy, *etc., Appellants, v. ANDREW G. DUNLOP, Trustee in Bankruptcy, etc. [No. 296.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. M. H. Boutelle for appellants.

Mr. Hector Backster for appellee.

January 4, 1909. Dismissed per stipulation.

R. FLORES MAGON et al., Appellants, v. UNITED STATES. [No. 378.]

Appeal from the Circuit Court of the United States for the Southern District of California.

Mr. Halvor Steenerson for appellants.

The Attorney General and the Solicitor General for appellee.

January 4, 1909. Dismissed pursuant to the Tenth Rule.

JAMES RUDOLPH GARFIELD, Secretary of the Interior, Plaintiff in Error, v. UNITED STATES EX REL. BENJAMIN F. VAUGHAN, Guardian, etc. [No. 371]; JAMES RUDOLPH GARFIELD, Secretary of the Interior, Plaintiff in Error, v. UNITED STATES EX REL. EDWARD A. VAUGHAN [No. 372]; JAMES RUDOLPH GARFIELD, Secretary of the Interior, Plaintiff in Error, v. UNITED STATES EX REL. BENJAMIN F. VAUGHAN [No. 373]; JAMES RUDOLPH GARFIELD, Secretary of the Interior, Plaintiff in Error, v. UNITED STATES EX REL. AMBROSE L. RICE [No. 374].

In Error to the Court of Appeals of the District of Columbia.

The Attorney General for plaintiff in error.

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Messrs. Charles J. Kappler, Charles H. Merillat, James K. Jones, and Charles M. Fecbheimer for defendants in error in Nos. 371, 372, 373.

No appearance for defendant in error in No. 374.

January 18, 1909. Dismissed with costs on motion of Mr. Solicitor General Hoyt for the plaintiff in error.

MARCELO LEONO et al., Plaintiffs in Error, v. UNITED STATES. [No. 94.]

In Error to the Supreme Court of the *Philippine Islands. [590]

Messrs. A. B. Browne and Alexander Britton for plaintiffs in error.

The Attorney General for defendant in error.

January 21, 1909. Dismissed pursuant to Tenth Rule.

H. V. MERCEB et al., Trustees, etc., Appellants, v. MONITOR DRILL COMPANY. [No. 617.]

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

Mr. M. H. Boutelle for appellants.

No appearance for appellee.

February 23, 1909. Dismissed per stipulation.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

OCTOBER TERM, 1908.

Vol. 213.

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THE DECISIONS

OF THE

Supreme Court of the United States

AT

OCTOBER TERM, 1908.

1]*ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Plff. in Err. and
Appt.,

v.

SAMUEL CALHOUN, by Anna Calhoun,
His Next Friend.

(See S. C. Reporter's ed. 1-10.)

Carriers — negligence — safety of station platform.

Leaving a baggage truck at the very end of the station platform, at or near the place where it has been used in unloading baggage from the baggage car of a train, and failing to light the platform at that point, is not such negligence as will render the railway company liable, where a person, while endeavoring, by running alongside the rapidly receding train, to restore a child in his arms to its mother, who is standing on the platform of a car, stumbles over the truck in the dark, and drops the child, to its injury, as the railway is not bound to foresee and guard against such extraordinary conduct.

[For other cases, see Carriers, II. a, 7, in Digest Sup. Ct. 1908.]

[No. 71.]

Argued and submitted January 12, 13, 1909.
Decided February 23, 1909.

IN ERROR to, and APPEAL from, the Supreme Court of the Territory of Oklahoma to review a judgment which affirmed a judgment of the District Court of Oklahoma County, in that Territory, in favor of plaintiff, in an action to recover damages for personal injuries alleged to have resulted from the negligence of defendant. Reversed.

NOTE. — On the measure of care which a carrier must exercise to keep its platforms and approaches safe—see note to Johns v. Charlotte, C. & A. R. Co. 20 L.R.A. 520.
53 L. ed.

See same case below, 18 Okla. 75, 89 Pac. 207, 11 A. & E. Ann. Cas. 681.

The facts are stated in the opinion.

Mr. Robert Dunlap argued the cause and filed a brief for plaintiff in error and appellant:

The accident was caused directly by the act of the custodian Jones in attempting to put plaintiff on the train while it was in motion, and after plaintiff had been safely deposited at the station. This was an intervening cause which rendered the alleged negligence in failing to announce the station or assist plaintiff from the train, or failure to stop the same longer than it was stopped at that station, too remote. A new agency intervened.

Fetter, Carr. Pass. § 117, p. 287; South Side Pass. R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627; Dunn v. Cass Ave. & F. G. R. Co. 21 Mo. App. 188; Reibel v. Cincinnati, I. St. L. & C. R. Co. 114 Ind. 476, 17 N. E. 107; Evansville, C. & M. Steam Packet Co. v. Wildman, 63 Ind. 370; Hobbs v. London & S. W. R. Co. L. R. 10 Q. B. 111; Lewis v. Flint & P. M. R. Co. 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; Metropolitan R. Co. v. Jackson, L. R. 3 App. Cas. 193; Daniel v. Metropolitan R. Co. L. R. 5 H. L. 56; Speake v. Hughes [1904] 1 Q. B. 138; Walker v. Goe, 4 Hurlst. & N. 350; O'Neil v. Everest, 61 L. J. Q. B. N. S. 453; Glassey v. Worcester Consol. Street R. Co. 185 Mass. 315, 70 N. E. 199.

Defendant could only be held liable for such consequences as were likely and probable to follow from its alleged negligence, but not for all possible consequences.

Pollock, Torts, p. 36; Globe Ref. Co. v. Landa Cotton Oil Co. 190 U. S. 544, 47 L. ed. 1173, 23 Sup. Ct. Rep. 754; Hadley v. Baxendale, 9 Exch. 354; Smith v. Bolles, 132 U. S. 130, 33 L. ed. 281, 10 Sup. Ct. Rep. 39.

The railway company owed no duty to have its station grounds free of all obstructions at the place where the baggage car alone had been standing. It was not guilty of culpable negligence, and the accident could not have been foreseen as likely to result from the temporary position of the baggage truck.

Haldan v. Great Western R. Co. 30 U. C. C. P. 89; *Chicago & N. W. R. Co. v. Scates*, 90 Ill. 586.

Messrs. Henry E. Asp, Charles H. Woods, and George M. Green also filed a brief for plaintiff in error and appellant:

If, subsequent to the original wrongful or negligent act, a new course intervened, of itself sufficient to stand as the cause of the misfortune, the former must be considered as too remote.

1 Thomp. Neg. § 55; *Galveston, H. & S. A. R. Co. v. Chambers*, 73 Tex. 296, 11 S. W. 279; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1; *Glassey v. Worcester Consol. Street R. Co.* 185 Mass. 315, 70 N. E. 199; *Herr v. Lebanon*, 149 Pa. 222, 16 L.R.A. 106, 34 Am. St. Rep. 603, 24 Atl. 207; *Schaeffer v. Jackson Twp.* 150 Pa. 145, 18 L.R.A. 100, 30 Am. St. Rep. 792, 24 Atl. 629; *Texas & P. R. Co. v. Beckworth*, 11 Tex. Civ. App. 153, 32 S. W. 347; *Cleghorn v. Thompson*, 62 Kan. 727, 54 L.R.A. 402, 64 Pac. 605; *Missouri P. R. Co. v. Columbia*, 65 Kan. 390, 58 L.R.A. 399, 69 Pac. 338; *Frassi v. McDonald*, 122 Cal. 400, 55 Pac. 139, 772; *Stanton v. Louisville & N. R. Co.* 91 Ala. 382, 8 So. 798; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55, 52 Am. Rep. 790, 19 N. W. 744; *Claypool v. Wigmore*, 34 Ind. App. 35, 71 N. E. 509; *Baltimore & O. R. Co. v. State*, 33 Md. 542; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293, 27 Am. Rep. 653; *Cuff v. Newark & N. Y. R. Co.* 35 N. J. L. 18, 10 Am. Rep. 205; *Hofnagle v. New York C. & H. R. R. Co.* 55 N. Y. 608; *New York, C. & St. L. R. Co. v. Perriguet*, 138 Ind. 414, 34 N. E. 233, 37 N. E. 976; *Ray, Negligence of Imposed Duties*, Pass. Carr. p. 669; *Alexander v. New Castle*, 115 Ind. 51, 17 N. E. 200; *McGahan v. Indianapolis Natural Gas. Co.* 140 Ind. 335, 29 L.R.A. 355, 49 Am. St. Rep. 199, 37 N. E. 601; *Williams v. Woodward Iron Co.* 106 Ala. 254, 17 So. 517; *Lowery v. Western U. Teleg. Co.* 60 N. Y. 198, 19 Am. Rep. 154; *Mars v. Delaware & H. Canal Co.* 28 N. Y. S. R. 228, 8 N. Y. Supp. 107; *Beall v. Athens Twp.* 81 Mich. 536, 45 N. W. 1014; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L.R.A. 582, 5 C. A. 347, 12 U. S. App. 381, 55 Fed. 949; *Pike v. Grand Trunk R. Co.* 39 Fed. 255; *Cartarso v. The Burgundia*, 29 Fed. 464; *Scheffer v. Washington City, V. M. & G. S.*

R. Co. 105 U. S. 249, 26 L. ed. 1070; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; *Atchison, T. & S. F. R. Co. v. Dickens*, 7 Ind. Terr. 16, 103 S. W. 750.

Mr. Selwyn Douglas submitted the cause for defendant in error and appellee. Mr. Henry H. Howard was on the brief:

A railroad company must give a passenger a reasonable time to alight at the end of his journey.

Baltimore & O. S. W. R. Co. v. Mullen, 217 Ill. 203, 2 L.R.A. (N.S.) 115, 75 N. E. 474, 3 A. & E. Ann. Cas. 1015.

It is the duty of a railroad company to furnish passengers a safe place to alight.

Harris v. Pittsburgh, C. C. & St. L. R. Co. 32 Ind. App. 600, 70 N. E. 407.

The duty is one of law, and does not necessarily depend upon the rules of the company, but upon the circumstances, and the character and extent of the business done at the place.

New England R. Co. v. Hyde, 41 C. C. A. 549, 101 Fed. 401; *St. Louis & S. F. R. Co. v. Marshall*, 71 Kan. 866, 81 Pac. 169.

The relation of carrier and passenger does not terminate when he alights upon the platform, but continues until he has had a reasonable time, under the circumstances of the case, to leave the station.

Chicago, R. I. & P. R. Co. v. Wood, 44 C. C. A. 118, 104 Fed. 663.

Mr. Justice Moody delivered the opinion of the court:

The defendant in error, hereafter called the plaintiff, brought an action in a district court of the territory of Oklahoma *against the plaintiff in error, hereafter[4 called the defendant, to recover damages suffered by him on account of an injury alleged to have resulted from the negligence of the defendant. He had judgment, which was affirmed by the supreme court of the territory, and the case is now here upon a writ of error directed to that court. The trial was by a jury, and, as one question of law before us is whether a verdict for the plaintiff was warranted, the evidence is reported in full. In returning a general verdict for the plaintiff, the jury also made special findings in response to 57 questions submitted to it, in accordance with the practice permitted in the territory. The only question of law which it is deemed necessary to determine is whether all the evidence, with the inferences which might properly be drawn from it, sustained the verdict for the plaintiff, upon the issue submitted to the jury. Instead of setting forth fully the material parts of the evidence, it seems better, with the aid of the special

findings, to state the facts which it tended to prove. It hardly need be said that wherever there is a fair doubt, that aspect of the evidence most favorable to the plaintiff has been accepted.

Mrs. Calhoun and her son, the plaintiff, a boy a little less than three years of age, were passengers upon a southbound train of the defendant railroad. Their destination was Edmond in the territory of Oklahoma. The train, somewhat late, arrived at Edmond about 11:30 o'clock in the evening. Mrs. Calhoun had never traveled over the route before, the station was not called out by any of the trainmen, nor was she told by any of them that it was Edmond. In answer to a question, she was informed by other passengers that the train had arrived at Edmond, and she hastened to alight, leading the boy with her. When she reached the platform of the car the train had started up again, after, as the jury found, a stop of one minute, and she handed the boy to Mr. Robertson, another passenger on the train, who had left it momentarily, intending to return and resume his journey. Mr. Robertson was then standing upon the station platform. He took the child, handed him to his son, whom he had met at the station, returned to the steps of the car, and told Mrs. Calhoun not to jump off, as the car was running too rapidly. The station platform was dimly lighted, and no employee of the defendant rendered Mrs. Calhoun or her boy any assistance in leaving the train, nor gave them any warning.

The plaintiff was landed without injury on the station platform and put in the charge of Mr. Robertson's son by his father, who said: "Keep the child and the train will stop and let the lady off." Just then a young man or boy by the name of Carl Jones, supposed by Mr. Robertson's son to be a railroad official, though he was not, took up the child in his arms, ran along by the car, which was moving all the time with increasing rapidity, and attempted, without success, to return the child to its mother, who was standing on the platform of the car. Jones ran 75 to 100 feet to the end of the wooden station platform and then stumbled over a baggage truck, which had been used in unloading the baggage from the train, and had been left at the very end of the platform and partly on it, within a few feet of the rails. When Jones stumbled he lost his hold of the child, who fell under the car and was injured. The train consisted of the engine, followed by a mail car, baggage car, express car, smoking car, day coach, in which the plaintiff had been traveling, chair car, and a sleeper, in the order named. The baggage car, therefore, was

some distance ahead of any passenger car, and the truck was used at the baggage car and left at or near the point where it had been used. Mrs. Calhoun started to leave the car at its south end, nearest the baggage car, and there was, therefore, between that point and the north end of the baggage car, the length of the express and smoking cars. Jones was not called as a witness by either party. None of the trainmen knew that Jones was attempting to put the plaintiff back on the train until after the injury.

The jury was instructed by the presiding judge that, as the plaintiff had been safely taken from the train and committed to the care of a young man on the station platform, there could *only be a recovery by [6] reason of what happened after that time. But the jury was instructed that the plaintiff might recover if it found that "the company was guilty of negligence in leaving the truck in a dangerous position, and in not having the depot platform properly lighted, and that such condition directly and approximately contributed to the injury." There was another ground of recovery submitted to the jury, but it was negated by the findings and need not be considered further.

It is clear enough, upon this statement of facts, that the railroad did not exercise proper care to afford the plaintiff and his mother a reasonable opportunity to leave the car with safety. The train was late. The attention of the trainmen was fixed upon quick starting, and diverted from the care of the passengers, and the stop at the station was very brief. Taking these circumstances into account, with the failure to inform Mrs. Calhoun that she had arrived at her place of destination, there is no difficulty in concluding that the defendant was negligent. If Mrs. Calhoun and her son, as they were about to step upon the station platform, had been injured by the premature starting of the car, the defendant unquestionably would have been liable. But the injury did not occur in that way. Mrs. Calhoun handed the child to Mr. Robertson to take off the train, and she herself testified that "the child was safely off the train; I saw it in the arms of the gentleman."

The defendant contends that the jury was permitted to find for the plaintiff on account of the negligence which occurred prior to the time he was landed without injury,—namely, the failure to announce the station, to assist the passengers, to light the platform adequately at the point of leaving the train, and the delay insufficient to allow passengers to leave the train with safety. The failure in the performance of the clear

duty to afford the passengers a safe place and a reasonable time in which to alight was not, the defendant insists, the proximate cause of the subsequent injury, which was, on the contrary, caused by the foolhardy conduct of Jones in attempting to put back the plaintiff on the train.

7] *Few questions have more frequently come before the courts than that whether a particular mischief was the result of a particular default. It would not be useful to examine the numerous decisions in which this question has received consideration, for no case exactly resembles another, and slight differences of fact may be of great importance. The rules of law are reasonably well settled, however difficult they may be of application to the varied affairs of life. In this case undoubtedly the plaintiff's injury was traceable to the original negligence, in the sense that it would not have occurred if the plaintiff had not been separated from his mother. Nevertheless, that negligence may not be the cause of the injury, in the meaning which the law attributes to the word "cause" when used in this connection. The law, in its practical administration, in cases of this kind regards only proximate or immediate, and not remote, causes, and, in ascertaining which is proximate and which remote, refuses to indulge in metaphysical niceties. Where, in the sequence of events between the original default and the final mischief an entirely independent and unrelated cause intervenes, and is of itself sufficient to stand as the cause of the mischief, the second cause is ordinarily regarded as the proximate cause and the other as the remote cause. *Louisiana Mut. Ins. Co. v. Tweed*, 7 Wall. 44, 52, 19 L. ed. 65, 67. This is emphatically true when the intervening cause is the act of some person entirely unrelated to the original actor. Nevertheless, a careless person is liable for all the natural and probable consequences of his misconduct. If the misconduct is of a character which, according to the usual experience of mankind, is calculated to invite or induce the intervention of some subsequent cause, the intervening cause will not excuse him, and the subsequent mischief will be held to be the result of the original misconduct. This is upon the ground that one is held responsible for all the consequences of his act which are natural and probable, and ought to have been foreseen by a reasonably prudent man. Thus it has been held that if one unlawfully leaves upon a public street a truck loaded with iron which he ought to have foreseen would very likely

8]be disturbed by heedless *children, he is responsible for an injury which occurs as the result of such disturbance. *Lane v. At-*

lantic Works, 111 Mass. 136, and see *Lynch v. Nurdin*, 1 Q. B. 29; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Union P. R. Co. v. McDonald*, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619. Without pursuing the subject further, it may be said that, among the many cases in which the subject of proximate cause has been discussed, are the following: *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. ed. 256, 259; *Scheffer v. Washington City, V. M. & G. S. R. Co.* 105 U. S. 249, 26 L. ed. 1070; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113; *Stone v. Boston & A. R. Co.* 171 Mass. 536, 41 L.R.A. 794, 51 N. E. 1.

It is not necessary for us to consider whether the original neglect of the defendant could properly have been found by the jury to have been the cause of the plaintiff's injury, and we express no opinion upon that question. The defendant's contention that the jury was permitted to find a verdict on that ground cannot be sustained. The charge to the jury makes this clear. The presiding judge said:

"It is admitted that the plaintiff was safely taken from the train in question, and committed to the care of a young man on the depot platform; therefore, even though you find that the station at Edmond was not called, that fact can only be considered by you for the purpose of explaining the respective positions of mother and child at that time; and, if the plaintiff recover, it must be by reason of events and conditions subsequent to the time he was taken from the train."

The defendant, it is true, claims that it suffered harm because the conflicting evidence with regard to the original negligence was submitted to the jury and tended to divert their minds from the real issue. But we think the judge did about as well as he could to make the issue plain to the jury, in view of the fact that he was tied down to written instructions, and thereby prevented from giving the jury the aid that is demanded from the bench for the most successful working of the jury system.

Leaving entirely out of view, then, the original carelessness of *the defendant, we[9 come to the real issue, which was submitted to the jury, upon which alone its verdict can stand. Was the company guilty of negligence in leaving the truck in a dangerous position and not having the depot platform properly lighted, and did that condition directly and proximately cause the injury?

It cannot be doubted that the conduct of Jones was careless in the extreme, though doubtless the motives which impelled him were good. But it is urged that Jones's

negligence concurred with the negligence of the defendant in leaving the truck where it did, and that therefore both are responsible for the consequences. There is no doubt that the act of Jones and the act of the defendant with respect to the track concurred in causing the injury, and we assume that, if the defendant failed in its duty by leaving the truck at the end of the wooden platform, the verdict can be sustained. *Washington & G. R. Co. v. Hickey*, 166 U. S. 521, 41 L. ed. 1101, 17 Sup. Ct. Rep. 661. It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But, even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that, "if men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things." *Pollock, Torts*, 8th ed. 41.

In judging of the defendant's conduct, attention must be paid to the place where the truck was left. If it had been left where the passengers were at all likely to get off or on the train, and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad. 10] On the other hand, if it *had been left a mile from the station, where, by no reasonable hypothesis, passengers would attempt to get off or on the train, there could be no doubt that the railroad would not be responsible in such a case. There was a wooden platform by the track at the station, 100 feet, more or less, in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity; much less that a person would take a helpless infant, and, while thus running, attempt

to place it on the train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed.

DAVIDSON BROS. MARBLE COMPANY,
Samuel A. Tolman, and John A. Tolman,
Plffs. in Err.,

v.

UNITED STATES OF AMERICA ON THE
RELATION OF MURRAY GIBSON.

(See S. C. Reporter's ed. 10-19.)

Statutes — retroactive effect — action on bond of public contractor.

1. The provisions as to the proper district for suit on the bond of a public contractor, made by the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1907, p. 709), amending the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), for the protection of persons furnishing materials and labor for the construction of a public work, do not apply where the contract with, and the bond to, the government, and the contract under which the labor and materials were furnished, all antedate the passage of the amendatory act.

[For other cases, see Statutes, II. v, in Digest Sup. Ct. 1908.]

Federal courts — proper district for suit — action on bond of public contractor.

2. A suit brought in the name of the United States under the act of August 13, 1894, on the bond of a public contractor, for the benefit of a person furnishing materials and labor for the construction of a public work, is governed by that part of the act of March 3, 1887 (24 Stat. at L. 552, chap. 373), as corrected by the act of August 13, 1888 (25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508), which provides that no civil suit shall be brought before any Federal circuit court "against any person, by any original process or proceeding, in any other district than that whereof he is an inhabitant."

[For other cases, see Courts, V. c. 7, in Digest Sup. Ct. 1908.]

Federal courts — court rule regulating appearance — validity.

3. A rule of a Federal circuit court which

NOTE. — On statutes as prospective or retrospective in their operation—see notes to *Stewart v. Vandervort*, 12 L.R.A. 50; *Franklin County Grammar School v. Bailey*, 10 L.R.A. 407; *Otoe County v. Baldwin*, 28 L. ed. U. S. 331; and *Barnitz v. Beverly*, 41 L. ed. U. S. 94.

On the proper Federal district for suit—see note to *Roberts v. Lewis*, 36 L. ed. U. S. 579.

treats as a general appearance a special appearance by a party sued in the wrong Federal district, made solely for the purpose of objecting to the jurisdiction, without stating that, if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case, is invalid, as substantially impairing his right under the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 5, to appear specially and object to the jurisdiction of the court, and bring an adverse decision directly to the Supreme Court for review.

[For other cases, see Courts, V. e. 5, in Digest Sup. Ct. 1908.]

[No. 78.]

Argued and submitted January 15, 1909.
Decided February 23, 1909.

IN ERROR to the Circuit Court of the United States for the Northern District of California to review a judgment for plaintiff in an action on a bond of a public contractor, entered after denying a motion to quash, and overruling a demurrer founded on an objection to the jurisdiction. Reversed and remanded with instructions to dismiss the action.

Statement by Mr. Justice Moody:

This case comes here from the circuit court of the United States for the northern district of California, on the single question of the jurisdiction of that court.

The United States, on the relation of Murray Gibson, on November 20, 1906, brought this action against Davidson Bros. Marble Company, a corporation organized under the laws of the state of Illinois, and therefore, for jurisdictional purposes, a citizen of that state, and Samuel A. Tolman and John A. Tolman, citizens and residents of that state. Neither of the defendants was alleged to be an inhabitant of the district. The complaint set forth in substance the following cause of action: The Davidson Company on October 10, 1901, agreed, in writing, with the United States, to construct a public building in San Francisco, in the northern district of California. On October 18, 1901, the Davidson Company, as principal, and the two individual defendants as sureties, executed a bond running to the United States, conditioned that the Davidson Company should fulfil its contract with the United States and make payment to all persons supplying the Davidson Company with labor or materials in the prosecution of the work. Under a contract made on July 25, 1902, Gibson furnished to the Davidson Company certain labor and materials used in the prosecution of the work, for which a large sum is due and unpaid. No *suit

was brought by the United States within six months after the completion of Davidson Company's contract with the United States, and thereafter Gibson applied to the Treasury Department, and furnished an affidavit that he had supplied labor and materials for which payment had not been made. Whereupon, the Department furnished him with a certified copy of the contract, and subsequently this action was begun. A writ of summons was issued to the defendants, and served upon them personally in Illinois. Notice of the pendency of the suit was also given by publication. On January 9, 1907, the defendants appeared specially and filed a demurrer and a motion to quash service and to dismiss, which were, respectively, as follows:

Demurrer.

The defendants . . . demur to the complaint of the plaintiff herein upon the following grounds:

First. That the court has no jurisdiction of the defendants or either of them.

Second. That the plaintiff is not a resident or citizen of the northern district of California in the ninth judicial circuit or of the state of California.

Third. That the defendants are not nor is either of them a resident or citizen of the northern district of California in the ninth judicial circuit or of the state of California.

Fourth. That, at the time of the commencement of this action, the plaintiff, Murray Gibson, trading as John Gibson, was and now is a citizen and resident of the state of Pennsylvania, and that, at the time of the commencement of this action, the defendants were, and each of them was, and now is, a citizen and resident of the state of Illinois.

Fifth. That this court has no jurisdiction of the subject of the action.

Sixth. That this court has no jurisdiction of the controversy alleged in the complaint.

Wherefore the defendants pray to be hence dismissed with their cost.

*Motion to Quash.

[13

The defendants above named and each of them hereby appear specially in the above-entitled cause for the purpose only of moving the said court to quash and set aside the service of the summons in the said cause, and to dismiss the said action upon the ground that the said court has no jurisdiction of the persons of the defendants, and upon the further ground that the said court has no jurisdiction of the person of the plaintiff, and upon the further ground that neither the plaintiff nor the defendants or any or either of them are citizens of the

state of California or residents of the northern district of California in the ninth judicial circuit, and upon the further ground that the said court has no jurisdiction of the controversy at issue. The said motion will be based upon the complaint of the plaintiff, and all subsequent proceedings and the return of service of said summons herein.

The motion to quash was denied and the demurrer was overruled. The defendants declined to plead further, a judgment was entered against them for the amount claimed in the complaint, and thereupon the defendants, by writ of error, brought the question of jurisdiction directly to this court.

The law in force at the time the contract with the United States, the bond given to the United States, and the contract with Gibson were made, is the act of August 13, 1894 (28 Stat. at L. 278, chap. 280, U. S. Comp. Stat. 1901, p. 2523), which is as follows:

"That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the Department under *the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use, and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution: Provided, That such action and its prosecutions shall involve the United States in no expense.

"Sec. 2. Provided that in such case the court in which such action is brought is authorized to require proper security for costs in case judgment is for the defendant."

Mr. Edwin M. Ashcraft argued the cause and filed a brief for plaintiffs in error:

The act of February 24, 1905, is not 53 L. ed.

retroactive, and the act of August 13, 1894, governs in this case.

United States Fidelity & G. Co. v. United States, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537.

This action should have been properly brought in the northern district of Illinois, —the district of which plaintiffs in error are inhabitants.

McCormick Harvesting Mach. Co. v. Walthers, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; Re Keasbey & M. Co. 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150.

Plaintiffs in error have not voluntarily submitted to the jurisdiction of the court, or waived their privilege of being sued in the district of which they are inhabitants.

Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co. 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720; St. Louis & S. F. R. Co. v. McBride, 141 U. S. 127, 35 L. ed. 659, 11 Sup. Ct. Rep. 982; Harkness v. Hyde, 98 U. S. 476-479, 25 L. ed. 237, 238; Southern P. Co. v. Denton, 146 U. S. 202, 36 L. ed. 942, 13 Sup. Ct. Rep. 44.

The circuit court of the northern district of California has misconstrued rule 22 of its rules of court; and, if it has not, such rule 22 is unreasonable and invalid.

3 Rose, Code Fed. Proc. p. 2293; Southern P. Co. v. Denton, supra.

Messrs. Robert T. Devlin and Henry P. Brown submitted the cause for defendant in error:

The right to make a special appearance is not a substantial one, inherently existing, but is a privilege allowed by practice, and must be exercised within the rules of procedure; and the right of the defendant in the Federal court to be sued in the district of his residence is one which he may waive, and which is waived by general appearance.

Mahr v. Union P. R. Co. 140 Fed. 921.

Mr. Justice Moody, after making the foregoing statement, delivered the opinion of the court:

The decision of the court below proceeded upon the erroneous assumption that the act of February 24, 1905 (33 Stat. at L. 811, chap. 778, U. S. Comp. Stat. Supp. 1907, p. 709), was retrospective. That act amended the act of 1894 in several important particulars, which it is not necessary to state, and provided specifically that a suit upon the bond should be brought by one furnishing labor and materials, in the name of the United States, in the circuit court of the United States in the district where the contract with the United States was to be performed, and not elsewhere. As this suit

was brought after the passage of the amending act, it was brought in the only district where it could be maintained, if the amending act were retrospective. But it is not retrospective. *United States Fidelity & G. Co. v. United States*, 209 U. S. 306, 52 L. ed. 804, 28 Sup. Ct. Rep. 537. In this case the contract *with and the bond to the United States, and the contract under which Gibson furnished labor and materials, all antedate the passage of the amending act, and the rights of the parties, therefore, must be determined under the act of 1894. An act passed on the same day, August 13, 1894 (28 Stat. at L. 279, chap. 282, U. S. Comp. Stat. 1901, p. 2315), authorized incorporated surety companies to become sureties on bonds running to the United States, and the 5th section fixed the district in which a suit upon the bond against the surety company should be brought. But nothing was said as to the district where the sureties were individuals, as was the case here. While the act of 1894 authorized a person supplying labor and materials to bring suit upon the bond in the name of the United States, against the contractor and sureties, it did not specify the court in which the suit should be brought, and the omission was not supplied until the enactment of the law of 1905, which, as has been pointed out, is not applicable to this case. The jurisdiction, therefore, of the courts of the United States, must be sought in the general provisions of the statutes relating to that subject. It has been decided that under this statute, for jurisdictional purposes, the United States is the real party plaintiff. *United States Fidelity & G. Co. v. United States*, 204 U. S. 349, 51 L. ed. 516, 27 Sup. Ct. Rep. 381. We have here, then, a suit in which the United States is plaintiff and three citizens and residents of the state of Illinois are defendants. Obviously, this suit is not a controversy between citizens of different states, and the rules governing where such diversity of citizenship exists have no application. The case is governed by that part of the act of March 3, 1887 [24 Stat. at L. 552, chap. 373], as corrected by the act of August 13, 1888 (25 Stat. at L. 434, chap. 866, U. S. Comp. Stat. 1901, p. 508), which provides that no civil suit shall be brought before any of the circuit courts of the United States "against any person by any original process or proceeding in any other district than that whereof he is an inhabitant." *McCormick Harvesting Mach. Co. v. Walthers*, 134 U. S. 41, 33 L. ed. 833, 10 Sup. Ct. Rep. 485; *Re Keasbey & M. Co.* 160 U. S. 221, 40 L. ed. 402, 16 Sup. Ct. Rep. 273; *United States v. Southern P. R. Co.* 49 Fed. 297, opinion by Mr. Justice Harlan. It follows, therefore, that the court below

was without jurisdiction of this cause, and, as the *defendants have taken no action [18 whatever in response to the summons, except to appear specially and object to the jurisdiction, it cannot possibly be said that the objection to the jurisdiction has been waived.

The learned judge of the circuit court, however, based his decision upon rule 22 of the circuit court of the United States for the ninth judicial circuit, which is as follows:

"Any party may, without leave of court, appear specially in any action at law or suit in equity for any purpose for which leave to appear could be granted by the court, by stating in the paper which he serves and files that the appearance is special, and that if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court, he will appear generally in the case within the time allowed therefor by law, or by the order of court or by stipulation of the parties. If such statement be not made as above provided, the appearance shall be deemed and treated as a general appearance."

The defendants appeared specially and objected to the jurisdiction, but did not state in the appearance that "if the purpose for which such special appearance is made shall not be sanctioned or sustained by the court," they "will appear generally in the case." Therefore, if the rule is held to be valid, such an appearance must be deemed a general appearance. And so it was decided in the court below.

The rule, as construed and applied in this case, is inconsistent with the laws of the United States, and therefore invalid. *Rev. Stat. § 918, U. S. Comp. Stat. 1901, p. 385.* A party who is sued in the wrong district, and does not waive the objection, may of right appear specially and object to the jurisdiction of the court, and, the decision being against his objection, may of right bring the question directly to this court. The rule substantially impairs his right to appeal to this court,—a right which is conferred by statute. 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488. It says to him, you may appear specially and object to the jurisdiction, only upon the condition that you will abide by the decision of a single judge; if that is against you, you must waive your objection and enter a general *appearance; if you do not agree to [19 do this, your special appearance will be deemed to be general. We think it was beyond the power of the circuit court to make and enforce a rule which imposes upon defendants such conditions, and transforms an objection to the jurisdiction into a waiver of the objection itself. The jurisdiction of the

circuit courts is fixed by statute. In certain cases a defendant may waive an objection to the jurisdiction over his person. But he cannot be compelled to waive the objection if he chooses seasonably to insist upon it, and any rule of court which seeks to compel a waiver is unauthorized by law and invalid. So it has been held that, under the act which requires the practice in the courts of the United States to conform as near as may be to the practice of the courts of the states in which they are held, state statutes which give a special appearance to challenge the jurisdiction the force and effect of a general appearance must not be followed by the courts of the United States. *Southern P. Co. v. Denton*, 146 U. S. 202, 36 L. ed. 943, 13 Sup. Ct. Rep. 44; *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; *Galveston, H. & S. A. R. Co. v. Gonzales*, 151 U. S. 496, 38 L. ed. 248, 14 Sup. Ct. Rep. 401. The reasoning in these cases is pertinent to the case at bar.

To sum up, the circuit court for the northern district of California had no jurisdiction to entertain this suit against these defendants, who are not inhabitants of that district, but, on the contrary, inhabitants of the state of Illinois. The defendants appeared specially, as they had a right to do, solely for the purpose of objecting to the jurisdiction. They were not bound to agree to submit their objection to the final decision of the judge of the circuit court, and the rule of court which treated the special appearance, without such an agreement, as a general appearance, was invalid.

For these reasons the judgment is reversed and the case remanded to the Circuit Court, with instructions to dismiss the action for want of jurisdiction; and it is so ordered.

Mr. Justice McKenna dissents.

20]*JOSEFA DIANA MARTINEZ, Julio N. Chardon, Carlos Cabrera, and Tomas Torres, Appts.,

v.

LA ASOCIACION DE SEÑORAS DAMAS DEL SANTO ASILO DE PONCE.

(See S. C. Reporter's ed. 20-25.)

Federal courts — jurisdiction of district court for Porto Rico — effect of treaty on citizenship of Spanish corporation.

1. A corporation created by a decree of the Spanish Crown for charitable purposes, and limited in its field of operations to Porto Rico, does not continue, after the ratification of the treaty of peace between the United States and Spain, to be a citizen of Spain.

zen or subject of Spain, within the meaning of the act of March 2, 1901 (31 Stat. at L. 953, chap. 812), § 3, extending the jurisdiction of the district court of the United States for Porto Rico to controversies where the parties or either of them are citizens or subjects of a foreign state.

[For other cases, see Courts, III. c, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction of district court of Porto Rico — citizenship of corporation.

2. A charitable corporation created by decree of the Spanish Crown to operate in Porto Rico is not a citizen of the United States, within the meaning of the act of March 2, 1901, § 3, extending the jurisdiction of the district court for Porto Rico to controversies where the parties or either of them are citizens of the United States, but, since the enactment of the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), establishing a civil government for Porto Rico, is, if a citizen of any country, a citizen of Porto Rico.

[For other cases, see Courts, III. c, in Digest Sup. Ct. 1908.]

[No. 83.]

Argued January 21, 1909. Decided February 23, 1909.

APPEAL from the District Court of the United States for Porto Rico to review a decree in favor of complainant in a suit brought by a charitable corporation to establish title to land. Reversed and remanded with instructions to dismiss without prejudice, for want of jurisdiction.

See same case below, 2 Porto Rico Fed. Rep. 369.

The facts are stated in the opinion.

Mr. Fritz von Briesen argued the cause and filed a brief for appellants:

If the association exists at all, it exists only by virtue of the express or implied authority granted to the same by the people of Porto Rico. It is therefore a citizen of Porto Rico. It owes allegiance to the present government, and may claim protection from it.

7 Cyc. Law & Proc. pp. 133, 136, 142.

The situation is substantially identical with that which arose under the charter of Dartmouth college and our treaty with England of 1783.

Dartmouth College v. Woodward, 4 Wheat. 518, 643, 4 L. ed. 629, 660.

A corporation can have no legal existence out of the bounds of the sovereignty by which it is created; it exists only in contemplation of law and by force of law; and, where that law ceases to operate, the corporation can have no existence. It must dwell in the place of its creation.

Ohio & M. R. Co. v. Wheeler, 1 Black,

286, 295, 17 L. ed. 130, 132; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. ed. 274; *Paul v. Virginia*, 8 Wall. 168, 181, 19 L. ed. 357, 360.

The case is analogous to that of a territorial corporation when the territory becomes a state. In such case the corporation becomes a citizen of the state.

Kansas P. R. Co. v. Atchison, T. & S. F. R. Co. 112 U. S. 415, 28 L. ed. 795, 5 Sup. Ct. Rep. 208.

The earlier decisions under which the present doctrine of citizenship was developed referred to the fact that the corporations in question were not only created by, "but did business" or "had a home" in, the state of their incorporation.

Louisville, C. & C. R. Co. v. Letsom, 2 How. 497, 11 L. ed. 353.

Mr. Charles M. Boerman also filed a brief for appellants.

Mr. John W. Yerkes argued the cause, and, with Messrs. George E. Hamilton, M. J. Colbert, and John J. Hamilton, filed a brief for appellee.

Mr. Justice Moody delivered the opinion of the court:

The appellee, alleging itself to be "a charitable corporation, organized and existing under the laws of the Kingdom of Spain," brought a bill in equity in the district court of the United States for Porto Rico against the appellants, alleging them to be citizens of Porto Rico. The object of the suit, generally described, is to assert title to certain lands in Porto Rico, and its determination turns upon the construction of the will of Juan Bautista Silva, an inhabitant of Porto Rico, who died in 1875. The suit, therefore, does not arise under the Constitution, laws, or a treaty of the United States. A decree was entered in favor of the plaintiff, and the defendants appealed to this court.

Before entering upon a consideration of the merits of the cause, the jurisdiction of the court below to entertain it, which is questioned, must be passed upon. The district court of the United States for Porto Rico was created, and its jurisdiction defined, by the act of April 12, 1900, establishing a civil government for Porto Rico (31 Stat. at L. 77, chap. 191), as amended by the act of March 2, 1901 (31 Stat. at L. 953, chap. 812). By § 34 of the first act it was provided that—

"Porto Rico shall constitute a judicial district, to be called the 'district of Porto Rico,' . . . the district court for said district shall be called the district court of the United States for Porto Rico . . . and shall have, in addition to the ordinary jurisdiction of district courts of the United

States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed therein in the same manner as a circuit court."

The jurisdiction was further defined in § 3 of the last act, which provided that "the jurisdiction of the district court of the United States for Porto Rico in civil cases shall, in addition *to that conferred by [22 the act of April 12, 1900, extend to and embrace controversies where the parties, or either of them, are citizens of the United States, or citizens or subjects of a foreign state or states, wherein the matter in dispute exceeds, exclusive of interest or costs, the sum or value of one thousand dollars."

If the court below had jurisdiction, it must be under the amending act, and because the plaintiff was either a citizen of the United States or a citizen or subject of a foreign state. No other ground of jurisdiction has been or can be suggested. It was found by the district court that the plaintiff was a citizen or subject of Spain, and the jurisdiction was sustained upon that theory. Counsel in this court have attempted to sustain the jurisdiction on the ground that the plaintiff, if not a citizen or subject of Spain, is a citizen of the United States. If the plaintiff was neither a citizen of the United States nor a citizen or subject of Spain, it is clear that the court was without jurisdiction.

We assume, in favor of the plaintiff, that it was a corporation organized in 1863 by a decree of the Spanish Crown. That decree incorporated an asylum of charity in Ponce. The purposes of the incorporation are described in article 1 of the by-laws, which follows:

"This association recognizes as its principal object the alleviation of human suffering; and for this purpose it will establish an asylum for the poor of the district. When its resources permit it to give its attention to other objects related to its purpose, it will establish schools for poor children of both sexes, under the supervision of Sisters of Charity."

The incorporators were all residents of Ponce, and all the purposes of the corporation were to be accomplished and all its business done in that locality.

The first question is whether, after the ratification of the treaty of peace between the United States and Spain, the plaintiff corporation continued to be a citizen or subject of Spain.

It is assumed, in passing upon this question, that Congress, *in employing the [23 word "citizen" in this connection, intended to include corporations, in view of the decisions of this court that the word has that meaning when used in the definition of the

jurisdiction of the circuit courts of the United States. *St. Louis & S. F. R. Co. v. James*, 161 U. S. 545, 40 L. ed. 802, 16 Sup. Ct. Rep. 621.

By the treaty of peace (30 Stat. at L. 1754), Spain ceded Porto Rico to the United States and thereby parted with all sovereignty over that island. Careful provision was made that the cession should not impair the property or rights of corporations, associations, or individuals. Article 8. It is clear, however, that thereafter the duty to protect property and rights within the ceded territory rested upon the United States. An opportunity was afforded to Spanish subjects, natives of the Peninsula, to preserve their allegiance to the Crown of Spain by making, within a limited time, a declaration to that effect. Article 9. This article obviously had no reference to corporations. No other provisions of the treaty seem relevant to the question before us.

We are of opinion that the cession of Porto Rico by Spain to the United States severed all relations between Spain and this corporation, and that thereafter it cannot be regarded in any sense as a citizen or subject of Spain. Spain has no duty to or power over it. We confine this statement to a corporation like the one before us, formed for charitable purposes, and limited in its operations to the ceded territory. A different question (which need not be decided) would be presented if the corporation had other characteristics than those possessed by the one under consideration; as, for instance, if it were a Spanish trading corporation, with a place of business in Spain, but doing business by comity in the island of Porto Rico.

The next question is whether the plaintiff corporation is a citizen of the United States. Its status during the period between the cession and the passage of the act to provide a civil government for the island need not be determined. That act created a form of government for Porto Rico and its adjacent islands, in which there was exhibited, with 24]some modifications, *the characteristic American separation of the legislative, executive, and judicial powers. The United States has never granted to any territory organized by act of Congress complete self-government, and Porto Rico is no exception to the rule. Indeed, though the act confers a considerable measure of self-government, for reasons deemed sufficient by Congress, it stops short of the power usually conferred upon territories within the continent. This organic act has the provision common to most, if not all, our territories, whether fully incorporated into the United States or not, that Congress may, if it deem advisable, annul all laws enacted by the local legislative assembly. Subject to these limitations, a body

politic, under the name of The People of Porto Rico, with a citizenship of its own, is created (§ 7); existing laws, not in conflict with the applicable laws of the United States, are continued in force until altered, amended, or repealed by the legislative assembly or by Congress (§ 8); public property acquired by the United States from Spain is placed under the control of the local government, and the legislative assembly is given power to legislate with respect to it (§ 13); the legislative authority is given "power by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this act" (§ 15); the governor is enjoined faithfully to execute the laws, and given to that end the applicable powers of a governor of a territory of the United States (§ 17); the legislative assembly of Porto Rico is constituted (§ 27); and the scope of the legislative power is fully described in § 32, as follows:

"That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, and to provide and repeal laws and ordinances therefor; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: Provided, however, That all grants of franchises, rights *and privileges or conces-[25 sions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises granted in Porto Rico shall be reported to Congress, which hereby reserves the power to annul or modify the same."

In the form of government which is typically American, the creation and control of corporations is exclusively a legislative function. We are of opinion that the effect of the organic act is to intrust that function, so far as it relates to a corporation of the kind under consideration, whose essential qualities need not be repeated, to the government of Porto Rico; and that such a corporation is now, if a citizen of any country, a citizen of Porto Rico. We need not consider whether the corporation has more than a *de facto* existence, subject to the will of the Porto Rican legislature. It follows that the court below had no jurisdiction of this cause.

The decree is reversed and the cause remanded to the District Court of the United States for Porto Rico, with instructions to dismiss the bill, without prejudice, for want of jurisdiction.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES, Petitioner,

v.

J. WILLCOX BROWN.

(See S. C. Reporter's ed. 25-51.)

Insurance — accounting in equity — winding up.

1. A court of equity is bound to take all the facts into consideration and to weigh the relative advantages and disadvantages of granting an accounting and appointing a receiver to wind up the business of a mutual life insurance company at the suit of a policy holder because of the wrongdoing of its former officers and directors, assuming that jurisdiction exists to grant such relief.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Insurance — accounting in equity — winding up.

2. The fact that the stockholders in a mutual life insurance company claim in a pending suit to own the entire surplus, which claim the company fails to deny, does not authorize a suit in equity by a policy holder entitled to participate equitably in the distribution of the surplus according to methods and principles adopted by the company, for an accounting and the appointment of a receiver to wind up its affairs, based upon mismanagement and misappropriation by its officers and directors.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Pleading — what facts admitted by demurrer.

3. A demurrer to a bill only admits the facts well pleaded in such bill, and does not admit the pleader's conclusions of law, nor the correctness of any opinion set forth therein.

[For other cases, see Pleading, VII. e, in Digest Sup. Ct. 1908.]

Federal courts — following decisions of state courts.

4. Decisions of the highest court of the state of New York as to the construction of the charter of an insurance company obtained under a general law of the state are binding upon the Federal courts.

[For other cases, see Courts, 1876-1883, in Digest Sup. Ct. 1908.]

Federal courts — following decisions of state courts.

5. The meaning and construction of a policy of insurance issued by a New York company, and both executed and to be carried out in that state, as declared by the highest court of the state, is of most persuasive influence, even if not of binding force, in the Federal courts, in the absence of any Federal question arising in the case. [For other cases, see Courts, 1894-1898, in Digest Sup. Ct. 1908.]

Insurance — accounting in equity — wrongdoing by officers or agents.

6. Wrongdoing by the officers and directors of a mutual life insurance company gives no jurisdiction for an accounting in equity as between the company and a policy holder, in the absence of any trust relation between them.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Accounting — who may have — creditor.

7. A mere creditor, as such, has no right to compel his debtor to account in equity, in the absence of any trust relation between them.

[Right to accounting, see Accounting, 1-12, in Digest Sup. Ct. 1908.]

Insurance — surplus in mutual company — trust for policy holder.

8. Waste and misappropriation of the moneys of a mutual life insurance company by its officers or directors before such moneys reach the surplus fund, and before any distribution to policy holders is made, do not authorize a suit in equity to establish a trust in favor of a policy holder, in the absence of any trust relation between the company and the policy holder resulting from the policy.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Insurance — surplus in mutual company — trust for policy holder.

9. There is no trust relation in New York between a mutual life insurance company and a policy holder entitled to participate equitably in the distribution of the surplus according to such methods and principles as shall be adopted by the company.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Insurance — accounting in equity — distribution of surplus in mutual company.

10. Frauds and mismanagement by the officers and directors of a mutual life in

diverting funds of mutual insurance company—see notes to Perry v. Farmers' Mut. F. Ins. Asso. 2 L.R.A.(N.S.) 165, and Brown v. Equitable Life Assur. Soc. 81 C. C. A. 4.

On the distribution of the assets of an insolvent insurance company see note to Boston & A. R. Co. v. Mercantile Trust & D Co. 38 L.R.A. 97.

As to fraud as ground for equitable relief—see notes to Curdy v. Berton, 5 L.R.A. 189, and Meldrum v. Meldrum, 11 L.R.A. 65

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to Wilson v. Perrin, 11 C. C. A. 71; Hill v. Hite, 29 C. C. A. 553; Griffin v. Overman Wheel Co. 9 C. C. A. 548; Elmen-dorf v. Taylor, 6 L. ed. U. S. 290; Jackson ex dem. St. John v. Chew, 6 L. ed. U. S. 583; United States ex rel. Butz v. Muscatine, 19 L. ed. U. S. 490; Clark v. Graham, 5 L. ed. U. S. 334; Forepaugh v. Delaware, L. & W. R. Co. 5 L.R.A. 508; and Mitchell v. Burlington, 18 L. ed. U. S. 351.

On the liability of officers to member for

insurance company do not entitle a policy holder to an accounting and distribution of the surplus in any other manner, or at any other time, or in any other amounts, than as provided for in the contract of insurance, where, by such contract, he is entitled to participate equitably in the distribution of some part of the surplus, according to such principles and methods as shall be adopted by the company.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Insurance — mutual company — winding up.

11. The appointment of a receiver and a real, though not formal, dissolution of a mutual life insurance company, and the distribution of its assets, cannot be had at the instance of a policy holder entitled to participate equitably in the distribution of the surplus, because the surplus fund is not as large as it should have been, owing to the misconduct of the company's officers, and because the company has not distributed as much of the surplus as complainant deems himself entitled to, by reason of such misconduct, where no trust relation exists between the policy holder and the company, and no claim is made that the apportionment made is inequitable as between the policy holders, or is based upon erroneous principles.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Insurance — accounting in equity — winding up — insolvency.

12. No case for an accounting or for the appointment of a receiver to wind up the affairs of a mutual life insurance company is made by allegations of insolvency contained in a bill filed by a policy holder, which are based upon the idea that the company itself is liable to policy holders for frauds or wrongdoing committed by the officers or directors against the company, and in their personal interests.

[For other cases, see Insurance, I. c, in Digest Sup. Ct. 1908.]

Equity — fraud as ground for jurisdiction.

13. Equity does not take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, and where, so far as is necessary, discovery may be obtained as well as in equity.

[For other cases, see Equity, 89-93, in Digest Sup. Ct. 1908.]

Equity — jurisdiction — multiplicity of suits.

14. Complainant cannot urge, as a ground for jurisdiction in equity of his suit, that defendant will thereby be saved a multiplicity of suits by other parties, where defendant raises no objection to such possible suits, and urges no such ground for jurisdiction in equity of the suit in question.

[For other cases, see Equity, 79-86, in Digest Sup. Ct. 1908.]

Argued January 13, 14, 1909. Decided March 1, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which reversed a decree of the Circuit Court for the Southern District of New York, sustaining a demurrer to and dismissing a bill filed by a policy holder against a mutual life insurance company for an accounting and the appointment of a receiver to wind up its affairs. Reversed.

See same case below, 81 C. C. A. 1, 151 Fed. 1.

Statement by Mr. Justice Peckham:

This case comes here on writ of certiorari, which brings up the record from the circuit court of appeals of the second circuit, reversing the decree of the circuit court for the southern district of New York, which sustained the petitioner's demurrer to the plaintiff's bill and dismissed the same. The opinion of the circuit court is reported in 142 Fed. 835, and that of the circuit court of appeals, 81 C. C. A. 1, 151 Fed. 1.

The bill was filed against the defendant (the petitioner above named) some time in August, 1905, and is one of extreme length, and makes allegations in great detail relating to the conduct of the business of the defendant by its board of directors and by its officers and agents for many years prior to the filing of the bill. It will not be necessary to repeat all of them in order to understand the case as made. The following facts, among many others of a similar nature, appear in the bill:

The complainant is a citizen of the state of Maryland and brings this suit in behalf of himself, as well as all the policy holders and annuitants of the company defendant who may choose to come in and join therein; the defendant is a citizen of the state of New York and an inhabitant of the southern district thereof.

The defendant was incorporated in May, 1859, under a general law of the state of New York, passed June 24, 1853, providing for the incorporation of life and health insurance companies. In accordance with this act there was filed by the incorporators a declaration, in the nature of a charter, from which it appears that the capital of the defendant was \$100,000 in cash, divided into 1,000 shares of \$100 each, and the corporate powers of the company were vested in a [28] board of directors. The insurance business was to be conducted upon the mutual plan. The holders of the capital stock were, by the declaration, to have the right "to receive a semiannual dividend on the stock so held by them, not to exceed 3½ per cent

of the same; such dividends to be paid at the times and in the manner designated by said directors of the company. The earnings and receipts of said company, over and above the dividends, losses, and expenses, shall be accumulated."

The officers were to strike a balance every five years from December 31, 1859, which was to exhibit its assets and liabilities and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policy holder was to be credited with an equitable share of the surplus, which was to be applied to the purchase of an additional amount of insurance for each policy holder, or, if any policy holder should so direct, such equitable share of the surplus should be applied in his case to the purchase of an annuity.

The complainant took out a policy in the company on the 28th of December, 1867, for \$25,000, in the form of an ordinary life policy, which was subsequently, and on the 12th of January, 1876, changed to another ordinary life policy, payable to his wife upon his death, and, if his wife were not then living, then to the children of complainant, and, if there were no children, then to the complainant's executors, administrators, or assigns. The policy was also issued and accepted upon certain conditions printed on its back, which were accepted as a part of the contract, among which provisions is the following:

"6. This policy, during its continuance, shall be entitled to participate in the distribution of the surplus of this society, by way of increase to the amount insured, according to such principles and methods as may, from time to time, be adopted by this society for such distribution, which principles and methods are hereby ratified and accepted by and for every person who shall have or claim any interest under this contract; but the society may, at any time before a forfeiture, upon the request *of the person holding the absolute legal title to this policy, substitute a cash payment, to be fixed by said society, in lieu of the said increase to the amount insured, and such payment may be made by reduction of subsequent premiums, if said policy holder shall so elect."

The complainant elected to receive his share of the surplus, as ascertained from time to time, in the reduction of the premium, and the company was notified of that election, and ratified and accepted the same; and, since the date of the issuing of the policy, the complainant has regularly paid the premiums thereon as they severally accrued, after deducting the sums which, at each period, the officers of the defendant stated to be the entire amount applicable

in reduction of the premiums as complainant's equitable share in the surplus. Although the complainant has been entitled to have his full share of the lawfully-ascertained and true surplus profits of the defendant applied in reduction of his premium, yet the amounts allowed by the officers of the defendant in reduction of his premium have not been the real amounts of complainant's equitable share in the true surplus, but, by means of the abuse of discretion, wrongs, and the inequitable and fraudulent conduct of the defendant, its officers and agents, the company, its officers and stockholders, have wrongfully retained, and, to the extent of a large sum, fraudulently wasted and misappropriated to themselves, a large portion of complainant's share in said surplus that he has accepted such reductions of premium as have been from time to time assigned to him solely because of his belief that the officers of the defendant were acting in a just and lawful manner, and in reliance upon the representations of the officers of the defendant thereto, stating that he was receiving his lawful share of the true surplus, which representations were untrue and fraudulent, and without knowledge by complainant that they were untrue, or of the facts thereafter stated in the bill.

The defendant has, at the expiration of each year since the defendant's incorporation, ascertained and entered upon its books a sum alleged to be the "net surplus" earned by the *defendant during the preceding [30 year, which surplus has been reported annually for many years to the insurance department of the state of New York as the fund which belonged to the policy holders exclusively, and one in which the stockholders were without any interest whatever, while, on the other hand, the defendant now claims that such surplus belongs to its stockholders.

The defendant, through its officers, has been crediting and paying to its policy holders, from time to time, only a portion of the surplus admitted to exist by the defendant, and to the whole amount of which complainant and the other policy holders are entitled in equitable proportion, and the officers, contrary to the rights of the policy holders, and in fraud of their rights, have not credited the policy holders with their equitable share of the surplus, although such surplus has been duly ascertained from their books, nor have they paid policy holders whose policies matured from time to time their just and equitable share of such surplus to which they were entitled, and the stockholders now claim and threaten to appropriate all the surplus as a dividend, or earning, upon the shares of stock of the company, in direct disregard of the repre-

sentations made by the defendant to the superintendent of insurance of the state and in disregard of the rights of the policy holders.

From the books it appears that there were in 1904 over 500,000 policy holders; over \$1,495,000,000 of insurance risks; over \$413,000,000 of assets; liabilities over \$333,000,000, and a surplus of over \$80,000,000. That there are over \$10,000,000 of the surplus in which the stockholders can have no interest and which are still claimed by them. The retention of the surplus has been wrongful and for the fraudulent purpose to pile up a fund under the control of the defendant and its officers, by the use of which they could secure illegal and personal gain, and out of which they could distribute large sums to and among themselves under pretense of payment of salaries and expenses, by improper and extravagant disbursements, 31]and *that in fact they have distributed to themselves improper and extravagant salaries, commissions, and expenses from the fund or surplus which belonged to the policy holders. Great waste and extravagance are alleged to have been committed by the defendant through its officers in many ways. The officers of defendant have failed to properly invest and reinvest the funds of the company, but have wilfully and negligently misappropriated and fraudulently mismanaged them.

About January, 1905, dissensions among the officers and board of directors occurred, and in consequence a committee of the defendant was appointed for the purpose of investigating its affairs and condition, and the superintendent of insurance also conducted an investigation, and the results showed the facts above stated in very great detail. A committee of the legislature also investigated the condition of the defendant during the fall of 1905 and reported to the legislature in 1906, showing the same facts.

Mr. Thomas F. Ryan in the meantime had become the owner of 502 shares of the stock of the defendant (a majority thereof), with a par value of \$50,200, which were purchased by him for \$2,500,000, and thereupon he executed a deed of trust to three trustees, with power to vote the stock as stated in the deed, and since that time Ryan has been the managing spirit in the defendant. Twenty directors have been elected to fill vacancies in the board of directors, and are serving thereon, but the right to do so is denied by the complainant and the minority stockholders, and until such questions are settled by the determination of a court of final jurisdiction there does and will exist absolute confusion and corporate anarchy in the management of the affairs of the defendant.

If properly conducted, the defendant has sufficient assets to provide for and liquidate every outstanding policy, and to insure the performance of every contract made by the defendant with its annuitants. It is subsequently averred that the defendant is insolvent, because it is responsible to the policy holders for the excessive sums paid in the way of salaries and *fees, and also[32 for all sums of money lost consequent upon fraud and waste, and such amounts are said to be more than the defendant will have funds to meet when proved and demanded. (This, by way of opinion and prediction.)

The defendant is still in the control of the stockholders, whose representatives have been guilty of misappropriation, and its business is at a standstill. The interests of the policy holders are to place the assets in the hands of a receiver, in order to wind up the affairs of the defendant, which is the only way to safeguard the policy holders' interests. An action at law is inadequate to afford proper relief, and there would result, if such actions were necessary, a multiplicity of suits.

As relief, the bill prayed for the production of all books, papers, and records of the defendant, and that an accounting be had of all the dealings and transactions of the defendant, its officers and agents and stockholders, from the commencement of the business of the defendant in 1859, or for such period as the court might deem proper. Also, that a trust be adjudged and declared to exist and imposed upon the assurance funds and surplus, as ascertained, as against the defendant, its officers and stockholders, and that it be adjudged that they, and each of them, hold the same as trustees for such persons as shall be declared to have interests therein under the decree to be entered in the cause. Such accounting should also be taken for the purpose of ascertaining to what extent the defendant is indebted to the surplus fund on account of damage, loss, and depletion occasioned by the negligence, misconduct, misappropriation, and other causes averred in the bill. Also, that it be adjudged that the defendant pay into such assurance fund the amount ascertained on such accounting to be due from the defendant to such fund, and that the defendant, its directors, officers, and agents, be enjoined from further retaining the control of, or spending in any way, the said funds received from the policy holders and annuitants, and constituting the assurance fund and the so-called surplus of the company, and also from doing any other act or thing in *connec-[33 tion with the funds of the defendant, except to transfer the same to a receiver, and that a receiver be appointed to take possession of all the funds held by the defendant, of

every character and description, and administer and distribute the same as he may be directed by the court.

The defendant demurred to this bill (1) for want of equity; (2) complainant has an adequate remedy at law; (3) complainant, under the laws of New York, had not legal capacity to sue; (4) complainant had no interest in the subject-matter of the bill. Other grounds were stated not specially material now to notice.

Mr. William B. Hornblower argued the cause, and, with Mr. Allan McCulloh, filed a brief for petitioner:

A demurrer does not admit the correctness of conclusions of law.

Cragin v. Lovell, 109 U. S. 199, 27 L. ed. 905, 3 Sup. Ct. Rep. 132; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 253, 27 L. ed. 925, 3 Sup. Ct. Rep. 193; *Gould v. Evansville & C. R. Co.* 91 U. S. 536, 23 L. ed. 419; *Hollis v. Richardson*, 13 Gray, 392.

Where written instruments are set forth and annexed to the complaint, a demurrer does not admit the construction placed by the pleader upon such instruments, nor conclusions or inferences drawn by the pleader therefrom. It is for the court to decide whether the construction placed by the pleader upon the instruments, or the conclusions or inferences of the pleader, are correct.

Bogardus v. New York L. Ins. Co. 101 N. Y. 337, 4 N. E. 522; *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712; *United States v. Ames*, 99 U. S. 45, 46, 25 L. ed. 300, 301; *Interstate Land Co. v. Maxwell Land Grant Co.* 139 U. S. 577, 578, 35 L. ed. 281, 282, 11 Sup. Ct. Rep. 656; *Chicot County v. Sherwood*, 148 U. S. 536, 37 L. ed. 549, 13 Sup. Ct. Rep. 695; *Finney v. Guy*, 189 U. S. 343, 344, 47 L. ed. 844, 845, 23 Sup. Ct. Rep. 558.

Opinions of the pleader as to the propriety of defendant's conduct, or as to what is or is not the probable consequence of such conduct, are not admitted by a demurrer, and are of no probative value.

General allegations of fraudulent or negligent conduct or wrongful intent are to be disregarded upon demurrer, unless facts are alleged sufficient to substantiate the allegations.

People v. Equitable Life Assur. Soc. 124 App. Div. 732, 109 N. Y. Supp. 453; *Schiefer v. Freygang*, 125 App. Div. 498, 109 N. Y. Supp. 848.

A charter granted by special act to a corporation is simply a particular kind of statute. Therefore, the Federal courts hold themselves bound to follow the interpretation placed upon a corporation charter, con-

tained in an act of the legislature, by the highest court of the state which enacted it.

Smith v. Kernochen, 7 How. 198, 12 L. ed. 666; *Stone v. Wisconsin*, 94 U. S. 181, 24 L. ed. 102; *Cleveland, P. & A. R. Co. v. Franklin Canal Co.* Fed. Cas. No. 2,890; *Venner v. Atchison, T. & S. F. R. Co.* 28 Fed. 581; *New Orleans Waterworks Co. v. Southern Brewing Co.* 36 Fed. 833.

The same principle applies to the construction of "articles of incorporation" drawn up under a general statute authorizing the incorporation of certain classes of corporations.

The corporate rights and liabilities growing out of such articles are to be determined by the courts of the state under whose laws the corporation is organized.

Polk v. Mutual Reserve Fund Life Assn. 137 Fed. 276, affirmed in 207 U. S. 310, 52 L. ed. 222, 28 Sup. Ct. Rep. 65; *Merrimac Min. Co. v. Levy*, 54 Pa. 227, 93 Am. Dec. 697; *Clark v. Turner*, 73 Ga. 1; *First Nat. Bank v. Converse*, 200 U. S. 425, 50 L. ed. 537, 26 Sup. Ct. Rep. 306.

The United States courts have invariably followed the state decisions on all questions concerning corporations, where no Federal question was involved.

11 Cyc. Law & Proc. pp. 903-907; *Seecombe v. Milwaukee & St. P. R. Co.* 23 Wall. 108, 23 L. ed. 67; *Hancock v. Louisville & N. R. Co.* 145 U. S. 409, 36 L. ed. 755, 12 Sup. Ct. Rep. 969; *National Park Bank v. Remsen*, 158 U. S. 337, 39 L. ed. 1008, 15 Sup. Ct. Rep. 891; *SiouX City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341; *Williams v. Gaylord*, 186 U. S. 157, 46 L. ed. 1102, 22 Sup. Ct. Rep. 798; *Schofield v. Goodrich Bros. Bkg. Co.* 39 C. C. A. 76, 98 Fed. 271.

This defendant society is organized under the laws of New York state. Every person who has joined it as a policy holder has entered into his contract upon the basis of the laws of New York, as limited only by the Constitution and statutes of the United States. Every person becoming a policy holder since the decisions in *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363, and in *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712, has had a right to rely upon, and is bound by, those decisions as part of the law of the state, and, therefore, part of his contract. Every such person has presumably entered into his contract in the faith that it was the right and the duty of the society's officers "to retain out of its surplus an amount sufficient to insure the security of its policy holders, in the future as well as at present, and to cover any contingen-

cies that might arise or be fairly anticipated" (160 N. Y. 34); and subject to the ruling that the relations of a policy holder to the company are not those of *cestui que trust* and trustee, but simply those of creditor and debtor (109 N. Y. 421).

So far as the bill in this suit is based upon any alleged failure to comply with its charter or contract obligations as to the distribution of its entire net surplus, the bill is clearly demurrable under the rulings of the court of appeals of New York in *Greeff v. Equitable Life Assur. Soc.* supra.

So far as the bill is based upon the theory of a trust relationship between the policy holders and the society, it is at variance with the settled law of New York, as laid down by a long and unbroken line of decisions.

Uhlman v. New York L. Ins. Co. supra; *Everson v. Equitable Life Assur. Co.* 68 Fed. 258, affirmed in 18 C. C. A. 251, 39 U. S. App. 34, 71 Fed. 570; *Hunton v. Equitable Life Assur. Soc.* 45 Fed. 661; *St. John v. American Mut. L. Ins. Co.* 13 N. Y. 31, 64 Am. Dec. 529; *Cohen v. New York Mut. L. Ins. Co.* 50 N. Y. 610, 10 Am. Rep. 522; *People v. Security L. Ins. & A. Co.* 78 N. Y. 114, 34 Am. Rep. 522; *Taylor v. Charter Oak L. Ins. Co.* 9 Daly, 489, affirmed 8 Abb. N. C. 331; *Bewley v. Equitable Life Assur. Co.* 61 How. Pr. 344; *Buford v. Equitable Life Assur. Soc.* 98 N. Y. Supp. 152; *Pierce v. Equitable Life Assur. Soc.* 145 Mass. 56, 1 Am. St. Rep. 433, 12 N. E. 858; *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712.

The United States circuit court of appeals misapprehended the force and effect of the *obiter dicta* in the case of *Uhlman v. New York L. Ins. Co.* 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363.

Watts v. Equitable L. Assur. Soc. 55 Misc. 454, 105 N. Y. Supp. 363.

It is no longer true, at least, in the Federal courts, that equity will take jurisdiction of every case of fraud. On the contrary, where the main object of the bill is to obtain relief that could be given by a court of law, equity will not take jurisdiction.

Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616, 623, 20 L. ed. 501, 503; *Buzard v. Houston*, 119 U. S. 347, 352, 30 L. ed. 451, 453, 7 Sup. Ct. Rep. 249; *London Guarantee & Acci. Co. v. Doyle*, 130 Fed. 719; *United States v. Bitter Root Development Co.* 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318.

Nor does the fact that the bill also seeks discovery and an accounting make a case for jurisdiction in equity.

Safford v. Ensign Mfg. Co. 56 C. C. A. 630, 53 L. ed.

120 Fed. 480; *London Guarantee & Acci. Co. v. Doyle*, supra; *United States v. Bitter Root Development Co.* supra.

So far as the bill is based upon mismanagement and waste of corporate assets by the directors and officers, the only cause of action set forth in the bill is one which should be brought in the name of and for the benefit of the society as a corporation, and not in the name of or for the benefit of policy holders who are merely contract creditors, and who have not obtained any lien on the assets by way of judgment or otherwise, and who have no claim as *cestuis que trustent*, as is perfectly well settled by all the cases.

Graham v. LaCrosse & M. R. Co. 102 U. S. 148, 26 L. ed. 106.

It seems also sufficiently obvious that, if this bill is to be sustained either as a bill to recover assets wasted by the officers of the society, or as a bill for a receiver, and to wind up the society, there is a clear defect of parties defendant.

Minnesota v. Northern Securities Co. 184 U. S. 199, 235-237, 46 L. ed. 499, 515-517, 22 Sup. Ct. Rep. 308; *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 241, 33 L. ed. 589, 592, 10 Sup. Ct. Rep. 260; *Gregory v. Stetson*, 133 U. S. 579, 586, 33 L. ed. 792, 794, 10 Sup. Ct. Rep. 422; *People v. Equitable Life Assur. Soc.* 51 Misc. 339, 101 N. Y. Supp. 354.

A court of equity has the right, and is bound, to consider the relative advantages and disadvantages of granting equitable relief.

Columbia College v. Thacher, 87 N. Y. 317, 41 Am. Rep. 365; *McClure v. Leaycraft*, 183 N. Y. 41, 75 N. E. 961, 5 A. & E. Ann. Cas. 45; *New York v. Pine*, 185 U. S. 93, 46 L. ed. 820, 22 Sup. Ct. Rep. 592; *Penrhyn Slate Co. v. Granville Electric Light & P. Co.* 181 N. Y. 80, 73 N. E. 566, 2 A. & E. Ann. Cas. 782; *Knoth v. Manhattan R. Co.* 187 N. Y. 243, 79 N. E. 1015.

Mr. John R. Dos Passos argued the cause, and, with Messrs. Joseph De F. Jinkin, George Gordon Battle, H. Snowden Marshall, and Dos Passos Bros., filed a brief for respondent:

There can be no injury but there must be a remedy.

Charitable Corp. v. Sutton, 2 Atk. 406, 9 Mod. 349.

A trust is an obligation arising out of a confidence reposed in one who has the legal title to property conveyed to him, that he will faithfully apply and deal with such property according to the confidence reposed.

28 Am. & Eng. Enc. Law, p. 858; *Gifford v. Rising*, 51 Hun, 3, 3 N. Y. Supp. 392.

A policy holder places his money with a life insurer upon the trust, and in the confidence and belief, that his money will be invested, accumulated, and eventually paid to the proper beneficiaries.

Fuller v. Knapp, 24 Fed. 104.

The company, as a mutual company, is bound to treat the accounts of its policy holders as if they were *cestuis que trust*. Everyone who assumes, for pay, to handle the funds of another, to a specific end, ought to be supposed to keep accounts, and not to mingle them so as to balk every reasonable effort to get at just what is owing. The surplus of a mutual life insurance company belongs equitably to the policy holders who contribute to it, in the proportion in which they contribute.

United States L. Ins. Co. v. Spinks, 29 Ky. L. Rep. 960, 13 L.R.A.(N.S.) 1053, 96 S. W. 889.

The society held itself out as a mutual company.

Mygatt v. New York Protection Ins. Co. 21 N. Y. 55.

The society admits that its property belonged to the policy holders.

Lord v. Equitable Life Assur. Soc. 47 Misc. 187, 94 N. Y. Supp. 65; Greeff v. Equitable Life Assur. Soc. 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712.

A court of equity, if it is convinced that no adequate remedy exists for a policy holder, has the power to relieve him.

United States Shipbuilding Co. v. Conklin, 60 C. C. A. 680, 126 Fed. 132.

There was a distinct agreement to set aside a separate and definite fund for the stockholders, which constitutes a lien in equity, which will be enforced and protected.

Ketchum v. St. Louis, 101 U. S. 306, 25 L. ed. 999; 3 Pom. Eq. Jur. p. 1235; Walker v. Brown, 165 U. S. 664, 41 L. ed. 870, 17 Sup. Ct. Rep. 453; Legard v. Hodges, 1 Ves. Jr. 478; Re Strand Music Hall Co. 3 DeG. J. & S. 147; 2 Story, Eq. Jur. § 1231; Pinch v. Anthony, 8 Allen, 536; 1 Jones, Mortg. § 162; Jones, Railroad Securities, p. 57.

Both the Uhlman and Greeff Cases are pointedly in favor of the respondent.

Uhlman v. New York L. Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363; Greeff Case, *supra*.

The term "insolvent" usually means one whose estate is insufficient to pay his debts, or one who is unable to pay his debts from his own means.

Van Riper v. Poppenhausen, 43 N. Y. 75.

The business of insurance is a quasi public one.

Swan v. Mutual Reserve Fund Life Asso. 155 N. Y. 9, 49 N. E. 258.

Even if there be no technical trust re-

lation, either as to the surplus or corpus of the property, under the circumstances disclosed in the bill, a court of equity, in an omnibus or class suit, will assume jurisdiction, there being no adequate remedy at law, and the suit involving complicated accounts and a multiplicity of suits growing out of the different classes of policy holders interested.

Fuller v. Knapp, 24 Fed. 100; Corey v. Sherman (Iowa) 60 N. W. 232; McIntosh v. Pittsburg, 112 Fed. 707.

The remedy at law must always be plain and adequate, and as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity.

Watson v. Sutherland, 5 Wall. 78, 18 L. ed. 582; Boyce v. Grundy, 3 Pet. 210, 7 L. ed. 655; Sheets v. Selden, 7 Wall. 420, 19 L. ed. 168; 16 Cyc. Law & Proc. p. 799.

One who is entitled to sue in the Federal court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action.

Smyth v. Ames, 169 U. S. 516, 42 L. ed. 838, 18 Sup. Ct. Rep. 418.

The decisions in the Uhlman and Greeff cases, even if they could be tortured into precedents for petitioner, would not be binding upon the Federal courts.

Carpenter v. Providence Washington Ins. Co. 16 Pet. 511, 10 L. ed. 1051; Gamewell Fire-Alarm Teleg. Co. v. New York, 31 Fed. 313; Hull v. Dills, 19 Fed. 658; Hyde v. Stone, 20 How. 170, 175, 15 L. ed. 874, 875; Union Bank v. Vaiden, 18 How. 507, 15 L. ed. 474; Suydam v. Broadnax, 14 Pet. 74, 10 L. ed. 360; Chicago & N. W. R. Co. v. Whitton, 13 Wall. 285, 286, 20 L. ed. 576, 577; Payne v. Hook, 7 Wall. 429, 430, 19 L. ed. 261, 262; Bank of British N. A. v. Barling, 44 Fed. 641; Union Trust Co. v. Rochester & P. R. Co. 29 Fed. 610; Smith v. Ft. Scott, H. & W. R. Co. 99 U. S. 399, 401, 25 L. ed. 437, 438; Fitch v. Creighton, 24 How. 159, 162, 16 L. ed. 596, 598; Clark v. Smith, 13 Pet. 195, 203, 10 L. ed. 123, 127; Wotherspoon v. Massachusetts Ben. Asso. 38 Fed. 626; Edwards v. Connecticut Mut. L. Ins. Co. 20 Fed. 453; Wills v. Pauly, 51 Fed. 257; Goldsmith v. Gilliland, 10 Sawy. 606, 22 Fed. 866; Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, 520, 22 L. ed. 599, 605; Watts v. Camors, 115 U. S. 353, 362, 29 L. ed. 406, 409, 6 Sup. Ct. Rep. 91; Nickerson v. Atchison, T. & S. F. R. Co. 1 McCrary, 383, 30 Fed. 86; The Lottawanna (Rodd v. Heartt) 21 Wall. 558, 576, 22 L. ed. 654, 662; Cook v. Cook, 34 Fed. 249; Boyle v. Zacharie, 6 Pet. 647, 213 U. S.

657, 8 L. ed. 532, 535; *Hale v. Tyler*, 115 Fed. 835; *Schmidt v. West*, 104 Fed. 274.

There is no defect of parties defendant.

Buford v. Equitable Life Assur. Soc. 98 N. Y. Supp. 152; *Colonial & U. S. Mortg. Co. v. Hutchinson Mortg. Co.* 44 Fed. 223; *United States Shipbuilding Co. v. Conklin*, 60 C. C. A. 680, 126 Fed. 132; *Hawkins v. Glenn*, 131 U. S. 319, 33 L. ed. 184, 9 Sup. Ct. Rep. 739.

The Equitable Assurance Society is in court in this case, acknowledging, by its demurrer, all of the facts alleged, and such inferences as can be fairly drawn from them.

Greeff v. Equitable Life Assur. Soc. 160 N. Y. 29, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712.

The jurisdiction of a court of equity to prevent any threatened breach of trust in the misapplication or diversion of the funds of a corporation by illegal payments out of its capital and profits has been frequently sustained.

Pollock v. Farmers' Loan & T. Co. 157 U. S. 429, 553, 39 L. ed. 759, 809, 15 Sup. Ct. Rep. 673.

The relief demanded is fully justified by the facts set forth in the bill.

Huber v. Martin, 127 Wis. 420, 3 L.R.A. (N.S.) 653, 115 Am. St. Rep. 1023, 105 N. W. 1031, 1135, 7 A. & E. Ann. Cas. 400.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

Even if a court of equity had jurisdiction in a case like this, it is yet proper to consider the history of the defendant subsequent to the filing of the bill by complainant, with reference to the results which might and probably would follow a decree of the court in accordance with the demand of the complainant. The corporation is one of the largest in the world with its more than half million policy holders, its outstanding risks of an amount almost impossible to appreciate, and with assets and liabilities and surplus reaching into hundreds of millions of dollars in amount. The defendant is, in its nature, a public institution, and the interests of its policy holders are directly involved in any proceeding looking towards its winding up, and indirectly the interests of many hundreds of thousands of individuals connected with the policy holders as objects of their bounty. The result of a stopping of this institution and the winding up of its business because, although not in necessary consequence, of the flagrant wrongdoing of some of its former officers and directors, would be most disastrous to the great majority of the people interested in its affairs. Taking all 53 L. ed.

the averments of the bill together, there is not any foundation for apprehension as to the entire solvency of defendant. To place the institution in the hands of a receiver, while it is paying promptly all its obligations, and with undoubted resources to continue to pay them, and is daily engaged in taking new business, under other and different management, would be a premature and wholly unnecessary ending of the defendant, and one which it would be mild to characterize as "ruinous to the interests of" 42 hundreds of thousands of people, and really beneficial to none. The enormous and very likely necessary expenses connected with a receivership, its certain failure to give full satisfaction to all, and the very great delays that would accompany the granting of the relief asked, are strong reasons against granting it in the case of a defendant which is paying all its obligations as they are presented. In addition to all these objections, it has happened that since 1905 a new board of directors has been chosen, new officers placed in command, and probably an entirely new policy adopted and followed. Although these last-mentioned facts have happened since the filing of the bill, in 1905, nevertheless it is not improper to refer to them, as they only constitute a history of the defendant since that time. They are found in public documents in New York, filed and existing of record in its insurance department, and they are the sworn returns of the officers of the defendant, made since the change in 1906. They may be referred to, not to contradict the averments of the bill, but to show the officers now in control of the management of the defendant, its present condition, and the fact that it is now in full operation and in the daily discharge of all its obligations as they are presented. The right to an accounting in equity and the winding up of the defendant under these circumstances would have to be most clearly made out before such relief would be granted. A court of equity is bound to consider these facts before it would grant relief of the nature demanded. Such a court takes all the facts into consideration, and the relative advantages and disadvantages of granting a relief which lies largely, in cases of this nature, in the discretion of the court, even if it be assumed that jurisdiction to grant the relief existed at all.

Under these circumstances we proceed to inquire as to the jurisdiction of a court of equity in such a case as is presented by the bill. It might be here added that the history of the Lord Case, which is referred to in the bill, is to be found in 57 Misc. 417, 108 N. Y. Supp. 67, and, on appeal, in 126 App. Div. 937, 111 N. Y. Supp. 1129, *and 43 a still further appeal is pending in the New

York court of appeals. We do not regard the matter as material, as it only refers to the claims of the stockholders to own the entire surplus in the defendant, and to the alleged attitude of the defendant as to these matters, in not denying their claims. This gives no ground for equitable interference at the suit of a policy holder against the defendant of the nature herein demanded.

As the questions in this case arise upon the defendant's demurrer to the bill of the complainant, it is necessary to direct attention to the effect of a demurrer as an admission. We are not called upon to cite authorities for the statement that a demurrer only admits facts well pleaded in the pleading demurred to. It does not admit the pleader's conclusions of law, nor does it admit the correctness of any opinion set forth in the bill; as, for instance, in regard to the probable effect in the future of the continued control of the defendant by the interests existing therein up to 1906. Hence, any construction placed by complainant upon the charter of the defendant and the insurance policy issued by the defendant to the complainant is not admitted, nor is the allegation of the ownership of the surplus by the policy holders, as alleged by the complainant, nor any opinion which is expressed in the bill as to the ability of the defendant to continue business; nor is any other opinion as to future happenings admitted by the demurrer.

Before discussing the merits of the case it is also proper to first decide what force is to be given the decisions of the highest court of New York with reference to the construction of the charter of the defendant and the policy of insurance issued by it. *Greeff v. Equitable Life Assur. Soc.* 160 N. Y. 19, 46 L.R.A. 288, 73 Am. St. Rep. 659, 54 N. E. 712. Although the charter was obtained under a general law of the state of New York relating to the incorporation of insurance companies, yet the construction to be given that act and the charter obtained in pursuance of it pertains to the state courts just as if the charter were granted by a special act of the legislature. Ever since its incorporation under the general law of the state of New York, in 1859, the defendant has always done business *and had its general home office and its legal residence and domicile in that state. The insurance policy owned by complainant appears on its face to have been executed in New York, and there is no averment to the contrary. The decisions of the highest court of New York are therefore binding upon this court as to the meaning and effect of the charter of the defendant, and as it is a New York company, and the contract is a New York contract, executed and to be carried out there-

in, its meaning and construction, as held by the highest court of the state, will be of most persuasive influence, even if not of binding force, in the absence of any Federal question arising in the case. There is no such question here. *Stone v. Wisconsin*, 94 U. S. 181, 183, 24 L. ed. 102, 103; *National Park Bank v. Remsen*, 158 U. S. 337-342, 39 L. ed. 1008-1010, 15 Sup. Ct. Rep. 891; *Sioux City Terminal R. & Warehouse Co. v. Trust Co.* 173 U. S. 99, 43 L. ed. 628, 19 Sup. Ct. Rep. 341. This principle has been so frequently decided that further reference to adjudged cases need not be made.

The suit is brought by complainant for himself, as well as all other policy holders and annuitants of the defendant who may choose to come in and join in the suit, and the company is the sole defendant. No officer of the company or stockholder therein, or any alleged debtor to the company, is made a party, and consequently any averment of the continuance in power of the same persons in the board of directors or otherwise is immaterial as a reason for the bringing of the action by the complainant in his own behalf, etc., to recover debts due the defendant, which the defendant will not itself sue for. This is not an action of that nature, and there are not present the necessary parties to maintain it if it were. The purpose of the averment is probably to sustain the application for a receiver, made necessary, as alleged, by the wrongdoing of some of the former officers of the defendant. That, however, gives no jurisdiction for an accounting in equity as between a simple debtor and creditor, and in the absence of any trust relation between them. A mere creditor, as such, has no right to that remedy.

We come, then, to a careful analysis of the other averments *in the bill, and it[45 is seen that it is largely founded upon the theory of the existence of a trust in favor of the policy holders, past and present, of the defendant as against the defendant, its officers and stockholders, and it is asked that they, and each of them, be decreed to hold the funds and surplus, as they may be ascertained, as trustees for such persons as shall be declared to have interests in such fund and surplus, under the decree of the court to be entered in the case. The complainant alleges that this so-called surplus of the defendant belongs entirely to the policy holders, after making certain deductions, and the defendant holds it, or, at any rate, a large portion of it, in trust for them, and that such is the proper construction of the charter and the policy; and he also avers that defendant has not distributed it from time to time to the policy holders, as intended by the charter and the poli-

cy. The various allegations in regard to waste, mismanagement, and improper investment and reinvestment of the funds of the defendant, and also the alleged fraudulent conduct of the officers guilty of such acts, do not show any inequitable or improper actual distribution of the fund as among the policy holders themselves. Although the effect of such conduct has plainly been to prevent the growth of the surplus to greater proportions than it has reached, there is still no averment anywhere in the bill that the amount of the surplus that was, in fact, distributed, was not fairly and equitably distributed to each of the policy holders, according to the amount of his policy, and in strict accordance with the rules and regulations theretofore adopted by the defendant for such distribution, which rules had been accepted by the complainant from time to time as such distribution was made. The fact, as alleged, that the amounts were paid to the complainant and accepted by him on the fraudulent representations of the officers that such amounts were all that were due, has no effect upon the question of the equitable and proper distribution of the fund that was, as a matter of fact, actually distributed. Nor does it give a cause of action of an equitable nature. These averments only show waste and misappropriation [46]* of the moneys of the defendant before they ever reached the surplus fund, and before any distribution of it was made. In other words, they aver facts of mismanagement of the funds and wrongdoing by others, upon which a cause of action might arise against the officers and stockholders, or other persons guilty of such acts of wrongdoing and waste, in favor of the company itself. They lay no foundation for the jurisdiction of a court of equity in such a case, unless it appears that the relation between the policy holder and the defendant is that the latter is the trustee of the former by reason of the trust relation between them resulting from the insurance policy. The complainant's contention, as above stated, that there is such a trust in the fund mentioned, has never been regarded as the law in the state of New York (Cohen v. New York Mut. L. Ins. Co. 50 N. Y. 610, 10 Am. Rep. 522; People v. Security L. Ins. & Annuity Co. 78 N. Y. 114, 34 Am. Rep. 522; Bewley v. Equitable Life Assur. Soc. 61 How. Pr. 344; Uhlman v. New York L. Ins. Co. 109 N. Y. 421, 4 Am. St. Rep. 482, 17 N. E. 363; and, to the same effect, Greeff v. Equitable Life Assur. Soc. supra), nor anywhere else so far as any case has been cited on the subject.

In the Uhlman Case, supra, the plaintiff was the owner of a policy known as a ten-year dividend system policy, otherwise a

"tontine plan" policy, which, it was averred, gave to the holder a special title to the funds derived from the payment of premiums on policies of that kind and in the particular class to which the policy belonged. The court of appeals of New York held that such claim was not well founded; "that it cannot be said that the defendant is, in any sense, a trustee of any particular fund for the plaintiff, or that it acts as to him and in relation to any such fund in a fiduciary capacity. It has been held that the holder of a policy of insurance, even in a mutual company, was in no sense a partner of the corporation which issued the policy, and that the relation between the policy holder and the company was one of contract, measured by the terms of the policy." The holder of a policy of the nature of that referred to in the Uhlman Case would be certainly as much entitled to claim that the company was a trustee for the holder as would be this *complainant. Indeed, the policy holder [47] in the Uhlman Case occupied a much stronger position for making the claim than does this complainant, who is the holder of an ordinary life policy, with rights to participate in the distribution of the surplus according to methods, etc., adopted by the defendant, as already mentioned. The claim was, however, denied by the state court, following the decisions of the New York courts for many years. To hold that a trust is proved in this case by virtue of the charter and policy of insurance is to hold contrary to the decisions of the highest court of the state of New York for a long number of years past, without a single decision the other way in all that time.

We also think there is no ground for the contention on the part of the complainant that he, as a policy holder, had any right to an accounting, and to compel the distribution of the surplus fund in other manner, or at any other time, or in any other amounts than that provided for in the contract of insurance. By that contract he was entitled to participate in the distribution of some part of the surplus, according to principles and methods that might be adopted from time to time by the defendant for such distribution, which principles and methods were ratified and accepted by and for every person who should have or claim any interest under the policy. It has been held that, under such a policy, how much of the surplus shall be distributed to the policy holder and how much shall be held for the security of the defendant and its members is to be decided by the officers and management of the defendant, in the exercise of their discretion to distribute, having in mind the present and future business, and, in the absence of any allegations

of wrongdoing or mistake by them, their determination must be treated as proper, and their apportionment of the surplus is to be regarded *prima facie* as equitable. *Greeff v. Equitable Life Assur. Soc. supra*. The court further held that manifestly a discretion rests with the defendant in determining how much of the surplus should be distributed to the policy holders and how much should be retained for the security of 48] the defendant and its members, *having in view the present and future contingencies of the business, and the court remarked that "there was no evidence or allegation that the plaintiff had been inequitably treated by the defendant as between himself and the other policy holders." The frauds and mismanagement mentioned did not, in themselves, give a policy holder any greater right to a distribution than is mentioned in the contract, and the right depended upon the judgment and discretion of the company as to time and amount.

Nor is there any possible reason for the appointment of a receiver and a real, though not formal, dissolution of the company, and the distribution of all its assets, because the fund is not as large as it ought to have been, owing to the misconduct of the officers, and because the defendant has not distributed as much of the surplus as complainant thinks he is entitled to, because of such frauds and misconduct. It is contended, however, that the New York court of appeals has held that complainant is entitled to such relief as is demanded herein, and he cites as authority the *Uhlman Case*, *supra*, and urges that provided it appear, by proper allegations (such as this bill contains) and proof, that frauds, misappropriation of the funds, etc., have been perpetrated by the officers or agents of the defendant, so as to prevent the proper accumulation of the surplus, the court will grant the relief demanded herein. We think that neither the *Uhlman* nor the *Greeff Case* decides any such principle as is asserted by the complainant. After holding, as already stated, that there was no trust existing between a policy holder and even a purely mutual company, reference was made in the former case to the contention of the defendant that the apportionment made by it, or under its direction, was absolutely and at all events conclusive upon the policy holders; it was said in the opinion that that was not an accurate statement, and that the plaintiff and others similarly situated had the right, upon proper allegations, of showing that the apportionment made by the defendant was not equitable, or had been based upon erroneous principles, and he had the right to a trial 49] and to make proof of *such allegations,

and if true, the court could declare the proper principles upon which the apportionment was to be made, so as to become an equitable apportionment. The *Greeff Case* simply adopted that statement in the course of the opinion, which is chiefly devoted to the discussion of other matters.

There is nothing in either case to show that any other wrongdoing or fraud was in contemplation of the court than that above mentioned, *viz.*, that the proposed or actual distribution of the money as between the policy holders themselves was not equitable, or was based on erroneous principles.

Wrongdoing, waste, misapplication of funds, and actions of that character, affecting the amount of the fund before distribution, were not held to furnish a ground of equitable jurisdiction for an accounting and it was not held that even frauds in the distribution itself as between policy holders, or the adoption of wrong principles for such distribution, would be ground of jurisdiction in equity. That question was not before the court, and was not decided. It was simply stated that it would afford ground of action, not necessarily ground for equitable jurisdiction. However, this is no such case as the language used shows was contemplated in the observations of the court in the *Uhlman Case*.

So far as the averments in the bill go as to the purchase of the majority of the stock of the defendant by Mr. Ryan, and the execution by him of a deed of trust, we think those averments have no tendency to prove the existence of facts material to the cause of action attempted to be set forth in the bill.

There is no ground of jurisdiction in equity, either for the accounting prayed for or the appointment of a receiver to wind up the affairs of the defendant on account of the alleged insolvency of the defendant. The complainant at first avers defendant's solvency, and that it is fully able to pay all demands from policy holders, and to perform every contract made by the defendant. The subsequent averment that the defendant is insolvent, because, as a conclusion of law asserted by the pleader, it is responsible to policy holders for excessive sums paid in the *way of salaries and fees, and also[50 for sums of money lost consequent upon the fraud and waste of the directors or officers of the defendant, all of which are too large for the defendant to pay when demanded, is not admitted by the demurrer, and is not accurate as a conclusion of law. Whether such liability could be legally maintained or whether the defendant would be unable to pay the amount claimed from it when it was properly proved, and judgment duly recovered against it in an action for that pur-

pose, is a mixture of a legal conclusion with a matter of opinion as to the future ability of the defendant to pay such liabilities. And the idea that the defendant itself is liable to policy holders for the frauds or wrongdoing set out in the bill and committed by its officers or members of its board of directors against the defendant, and in their personal interests, we regard as without foundation. Such a kind of future possible insolvency furnishes not the slightest ground for present legal action adverse to the defendant. Very likely the defendant could itself maintain an action against those who have been guilty of fraudulent conduct towards it, resulting in financial loss to it, and, of course, those who are alleged to be guilty would have to be made parties. No case is therefore made for an accounting or for a receiver, based upon these allegations of the bill. Certainly the court could not give any judgment that the policy holders are the owners of the so-called surplus. It may be that they are. The bill itself avers that the stockholders contend they are the owners of the surplus, or, at least, of some considerable part of it, and certainly no decree could be made on the subject of such ownership and against the claims of the stockholders, without their presence as parties.

If it be held that there is no trust, then it follows that the suit cannot be maintained in equity on the sole ground of fraud. Such a ground for the maintenance of the suit (even if complainant could otherwise maintain it) is a mere incident to the main ground set forth in the bill. Equity does not now take jurisdiction in cases of fraud where the relief properly obtainable on that ground can be obtained in a court of law, 51]and *where, so far as necessary, discovery may be obtained as well as in equity. U. S. Rev. Stat. § 724, U. S. Comp. Stat. 1901, p. 583; United States v. Bitter Root Development Co. 200 U. S. 451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318, and cases cited.

Complainant also claims jurisdiction in equity on the ground that such an action will prevent a multiplicity of suits. But this is not a case for the application of the doctrine. There can be no claim that the complainant is saved from a multiplicity of suits by the maintenance of this. A single action at law by him against the company would give him all the relief to which he might be entitled. If there are others similarly situated as to claims, they can themselves commence an action. The defendant is not in court, asking it to take jurisdiction of its suit against others in order to prevent a multiplicity of suits against it or by it. It does not rest with complainant to urge, as a foundation for his suit, that

the defendant may thereby be saved a multiplicity of suits by other parties when the defendant raises no objection to such possible suits, and urges no such ground for jurisdiction in equity of the complainant's suit.

After a careful consideration of all the facts, we are of opinion that no cause of action is alleged in the bill for an accounting, or for the appointment of a receiver, or for other equitable relief. The decree of the Circuit Court of Appeals is therefore reversed.

Mr. Justice Day, not having heard the case, took no part in its decision.

*WESTERN UNION TELEGRAPH[52
COMPANY, Plff. in Err.,

v.

SID WILSON.

(See S. C. Reporter's ed. 52-55.)

Error to state court—Federal question—decision on non-Federal ground.

The refusal of a state court to permit the filing of a plea setting up a Federal question does not necessarily involve a decision of such question so as to sustain the appellate jurisdiction of the Supreme Court of the United States, where the state court may have refused such permission either because the plea was not filed until more than nine months after the declaration, and not until the case was called for trial, or because such plea, which went in terms to the whole declaration, and prayed judgment, was clearly bad as to the second count in the declaration.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

[No. 65.]

Argued and submitted January 11, 1909.
Decided March 1, 1909.

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to Martin v. Hunter, 4 L. ed. U. S. 97; Hamblin v. Western Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39 L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

IN ERROR to the Corporation Court of the City of Radford, in the State of Virginia, to review a judgment in favor of plaintiff in an action to recover a penalty for the failure of a telegraph company to transmit and deliver a message as promptly as practicable. Dismissed for want of jurisdiction.

The facts are stated in the opinion.

Mr. Rush Taggart argued the cause, and, with Messrs. John F. Dillon, George H. Fearons, and Francis Raymond Stark, filed a brief for plaintiff in error.

Mr. James R. Caton submitted the cause for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action against the telegraph company, in two counts. The first alleges a failure to transmit a message from Graham, Virginia, to East Radford, in the same 53]state, as *promptly as practicable. The second alleges a failure to deliver the message as promptly as practicable after its arrival at East Radford. Both seek to recover \$100, under statutes of the state imposing a forfeiture of that sum in such cases to the sender of the dispatch. The declaration was filed in April, 1906. In June the defendant filed a demurrer and general denial by leave of court. On February 25 of the next year, when the case was about to be tried, the telegraph company offered a special plea that its only proper and regular route for transmitting the message was by way of Bluefield, West Virginia, to Washington, in the District of Columbia, and thence, by relaying, to East Radford; that it did promptly dispatch the message from Graham to Washington, but, by mistake, sent it from Washington to Cincinnati, causing a delay; that the transmission of the message was interstate commerce, and that therefore the statute of Virginia (act of January 18, 1904, chap. 8, § 5), as applied to the part of the transmission outside of the state, was void. U. S. Const. art. 1, § 8, cl. 3. The conclusion of the plea was that the plaintiff could not "recover the penalty in his declaration demanded," and the defendant prayed judgment. The court refused to allow the plea to be filed, and the defendant excepted. A trial followed, at which the plaintiff got a judgment. The errors assigned are that the court refused to allow the defendant to file the above plea, and that it rendered judgment for the plaintiff instead of for the defendant.

This case comes here from a state court, and, of course, therefore it must appear that a Federal question necessarily was involved in the decision before this court can

take jurisdiction or undertake to reverse the judgment of a tribunal over which it has no general power. It is not enough that a right under the Constitution of the United States was specially set up and claimed. It must be made manifest either that the right was denied in fact, or that the judgment could not have been rendered without denying it. *DeSaussure v. Gaillard*, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; *Johnson v. Risk*, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; *Leathe v. Thomas*, 207 U. S. 93, 99, 52 L. ed. 118, 120, 28 Sup. Ct. Rep. 30. See also *Bachtel v. Wilson*, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243.

*The reasons which led the court to [54 refuse leave to file the plea in this case do not appear. But it is apparent on the face of the record that there are at least two grounds on which it is possible that leave may have been denied before the Federal question was reached. The original demurrer and answer seem to have been late, as they were filed by leave of court. This plea was not offered until more than nine months after the declaration, when the case was called for trial. The circumstances are not disclosed, and it may be that the court, in its discretion, considered that it was unjust for the plaintiff to be called upon to meet a new and serious issue at the last moment. Again, the plea, although it only referred to the section of the statute upon which the first count was based, went, in terms, to the whole declaration, and prayed judgment. It clearly was bad as to the second count. In the absence of any action on the part of Congress, at least, it would not be denied that a state could regulate the conduct of local messengers when the transit by wire was over. *Western U. Tele. Co. v. James*, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934. It cannot be said that the second count was abandoned, for nothing of the sort appears, and the plea was offered before trial, so that the evidence was not in. If the plea was not good for all that it attempted to cover, it was bad altogether. It may be that if we were dealing with the judgment of a lower court of the United States, we should think that there were sufficient grounds for looking through the form to the substance of what the pleader seems to have had most in mind; but, when we are considering the action of a state court, we cannot say that the local tribunal did not yield to an argument that Saunders would have deemed conclusive, and that Gould or Stephen would have regarded as an end of the case. *Manchester v. Vale*, 1 Wms. Saund. 28; Gould, Pl. 4th ed. § 104.

The first assignment of error falls for the reasons that we have stated, and the sec-

ond falls with it. The second is that the court erred in rendering judgment for the plaintiff. But the delay was proved, and, as the plea was not admitted, there was nothing to show that the message went out-55]side the state. *Moreover, the judgment was upon both counts. It is impossible to go further, and to pass upon the delicate question of constitutional law that was argued here.

Writ of error dismissed.

Mr. Justice Brewer and Mr. Justice Moody dissent.

ATCHISON, TOPEKA, & SANTA FE
RAILWAY COMPANY, Plff. in Err.,
v.

GEORGE A. SOWERS.

(See S. C. Reporter's ed. 55-71.)

Error to state court — Federal question — full faith and credit.

1. The decision of a state court denying the force and effect specially claimed under the Federal Constitution and laws for a territorial statute is reviewable in the Supreme Court of the United States under U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, as a case in which a right, title, privilege, or immunity under the Federal Constitution, or under a statute of, or authority exercised under, the United States, was specially claimed and denied.

[For other cases, see Appeal and Error, 1968-2003, in Digest Sup. Ct. 1908.]

Territories — legislative power — revisory power of Congress.

2. The annulment by Congress of territorial legislation conformably to the provisions of the organic act of September 9, 1850 (9 Stat. at L. 449, chap. 49), establishing the territory of New Mexico, that all territorial laws shall be submitted to Congress, and, if disapproved, shall be null and of no effect, does not relate back so as to render invalid from the time of enactment territorial laws duly enacted and within the legislative power of the territory, but such laws remain in force until Congress exerts its authority.

[For other cases, see Territories, 40, 41, in Digest Sup. Ct. 1908.]

Statutes — full faith and credit — congressional power.

3. Congress had the power to enact U. S. Rev. Stat. § 906, U. S. Comp. Stat. 1901, p. 678, under which territorial legislation must be given, by every court within the United States, the same faith and credit which it has by law or usage in the court of the territory enacting it.

Territories — legislative power — actions for personal injuries.

4. Authority to legislate concerning personal injuries and rights of action therefor was conferred upon the territory of New Mexico by the provisions of the organic act of September 9, 1850, extending such authority to all rightful subjects of legislation consistent with the Constitution of the United States, although such act also provides that the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the territory as elsewhere within the United States.

[For other cases, see Territories, 26-35, in Digest Sup. Ct. 1908.]

Statutes — full faith and credit — territorial statutes.

5. The full faith and credit demanded by U. S. Rev. Stat. § 906, U. S. Comp. Stat. 1901, p. 678, is given by the Texas courts to N. M. act of March 11, 1903, providing that an action for personal injuries received in that territory will not lie unless certain requirements as to the making of an affidavit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restrictions, although the statute also undertakes to make the suit maintainable only in the district court of the territory.

[No. 64.]

Argued January 8, 1909. Decided March 1, 1909.

IN ERROR to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of El Paso County, in that state, in favor of plaintiff in an action for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

See same case below (Tex. Civ. App.) 99 S. W. 190.

The facts are stated in the opinion.

Mr. Andrew H. Culwell argued the cause, and Messrs. J. W. Terry, Gardiner Lathrop, and Aldis B. Browne filed a brief for plaintiff in error:

The act under consideration will be held to be valid until specifically disapproved by Congress.

Coulter v. Stafford, 6 C. C. A. 18, 15 U. S. App. 118, 56 Fed. 564; Hornbuckle v. Toombs, 18 Wall. 655, 21 L. ed. 967; Miners' Bank v. Iowa, 12 How. 6, 13 L. ed. 869.

Each of the states has the unquestioned right to regulate the relations between employers and employees, and to fix by legislative enactment the liabilities of the former for the negligence of the latter.

NOTE.—On review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551,

Southern P. Co. v. Schoer, 57 L.R.A. 707, 52 C. C. A. 268, 114 Fed. 470.

The very act of the territory of New Mexico under consideration was held to be within the proper discretion of the legislative assembly of that territory by the same court of appeals in Texas which affirmed the judgment in the present case.

Buttron v. El Paso North Eastern R. Co. (Tex. Civ. App.) 93 S. W. 676.

See also *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1.

It was the duty of the courts of Texas, in trying this case, to apply the laws of the territory of New Mexico, together with all the restrictions imposed.

Swisher v. Atchison, T. & S. F. R. Co. 76 Kan. 97, 90 Pac. 812; *Poff v. New England Teleph. & Teleg. Co.* 72 N. H. 164, 55 Atl. 891; *Dennis v. Atlantic Coast Line R. Co.* 70 S. C. 254, 106 Am. St. Rep. 746, 49 S. E. 869; *Rodman v. Missouri P. R. Co.* 65 Kan. 645, 59 L.R.A. 704, 70 Pac. 642; *The Harrisburg*, 119 U. S. 199, 30 L. ed. 358, 7 Sup. Ct. Rep. 140; *Coyne v. Southern P. Co.* 155 Fed. 683; *Davis v. New York & N. E. R. Co.* 143 Mass. 301, 58 Am. Rep. 138, 9 N. E. 815; *Higgins v. Central New England & W. R. Co.* 155 Mass. 176, 31 Am. St. Rep. 544, 29 N. E. 534; *Nonce v. Richmond & D. R. Co.* 33 Fed. 435; *Hamilton v. Hannibal & St. J. R. Co.* 39 Kan. 56, 18 Pac. 57; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, 15 N. E. 230; *Slater v. Mexican Nat. R. Co.* 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581.

The duty of courts in one state to give full faith and credit to the decrees and legislative acts of other states has frequently been before this court, and we do not know of a break in the decisions, all being to the effect that this provision of the Constitution is mandatory.

Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Cole v. Cunningham*, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Chicago, R. I. & P. R. Co. v. Thompson*, 16 Tex. Ct. Rep. 979; *Mexican Nat. R. Co. v. Jackson*, 89 Tex. 107, 31 L.R.A. 276, 59 Am. St. Rep. 28, 33 S. W. 857; *St. Louis, I. M. & S. R. Co. v. McCormick*, 71 Tex. 660, 1 L.R.A. 804, 9 S. W. 540; *Texas & P. R. Co. v. Richards*, 68 Tex. 375, 4 S. W. 627.

The territories are included in this constitutional provision.

United States use of Mackey v. Cox, 18 How. 100, 15 L. ed. 299; *Mehlin v. Lee*, 5 C. C. A. 403, 12 U. S. App. 305, 56 Fed. 12; *Suesenbach v. Wagner*, 41 Minn. 108, 42 N. W. 925.

The validity of a statute is drawn in question when the power to enact it is fairly open to denial.

Baltimore & P. R. Co. v. Hopkins, 130 U. S. 210, 32 L. ed. 908, 9 Sup. Ct. Rep. 503.

It is the duty of the courts of one state to give full faith and credit to the public acts of another, and the failure to do so raises a Federal question, which gives this court jurisdiction to pass on the subject as an original proposition.

Martin v. Pittsburg & L. E. R. Co. 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; *Great Western Teleg. Co. v. Purdy*, 162 U. S. 329, 40 L. ed. 986, 16 Sup. Ct. Rep. 810; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Huntington v. Attrill*, 146 U. S. 657, 36 L. ed. 1123, 13 Sup. Ct. Rep. 224.

Mr. Harry Peyton argued the cause, and, with Messrs. William H. Robeson and George E. Wallace, filed a brief for defendant in error:

The Supreme Court of the United States has no authority to review the decision of a state court that holds that the law of a territory is not repugnant to the Constitution of the United States.

Scott v. Jones, 5 How. 343, 12 L. ed. 181; *Messenger v. Mason*, 10 Wall. 510, 19 L. ed. 1029; *Miners' Bank v. Iowa*, 12 How. 1, 13 L. ed. 867.

That courts will preserve and assert their own jurisdiction is quite well settled.

Nonce v. Richmond & D. R. Co. 33 Fed. 435; *Dennick v. Central R. Co.* 103 U. S. 18, 26 L. ed. 439; *Smyth v. Ames*, 169 U. S. 467, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Hyde v. Stone*, 20 How. 170, 15 L. ed. 874; *Chicot County v. Sherwood*, 148 U. S. 529, 37 L. ed. 546, 13 Sup. Ct. Rep. 695; *Lincoln County v. Luning*, 103 U. S. 529, 33 L. ed. 766, 10 Sup. Ct. Rep. 363; *Cowles v. Mercer County*, 7 Wall. 118, 19 L. ed. 86.

Messrs. William H. Robeson and George E. Wallace also filed a separate brief for defendant in error:

This being a transitory cause of action, and defendant in error having complied fully with the laws of New Mexico by giving the statutory notice, the courts of the state of Texas had the right to determine

their own jurisdiction, and that right is not subject to revision by the Supreme Court of the United States.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

All that portion and part of the territorial law which attempts to make it unlawful for plaintiff, or other person, to institute or maintain a transitory cause of action outside of the territory of New Mexico, or in another state or territory, is unconstitutional and void, and is in violation of § 2, article 4, of the United States Constitution, as it deprives plaintiff, and all other persons affected by said act, of privileges and immunities guaranteed by the Constitution of the United States and the law of the land.

Cole v. Cunningham, 133 U. S. 107, 33 L. ed. 538, 10 Sup. Ct. Rep. 269; Willis v. Missouri P. R. Co. 61 Tex. 432, 48 Am. Rep. 301; Blake v. McClung, 172 U. S. 239-256, 43 L. ed. 432-438, 19 Sup. Ct. Rep. 165; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34.

All that portion of the New Mexico statute which requires suits to be brought in the district court of the territory, to the exclusion of the Federal courts, and also to the exclusion of the minor courts, discriminates not only against the courts of other states and territories, but against the Federal courts themselves; and it is therefore unconstitutional and void.

Coyne v. Southern P. Co. 155 Fed. 684; El Paso & N. E. R. Co. v. Gutierrez (Tex. Civ. App.) 111 S. W. 159; Atchison, T. & S. F. R. Co. v. Sowers (Tex. Civ. App.) 99 S. W. 190.

Mr. Justice Day delivered the opinion of the court:

This is a writ of error to the court of 59]civil appeals for the *fourth supreme judicial district of the state of Texas. The defendant in error, George A. Sowers, a citizen of Arizona, recovered judgment in the district court of El Paso county, Texas, in the sum of \$5,000, for personal injuries alleged to have been sustained by him while employed in the service of the plaintiff in error as a brakeman in the territory of New Mexico. The judgment was affirmed by the court of civil appeals. 99 S. W. 190. Subsequently leave to file a petition in error was denied by the supreme court of Texas, and the case was brought here by writ of error to the court of civil appeals.

The defendant in error recovered because of injuries received while riding on the pilot of an engine at Gallup, New Mexico. His injuries are alleged to have been occasioned by the negligence of the railroad 53 L. ed.

company in permitting its track to become soft and out of repair, permitting low joints therein, by reason of which the engine's pilot struck a frog and guard rail, and the plaintiff was injured.

We are not concerned with the questions of general law in actions of negligence which were involved in the case. The Federal question which invites our attention concerns an act of the legislature of New Mexico, passed March 11, 1903 (chapter 23, Acts of 35th Legislative Assembly of New Mexico). We give this act in full in the margin.†

*It is contended by the plaintiff in[60 error that its effect is to prescribe causes of action for personal injuries, enforceable only in *the district court of the[61 territory of New Mexico, and not elsewhere, and that the court of Texas in maintaining jurisdiction of *the case,[62 and refusing to enforce the territorial statute, denied a Federal right guaranteed by the Constitution and statutes of the United States, requiring such faith and credit to be given in every court within the United States to the public acts, records, and judicial proceedings of every other state or territory as they have, by law, in the courts of the state or territory from which they are taken.

It is contended that there is no jurisdiction in this court to entertain this writ of error. But we are of opinion that there is

†Whereas, it has become customary for persons claiming damages for personal injuries received in this territory to institute and maintain suits for the recovery thereof in other states and territories, to the increased cost and annoyance and manifest injury and oppression of the business interests of this territory, and the derogation of the dignity of the courts thereof.

Therefore, be it enacted by the legislative assembly of the territory of New Mexico:

Section 1. Hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this territory, unless the person claiming damages therefor shall, within ninety days after such injuries shall have been inflicted, make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer within this territory who is authorized to administer oaths, in which the affiant shall state his name and address, the name of the person receiving such injuries, if such person be other than the affiant, the character and extent of such injuries, in so far as the same may be known to affiant, the way or manner in which such injuries were caused, in so far as the affiant has any knowledge thereof, and the names and addresses of all witnesses to the happen-

jurisdiction. The Revised Statutes of the United States, § 709 (U. S. Comp. Stat. 1901, p. 575), authorize this court to review final judgments in the highest court of the state in which a decision in the suit could be had, where any title, right, privilege, or immunity under the Federal Constitution or under any statute of or authority exercised under the United States is specially claimed and denied.

The territorial law was specially set up in the case, and was offered in evidence at the trial, and it was held by the Texas court that it was not required to give force and effect to the territorial statute under the Constitution and laws of the United States.

The opinion of the court of civil appeals 63] of Texas shows that *the validity of this statute and its binding force to control the right of action asserted was considered and denied in giving judgment against the plaintiff in error. Such judgment gives this court jurisdiction of the case. Hancock Nat. Bank

v. Farnum, 176 U. S. 640, 44 L. ed. 619, 20 Sup. Ct. Rep. 506; St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616; American Exp. Co. v. Mullins, decided by this court, February 23, 1909 [212 U. S. 311, ante 525, 29 Sup. Ct. Rep. 381.]

It is contended at the outset that inasmuch as this territorial statute has been annulled by act of Congress (35 Stat. at L. pt. 1, p. 573), that the act is void from the beginning. The organic act establishing the territory of New Mexico provides (Compiled Laws of 1897, § 7, p. 43):

"All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and, if disapproved, shall be null and of no effect."

But we are not prepared to hold that the territorial law thus *annulled under the 64 power of Congress becomes void from the beginning. Conceding to the fullest extent the powers of Congress over territorial leg-

ing of the facts or any part thereof causing such injuries as may at such time be known to affiant; and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the district court of this territory in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or, in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business, and said suit, after having been commenced, shall not be dismissed by plaintiff unless by written consent of the defendant, filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided.

Sec. 2. Whenever any person or corporation shall file a petition in the district court of this territory for the county in which said petitioner lives, or, if a corporation, in the district court for the county in which such corporation has its principal place of business, stating in effect that such petitioner is informed and believes that some party named in such petition claims that he is entitled to damages from said petitioner for personal injuries inflicted in this territory upon the party named in said petition, or for personal injuries inflicted upon or death caused to some other person, for which such party claims to have a cause of action against said petitioner, and stating, as near as may be, the general character of such injuries, and the manner and date said party claims they were inflicted, and the place where he claims they were inflicted, as near as petitioner knows or is informed as to such facts, and praying that the said party

may be required to appear in said court and file therein a statement of his cause of action in the form of a complaint against said petitioner, summons shall issue out of said court and be served and returnable as other process, commanding and requiring the said party named in said petition to appear in said court and file such statement in the form of a complaint against said petitioner, if he has to make, and upon such complaint being filed by such party as required, the defendant named therein may demur to or answer the same, and such further pleading had as the parties may be entitled to or as may be meet and proper, as in other cases of a similar character, and from thenceforward such further proceedings shall be had in such causes as in other cases, and the same shall be determined upon its merits, and final judgment, subject, however, to appeal or writ of error, shall be rendered therein either for the petitioner named in said complaint, or for the adverse party; and, if the court finds the petitioner guilty of any of the wrongs, injuries, or trespasses complained of against him in said statement, such damages shall be assessed against the said petitioner as the law and the facts may require, in the same manner as though said cause had been instituted by the filing of said statement as a complaint.

In event said party complained of in said petition, after being duly served with such summons, shall fail or refuse to appear or file his said statement as required herein, judgment shall be rendered by default against him in favor of the petitioner, as in other cases, and thereupon the court shall try and determine the issues raised by such petition, including the question as to whether or not the petitioner is liable to said party on account of any of the matters or things stated in said petition in any sum of money whatsoever, and if so, in what amount, and final judgment shall be ren-

islation, we think such laws, duly enacted and within the legislative power of the territory, are in force until Congress has exerted its authority to annul them. If this be not so, rights acquired on the faith of territorial laws, passed within the scope of the legislative power of the territory, may be stricken down by the retroactive effect of an act of Congress annulling such legislation. All right to legislate would be at a standstill until that body should act. Congress might not be in session, or its action delayed, rendering the territory powerless, even in cases of emergency, to pass necessary laws. We think Congress has only reserved a revisory power over territorial legislation. *Miners' Bank v. Iowa*, 12 How. 1, 8, 13 L. ed. 867, 870.

To make effectual the full faith and credit clause of the Constitution (art. 4, § 1), Congress passed the act of May 26, 1790 (1 Stat. at L. 122, chap. 11, U. S. Comp. Stat. 1901, p. 677). This act made pro-

vision for the authentication of the records, judicial proceedings, and acts of the legislatures of the several states, and provided that the same should have such faith and credit given to them in every state within the United States as they have by law or usage in the courts of the state from which the records are or shall be taken. This act did not include the territories.

On March 27, 1804, Congress passed an act extending the provisions of the former statute to the public acts, records, judicial proceedings, etc., of the territories of the United States and countries subject to the jurisdiction thereof. 2 Stat. at L. 298, chap. 56, U. S. Comp. Stat. 1901, p. 677. Those statutory enactments subsequently became §§ 905 and 906 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 677, 678). Section 905 applies to judicial proceedings, and § 906 to records, etc., kept in offices not pertaining to courts. In the case of *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup.

dered in accordance with the facts and the law, and such judgment as the court may render shall be final and conclusive upon the question of the liability or nonliability of said petitioner to said party, and of the amount of the liability.

Sec. 3. It shall be unlawful for any person to institute, carry on, or maintain any suit for the recovery of any such damages in any other state or territory, and upon its being made to appear to the court in which any proceeding has been instituted in this territory, as herein provided, that any such suit has also been commenced, or is being maintained, in any other state or territory, contrary to the intent of this act, it shall be the duty of the court to set down for hearing, and try and determine the proceeding so pending in this territory as expeditiously as possible, upon which short notice to the other party thereto or his attorneys as the court may direct; and, for the purpose of trying the same, said court shall have the power to compel the parties thereto to plead or answer on such short day as it may determine, and, in event the same is triable by jury, it shall be the duty of the court, upon motion, to change the venue thereof to such county in said district as, in the opinion of the court, will afford an opportunity for the most speedy hearing; but, in event such action is not triable by jury, then the court shall immediately proceed to try and determine the same, giving such reasonable notice as it may determine, to the parties or their attorneys at any place in the territory which the court may designate, and witnesses may be compelled by subpoena to attend such place personally, from any part of the territory, and testify, as at present, at such time and place. The institution of any such suit in any other state or territory shall be construed by the court as a waiver upon the part of the party so instituting the same of the right of trial

by jury in the case pending in the courts of this territory.

Sec. 4. Whenever it shall be made to appear to the district court of this territory for the county in which petitioner or plaintiff lives, by any petition filed under § 3 hereof, or by a supplemental petition, or by any original complaint filed for that purpose, that petitioner or plaintiff fears or has good reason to fear that any other person is threatening or contemplating instituting suit in some other state or territory to recover damages against petitioner or plaintiff for personal injuries inflicted or death caused in this territory, or that he has already instituted and is then maintaining such a suit, it shall be the duty of the court, upon such bond as the court may require being given, to issue its injunction, *pendente lite*, restraining such suit in any court sitting in any other state or territory; and, at the final hearing, if such facts are found by the court to be true, the court shall make such injunction perpetual; and, at the final hearing in all cases instituted under the provisions of § 3 hereof, the party complained of in the petition shall be perpetually enjoined from further instituting or maintaining any suit or action to recover damages by reason of any of the matters or things set up in said petition.

Sec. 5. This act shall not apply to cases in which the person or corporation against whom damages for personal injuries are claimed cannot be duly served with process in this territory.

Sec. 6. Nothing herein contained shall be construed as in any way preventing anyone in this territory claiming to have a right of action for any such damages from compromising such claim.

Sec. 7. All acts and parts of acts and laws in conflict with this act are hereby repealed, and this act shall be in effect from and after its passage.

Ct. Rep. 25, it was held that a judgment of the supreme court of the District of Columbia, under the legislation of Congress (Rev. Stat. § 905), was conclusive in every state of the Union, except for such causes as would be sufficient to set it aside in the District. The opinion of the court, delivered 65] by Mr. Justice Matthews, *reached this conclusion because of § 905 of the Revised Statutes, above quoted. In considering the constitutional power to pass this act, speaking for the court, the learned justice said:

"So far as this statutory provision relates to the effect to be given to the judicial proceedings of the states, it is founded on article 4, § 1, of the Constitution, which, however, does not extend to the other cases covered by the statute. The power to prescribe what effect shall be given to the judicial proceedings of the courts of the United States is conferred by other provisions of the Constitution, such as those which declare the extent of the judicial power of the United States, which authorize all legislation necessary and proper for executing the powers vested by the Constitution in the government of the United States, or in any department or officer thereof, and which declare the supremacy of the authority of the national government within the limits of the Constitution. As part of its general authority, the power to give effect to the judgments of its courts is coextensive with its territorial jurisdiction. That the supreme court of the District of Columbia is a court of the United States results from the right of exclusive legislation over the District which the Constitution has given to Congress."

This language is equally applicable to legislative acts of the territory, as the passage of such laws is the exercise of authority under the United States. *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38-47, 51 L. ed. 78-85, 27 Sup. Ct. Rep. 1.

Section 906 of the Revised Statutes requires every court within the United States to give the same faith and credit to the acts of the territory as they have by law or usage in the courts of the territory from which they are taken. The Federal question then is, Did the court of Texas, in denying any force and validity to the New Mexico statute, violate this requirement of the Federal statute (§ 906), passed under the power conferred upon Congress by the Constitution?

Preliminary to the consideration of the effect of the statute in other jurisdictions, we may notice a question made as to the power of the territory to pass it.

66] *Sections 7 and 17 of the organic act

of the territory of New Mexico provide (Comp. Laws of 1897, p. 43):

"Sec. 7. That the legislative power of the territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act."

"Sec. 17. That the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said territory of New Mexico as elsewhere within the United States."

It is contended by the defendant in error that the effect of these statutes is to put the common law regulating the recovery of actions for personal injuries, in force in the territory, and that there is no authority to pass laws regulating recovery for injuries of the character attempted. But we are of opinion that the legislative power conferred, extending to all rightful subjects of legislation, did give the territory authority to legislate concerning the subject of personal injuries, and to pass laws respecting rights of action of that character. It is contended for the plaintiff in error that this statute of New Mexico is creative of a new statutory cause of action, taking the place of any common-law rights and remedies, and that in such cases it is within the legislative authority to make laws local and exclusive in their character.

In many states it has been held that such causes of actions, created by state statute, could not be sued upon in other jurisdictions. This doctrine is, however, contrary to the holding of this court in *Dennick v. Central R. Co.* 103 U. S. 11, 26 L. ed. 439. Mr. Justice Miller, in delivering the opinion of the court in that case, said:

"It would be a very dangerous doctrine to establish that in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred."

*An action for personal injuries is uni- [67] versally held to be transitory, and maintainable wherever a court may be found that has jurisdiction of the parties and the subject-matter. *Rorer, Interstate Law*, 154, 155; *McKenna v. Fisk*, 1 How. 242, 11 L. ed. 117; *Dennick v. Central R. Co.* 103 U. S. 11, 18, 26 L. ed. 439, 441.

Undoubtedly, where the cause of action is created by the state, as in the action to recover for death by wrongful injury, there is no objection to the enforcement of the law because it arose in another jurisdiction. *Northern P. R. Co. v. Babcock*, 154 U. S. 190, 38 L. ed. 958, 14 Sup. Ct. Rep. 978; *Stewart v. Baltimore & O. R. Co.* 168

U. S. 445, 449, 42 L. ed. 537, 539, 18 Sup. Ct. Rep. 105. Dealing with this subject in *Slater v. Mexican Nat. R. Co.* 194 U. S. 120, 48 L. ed. 900, 24 Sup. Ct. Rep. 581, this court said:

"As Texas has statutes which give an action for wrongfully causing death, of course there is no general objection of policy to enforcing such a liability there, although it arose in another jurisdiction. *Stewart v. Baltimore & O. R. Co.* 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105. But, when such a liability is enforced in a jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. *Stout v. Wood*, 1 Blackf. 71; *Dennick v. Central R. Co.* supra. But, if the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation (*Smith v. Condry*, 1 How. 28, 11 L. ed. 35), but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

It is, then, the settled law of this court 68] that in such statutory *actions the law of the place is to govern in enforcing the right in another jurisdiction; but such actions may be sustained in other jurisdictions when not inconsistent with any local policy of the state wherein the suit is brought. *Stewart v. Baltimore & O. R. Co.* supra.

Assuming that the territory may legislate upon this subject, when we turn to the act, what do we find to be its provisions? Section 1 of the act provides that "hereafter there shall be no civil liability under either the common law or any statute of this territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this territory"—unless certain things are done. It is required that the person injured shall make and serve, within ninety days after such injuries shall have been inflicted, and thirty days before beginning suit, an affidavit upon the person against whom damages are claimed; which affidavit

shall state the name and address of the affiant, the character and extent of such injuries, so far as the same may be known to the affiant, the way or manner in which such injuries were caused, the names and addresses of such witnesses to the happening of the facts causing the injuries as may be known to the affiant at the time, and the section concludes:—"and unless the person so claiming such damages shall also commence an action to recover the same within one year after such injuries occur, in the district court of this territory in and for the county of this territory where the claimant or person against whom such claim is asserted resides, or, in event such claim is asserted against a corporation, in the county in this territory where such corporation has its principal place of business, and said suit, after having been commenced, shall not be dismissed by plaintiff unless by written consent of the defendant, filed in the case, or for good cause shown to the court; it being hereby expressly provided and understood that such right of action is given only on the understanding that the foregoing conditions precedent are made a part of the law under which right to recover can exist for such injuries, except as herein otherwise provided."

*This section does not undertake to[69 create a new and statutory cause of action, but refers to the common law or previous statutes of the territory governing actions for personal injuries or wrongful death. It puts a condition upon such actions, requiring the making of the affidavit and the service thereof within ninety days after the injury and thirty days before commencing suit, and provides that such cause of action shall be prosecuted within one year, and undertakes to make the same maintainable only in the district court of the territory. If such an action for personal injuries were tried in the territory, it would be controlled by common-law principles, so far as the right of recovery is concerned, provided, of course, that the statutory requirements as to the affidavit and the time of beginning the action had been complied with. At the trial counsel for plaintiff in error stated: "It is admitted that the common law is in force in the territory of New Mexico, and that the accident happened in the territory of New Mexico."

Such suit at common law might be maintained in any court of general jurisdiction where service could be had upon the defendant. The question here is, When such court does entertain a suit of that kind, what is it required to do in order to give effect to the statutory requirements of § 906 of the Revised Statutes?

The object of this statute of the United States was to give to the public acts of each territory the same faith and credit in every court within the United States as they are entitled to, by law, in the territory where they are enacted. Before this statute the effect which would have been given to the judgment of the court of a territory rested alone upon principles of comity. These acts are now, and by force of the statute, to be given the force and effect that they would be given in the territory which passed them; that is, the cause of action is not to be enlarged, when regulated by the legislation of a territory, because the party sees fit to go to another jurisdiction where he can obtain service upon the defendant, and there prosecute his suit.

In the present case, in determining the merits of the cause of action, common-law principles were applied in the Texas court 70]*as they would have been in the court of New Mexico. So far as this court is concerned, we must assume that the principles governing such actions for negligence were properly given to the jury in the instructions of the court, and controlled in the decision of the case.

This record discloses that the affidavit required by the statute of New Mexico was made and served within the time prescribed, and that the action was commenced within one year. The only feature of the New Mexico statute which was disregarded was the requirement that suit should be brought only in the district court of the territory. But we are of opinion that where an action is brought in another jurisdiction, based upon common-law principles, although having certain statutory restrictions, such as are found in this act, as to the making of an affidavit and limiting the time of prosecuting the suit, full faith and credit is given to the law when the recovery is permitted, subject to the restrictions upon the right of action imposed in the territory enacting the statute. Of course, the territory of New Mexico could pass no law having force and effect over persons or property without its jurisdiction. *Pennoy v. Neff*, 95 U. S. 714, 722, 24 L. ed. 565, 568; *Story, Conf. L.* § 539.

"Each state may, subject to the restrictions of the Federal Constitution, determine the limits of the jurisdiction of its courts, the character of the controversies which shall be heard in them, and, specifically, how far it will, having jurisdiction of the parties, entertain in its courts transitory actions, where the cause of action has arisen outside its borders." *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 285, 52 L. ed. 1061, 1064, 28 Sup. Ct. Rep. 616.

The territory of New Mexico has a right

to pass laws regulating recovery for injuries incurred within the territory. *Martin v. Pittsburg, & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87. It has a right, under § 906 of the Revised Statutes, to require other states, when suits are therein brought to recover for an injury incurred within the territory, to observe the conditions imposed upon such causes of action, although otherwise controlled by common-law principles. But, when it is shown that the court in the *other jurisdiction observed such condi-[71 tions, and that a recovery was permitted after such conditions had been complied with, the jurisdiction thus invoked is not defeated because of the provision of the statute referred to.

Finding no error in the judgment of the Court of Civil Appeals of Texas, the same is affirmed.

Mr. Justice Holmes, dissenting:

I agree to pretty much everything that is said on behalf of the majority of the court, except the conclusion reached. But my trouble is this: The territory could have abolished the right of action altogether if it had seen fit. It said by its statutes that it would not do that, but would adopt the common-law liability on certain conditions precedent, making them, however, absolute conditions to the right to recover at all. One of those conditions was that the party should sue in the territory. § 1. A condition that goes to the right conditions it everywhere. *Davis v. Miller*, 194 U. S. 451, 457, 48 L. ed. 1067, 1071, 24 Sup. Ct. Rep. 692. I am willing to assume that the statute could not prohibit a suit in another state, and, indeed, it recognized that in that particular it might be disobeyed with effect. § 3. But I do not see why the condition in § 1 was not valid and important. If it had been complied with, there might have been a different result.

Mr. Justice McKenna concurs in this dissent.

*MAMMOTH MINING COMPANY,[72
Plff. in Err.,
v.

GRAND CENTRAL MINING COMPANY,
a Utah Corporation, and Grand Central
Mining Company, a Colorado Corporation.

(See S. C. Reporter's ed. 72-77.)

Mining claims — apexing veins.

1. The owner of a lode mining claim has the right to the ore beneath the surface of his claim in a vein not having its apex

there, subject only to the right of the owner of the claim where such vein apexes to follow it downward on its dip.

[For other cases, see *Mines*, I. d, in *Digest Sup. Ct. 1908.*]

Error to state court — Federal question — review of facts.

2. The decision of a state court rejecting the contention of an owner of a mining claim that a certain vein or lode has part of its apex in his claim is not reviewable in the Federal Supreme Court, where the case turned upon a question of fact.

[For other cases, see *Appeal and Error*, 2175-2208, in *Digest Sup. Ct. 1908.*]

[No. 97.]

Argued January 28, 1909. Decided March 8, 1909.

IN ERROR to the Supreme Court of the State of Utah and to the District Court of Juab County, in that state, to review decrees rejecting a counterclaim filed in a suit to recover for the removal of ores from beneath the surface of plaintiff's mining claim, and for an injunction. Dismissed for want of jurisdiction.

See same case below, 29 Utah, 490, 83 Pac. 648.

The facts are stated in the opinion.

Mr. Charles J. Hughes, Jr., argued the cause, and, with Messrs. R. N. Baskin, Everard Bierer, Jr., Aldis B. Browne, and Alexander Britton, filed a brief for plaintiff in error:

Every requirement of the Federal statute upon which a writ of error in cases of this kind is allowed exists in marked and pronounced form in the record herein.

St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 292, 52 L. ed. 1061, 1066, 28 Sup. Ct. Rep. 616; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 527, 528, 44 L. ed. 872, 874, 20 Sup. Ct. Rep. 715; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 203, 24 L. ed. 656, 658; *Shoshone Min. Co. v. Rutter*, 177 U. S. 505, 507, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Hussman v. Durham*, 165 U. S. 144, 41 L. ed. 664, 17

Sup. Ct. Rep. 253; *Aldrich v. Aetna Ins. Co.* 8 Wall. 491, 495, 19 L. ed. 473, 475; *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 385, 41 L. ed. 479, 480, 17 Sup. Ct. Rep. 98; *Pollard v. Kibbe*, 14 Pet. 353, 360, 10 L. ed. 490, 493; *Lytle v. Arkansas*, 22 How. 193, 202, 203, 16 L. ed. 306, 309, 310; *Silver v. Ladd*, 6 Wall. 440, 18 L. ed. 828; *Shively v. Bowlby*, 152 U. S. 1, 9, 38 L. ed. 331, 335, 14 Sup. Ct. Rep. 548; *Anderson v. Carkins*, 135 U. S. 483, 486, 34 L. ed. 272, 274, 10 Sup. Ct. Rep. 905; *Baldwin v. Stark*, 107 U. S. 463, 464, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 66, 67, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97.

The construction of the Federal statute is of such character and effect as to give this court jurisdiction of this writ of error.

Starin v. New York, 115 U. S. 248, 257, 29 L. ed. 388, 390, 6 Sup. Ct. Rep. 28; *Cohen v. Virginia*, 6 Wheat. 275, 5 L. ed. 259; *New Orleans, M. & T. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96; *San José Land & Water Co. v. San José Ranch Co.* 189 U. S. 177, 47 L. ed. 765, 23 Sup. Ct. Rep. 487; *American Exp. Co. v. Michigan*, 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695; *Trebilcock v. Wilson*, 12 Wall. 687, 20 L. ed. 460; *Carondelet v. St. Louis*, 1 Black, 179, 17 L. ed. 102; *Pennywit v. Eaton* (*Scott v. Eaton*) 15 Wall. 380, 21 L. ed. 72; *Hall v. Jordan*, 15 Wall. 393, 21 L. ed. 72; *Davis v. Packard*, 6 Pet. 41, 8 L. ed. 312; *Belden v. Chase*, 150 U. S. 674, 37 L. ed. 1218, 14 Sup. Ct. Rep. 264; *Talbot v. First Nat. Bank*, 185 U. S. 172, 46 L. ed. 857, 22 Sup. Ct. Rep. 612; *Talbot v. Sioux Nat. Bank*, 185 U. S. 182, 46 L. ed. 862, 22 Sup. Ct. Rep. 621; *Briggs v. Walker*, 171 U. S. 466, 4 L. ed. 243, 19 Sup. Ct. Rep. 1; *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; *Blythe v. Hinckley*, 180 U. S. 333, 45 L. ed. 557, 21 Sup. Ct. Rep. 390; *Lavagnino v. Uhlig*, 198 U. S. 443, 451, 49 L. ed. 1119, 25 Sup. Ct. Rep. 716; *Nutt v. Knut*, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216.

Consideration of the motion to dismiss or affirm should be reserved for full hearing.

Hecker v. Fowler, 1 Black, 95, 17 L. ed. 45; *Sparrow v. Strong*, 3 Wall. 97, 18 L. ed. 49; *Minor v. Tillotson*, 1 How. 288, 11 L. ed. 134; *Leonard v. Vicksburg, S. & P. R. Co.* 198 U. S. 416, 421, 49 L. ed. 1108, 1110, 25 Sup. Ct. Rep. 750; *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 186 U. S. 24, 46 L. ed. 1039, 22 Sup. Ct. Rep. 744; *Montana Min. Co. v. St. Louis Min. & Mill. Co.* 204 U. S. 204, 208, 51 L. ed. 444, 446, 27 Sup. Ct. Rep. 254; *Hussman v. Durham*, 165 U. S. 144, 145, 41 L. ed. 664, 665, 17 Sup.

NOTE.—On the right to follow a vein on its dip beyond surface lines of location—see notes to *Parrot Silver & Copper Co. v. Heinze*, 53 L.R.A. 491, and *Last Chance Min. Co. v. Bunker Hill & S. Min. & Concentrating Co.* 66 C. C. A. 311.

On review of questions of fact on writ of error to state court—see note to *Smiley v. Kansas*, 49 L. ed. U. S. 546.
83 L. ed.

Ct. Rep. 253; *Northern P. R. Co. v. Colburn*, 164 U. S. 383, 385, 41 L. ed. 479, 480, 17 Sup. Ct. Rep. 98; *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 66, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616; *Semple v. Hagar*, 4 Wall. 431, 18 L. ed. 402.

Mr. William H. Dickson argued the cause, and, with Mr. Henry P. Henderson, filed a brief for defendant in error:

In this case it is manifest that the validity of no treaty, statute of, or authority exercised under, the United States, nor the validity of any statute of, or authority exercised under the laws of, the state of Utah, was drawn in question; and as to the third class of cases provided for in U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, the right, title, etc., claimed under the Constitution, statute, etc., of the United States, must be specifically set up in the state court and there denied, in order that this court may, on writ of error, review the final judgment of the state court.

Speed v. McCarthy, 181 U. S. 269, 45 L. ed. 855, 21 Sup. Ct. Rep. 613; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Telluride Power Transmission Co. v. Rio Grande Western R. Co.* 175 U. S. 639, 644, 44 L. ed. 305, 307, 20 Sup. Ct. Rep. 245.

The fact that a suit is brought to enforce a right or title which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States.

Shoshone Min. Co. v. Rutter, 177 U. S. 505-507, 44 L. ed. 864, 865, 20 Sup. Ct. Rep. 726; *Blackburn v. Portland Gold Min. Co.* 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; *Bushnell v. Croke Min. & Smelting Co.* 148 U. S. 682, 37 L. ed. 610, 13 Sup. Ct. Rep. 771; *Beals v. Cone*, 188 U. S. 184, 47 L. ed. 435, 23 Sup. Ct. Rep. 275; *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 29 C. C. A. 462, 57 U. S. App. 13, 85 Fed. 867.

And the mere general allegations in the complaint, in such a case, that the action is one arising under the laws of the United States, and involving the construction of a specified statute of the United States, is not sufficient to meet the requirements of the provision of U. S. Rev. Stat. § 709, that, where a right or title is claimed under a statute of the United States, it must be specially set up and claimed.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 580, 581, 44 L. ed. 276, 281, 20 Sup. Ct. Rep. 222; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 24 L. ed. 656; *Montana Ore-Purchasing Co. v.*

Boston & M. Consol. Copper & S. Min. Co. supra; *Inez Min. Co. v. Kinney*, 46 Fed. 832.

It has been settled by repeated decisions of this court that the owner of a mining claim is entitled to everything vertically beneath the same, subject only to the right of another whose claim is so located upon the apex of a vein as to entitle him to follow such vein extralaterally, and mine and remove the ore therefrom beneath the surface of the former claim.

Iron Silver Min. Co. v. Elgin Min. & Smelting Co. 118 U. S. 196, 30 L. ed. 98, 6 Sup. Ct. Rep. 1177; *King v. Amy & S. Consol. Min. Co.* 152 U. S. 222, 38 L. ed. 419, 14 Sup. Ct. Rep. 510; *Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co.* 171 U. S. 65, 43 L. ed. 76, 18 Sup. Ct. Rep. 895; *Calhoun Gold Min. Co. v. Ajax Gold Min. Co.* 182 U. S. 499, 45 L. ed. 1200, 21 Sup. Ct. Rep. 885; *Parrôt Silver & Copper Co. v. Heinze*, 25 Mont. 139, 53 L.R.A. 491, 87 Am. St. Rep. 386, 64 Pac. 326; *Doe v. Waterloo Min. Co.* 54 Fed. 935; *Consolidated Wyoming Gold Min. Co. v. Champion Min. Co.* 63 Fed. 540; *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 194 U. S. 235, 48 L. ed. 953, 24 Sup. Ct. Rep. 654.

Messrs. William H. Dickson, Henry P. Henderson, A. C. Ellis, A. C. Ellis, Jr., and R. G. Schulder also filed a brief for defendant in error on the merits.

Mr. Justice Holmes delivered the opinion of the court:

This suit was begun by the Grand Central Mining Company *to recover for the [73 removal of ores from beneath the surface of its Silveropolis mining claim, and for an injunction. The defendant, the Mammoth Mining Company, filed a counterclaim, setting up that it was the owner of certain mining claims, especially the First Northern Extension of the Mammoth Mining Claim, lot No. 38, being senior to all the other claims concerned; the Bradley and the Golden King; the last two being to the west of the Mammoth Extension, between it and the Silveropolis, with more or less overlapping; and that the vein or lode from which the ore in question was taken has a part of its apex in the Mammoth Extension for 1,100 feet; which, if true, would entitle the Mammoth Company to the ore. It prayed that the plaintiff's claim be adjudged invalid, both because of the foregoing alleged facts and on the ground that the plaintiff's patent gave it no right to the ore unless the apex of the lode was within its claim, and it prayed also that the Mammoth Company's title be quieted and confirmed. After a trial the counterclaim of the Mammoth Company was rejected; the

judgment of the trial court was affirmed by the supreme court of Utah in an elaborate decision, and then the case was brought here, on the counterclaim alone.

Both of the parties are Utah corporations, and the suit was in a state court. The ground on which this court is asked to take jurisdiction is that the decision of the supreme court on the facts rested on a definition of a lode or vein which the plaintiff in error contests, and therefore turned on the construction of Rev. Stat. § 2322, U. S. Comp. Stat. 1901, p. 1425. There is a faint argument on the other point that we have mentioned, that the defendant in error had no right to ore beneath the surface of the Silveropolis claim, unless from a vein having its apex there, but that, if relevant, has been disposed of by previous decisions of this court, and may be disregarded. *St. Louis Min. & Mill. Co. v. Montana Min. Co.* 194 U. S. 235, 48 L. ed. 953, 24 Sup. Ct. Rep. 654. So also may an attempt to reopen the findings of fact. Of course, if these findings rest on a false definition they may have to be reconsidered, and cannot be assumed to be correct. But the evidence will not be discussed here. The [74] only *question with which we shall deal is whether the plaintiff in error makes out the alleged mistake of law. *Chrisman v. Miller*, 197 U. S. 313, 319, 49 L. ed. 770, 772, 25 Sup. Ct. Rep. 468; *Egan v. Hart*, 165 U. S. 188, 189, 41 L. ed. 680, 681, 17 Sup. Ct. Rep. 300.

The record discloses that the Mammoth Company in its cross complaint set up the proposition as to the limits of the title under the Silveropolis claim that we have dismissed, and that it alleged that it set up a title under the laws of the United States. The record also shows that at the trial the judge called in an advisory jury, and that he gave them certain instructions as to what constitutes the apex of a vein, etc.; and it is argued that it must be assumed that the judge, when he made his findings of fact adverse to the Mammoth Company, was governed by the same views of the law. But the cross complaint by itself shows no warrant for this writ of error, and as the case went to the supreme court by appeal, and the facts were discussed at great length and re-established by that court, it is in the opinion of that court alone, if anywhere, that the supposed error must be found. Indeed, the instructions to the jury were treated as immaterial by that court, and held not to be a ground for reversal, even if wrong, if the judgment was right upon the evidence. It is necessary, therefore, to show the nature of the case and of the course of reasoning followed by the supreme court of the state.

53 L. ed.

For the character of the country where the question arises we quote from the judgment under review:

"The mines are found in a lime belt which covers about 2 square miles, and is the great producing area of the Tintic district. In some places the limestone beds are upturned, large areas tilted upon edge, the beds dipping nearly vertically down; while in other places they dip at lower angles, and in special areas the dips are quite uniform; and again, though, it seems, not frequently, anticlinals exist. This limestone is surrounded on all sides, except the north, by igneous rocks. The sedimentary rocks are broken up and fractured, evidently the result of igneous intrusion. The limestone carries some iron, the different forms of iron oxide, also some manganese, and in places the limestone is crushed, crumbled, and brecciated. . . . The *surface of [75] the limestone area, wherever exposed, is marked with innumerable seams, cracks, and small fissures filled with carbonate of lime, stained more or less with iron, and sometimes manganese. Quartz, spar, and other materials, characteristic, in general, of mineral-bearing limestone areas, are present, and in places the surface is brecciated and cemented. A trace of mineral, and of one or more of the precious metals, and, in places, more than a trace, even where there is no known vein, seems also to be a characteristic of that lime belt."

In the belt thus described the Mammoth Company's lot 38 runs northeasterly, and the Silveropolis claim about north, its southerly boundary being considerably further north than the southern boundary of lot 38. It is admitted that the apex of a vein extends northerly in lot 38 from its southern boundary for 690 feet to a point 90 feet south of the southern boundary of the Silveropolis claim extended. But the Utah courts found that at that point the vein on its strike and at its apex wholly departs from lot 38, in a northwesterly and then in a more northerly direction, whereas the Mammoth Company contends that it continues in that lot to a line 1,100 feet distant from its southerly line, and that large deposits of ore, taken by the court to represent the strike of the vein, really are upon its dip.

In coming to its conclusion the supreme court, after stating the presumption that the ore belongs to the owner of the claim under which it is found, lays great stress on the fact that the Mammoth Company could not locate the hanging or foot wall of the supposed vein north of the point at which the vein was found to leave lot 38. It goes on to find that, by the preponderance of evidence, the surface indications

for a long distance east and west of lot 38, north of the point indicated above, are the same as those in the lot. It reaches the same result from assays of numerous samples, taken from the open cuts and exposures in the same part of the lot. It then elaborately discusses the workings underground. It says that the fact is clear that the ore always is found near the line of the [76] great ore bodies, *whether they be on the strike or on the dip of the vein, northwesterly beyond the above-mentioned point. It points out that the boundaries of a vein north of that point, and apex in lot 38, and a strike and dip that would carry the vein to and include the disputed ore bodies, have been left in doubt, at least, notwithstanding great efforts by drifts, cross cuts, raises, and winzes, to prove that the vein exists. This doubt is explained by the witnesses for the Grand Central Company and by the court, on the ground that the vein was formed by replacement or metasomatic action within narrowly limited areas, and that the boundaries of the vein are the limits of the ore. Underground as at the surface, excepting those from the vicinity of the back fissure and the ore channel, the assays show no mineralization not common generally through that limestone region. Underground as at the surface, the Mammoth Company cannot locate the hangings and foot walls of the vein.

The court observes that a vein cannot be said to exist merely because rock is crushed, shattered, or even fissured, and that what will constitute one must depend somewhat upon the nature of the country in which it is alleged to be found. It fully recognizes that a true vein may be barren in places, but concludes that to allow the Mammoth Company's claim would amount practically to declaring the whole limestone area to be one vein, thousands of feet wide. After calling attention to the admitted fact that the vein has well-defined boundaries and strike from the south end of lot 38 for about 700 feet, it finds that the same conditions continue to exist from there on in a northwesterly direction outside the limits of the lot, and that the ore bodies found outside those limits are on the strike, and not upon the dip. It calls attention to the almost vertical dip of the vein at specified places, and is of opinion from that and other facts discussed in detail that no dip is shown that could carry a vein from lot 38 to the ore bodies in dispute. It finds its conclusions confirmed by the conduct of the Mammoth Company during all the years of operation in its mine, making a strong argument that it is not necessary to recite.

[77] *The counsel for the Mammoth Company contends that the supreme court of

Utah based its judgment upon assays and a definition that fails to recognize that a vein may be a vein, although it is in soft rock, like limestone, where the walls of the fissures have been eaten into by the mineralizing solutions, and although the surface water has leached the valuable mineral constituents from the upper portion down into the vein. But the abridged statement that we have made of the material part of its reasoning shows that assays played but a small part, and that definitions played no important one in leading to the conclusion. On the contrary, most, if not all, of the findings that we have stated, deal with pure matters of fact. So far as definitions go, the court adopted those that were quoted in *Iron Silver Min. Co. v. Cheesman*, 116 U. S. 529, 29 L. ed. 712, 6 Sup. Ct. Rep. 481. It is true that it expressed the opinion that there is a difference between a lode sufficient to validate a location and an apex giving extralateral rights. But, without intimating agreement or disagreement with this view (*Lawson v. United States Min. Co.* 207 U. S. 1, 52 L. ed. 65, 28 Sup. Ct. Rep. 15), it is enough for us to say that it was not necessary to the result. The court was against the Mammoth Company on the facts, it did not accept its theory of leaching, etc., but was of opinion that the ore deposits were made within originally narrow boundaries by the mineral solutions rising through the main fissure from the deep.

We deem it unnecessary to discuss the opinion below at greater length, as we think it entirely plain, upon a study of the lengthy and careful discussion, that it presents no question that we can be asked to review. The plaintiff in error makes an elaborate argument upon the evidence that the supreme court was wrong in its findings of fact. We repeat that upon the writ of error we shall not go into such matters. It is enough to say that, upon the facts as found, neither the record nor the opinion presents a Federal question, and that therefore the writs of error must be dismissed.

Writs of error dismissed.

*STATE OF MISSOURI, Complainant, [78
v.

STATE OF KANSAS.

(See S. C. Reporter's ed. 78-85.)

Boundaries — between states.

The western boundary line of Missouri, extended by the act of Congress of June 7, 1836 (5 Stat. at L. 34, chap. 86), to the Missouri river, remains the center of that stream, even if, by erosion, the result may be to take from Missouri territory which

lies east of the original boundary, defined as a meridian line running due north from the mouth of the Kansas river.

[For other cases, see *Boundaries*, III. b, in *Digest Sup. Ct.* 1908.]

[No. 6, Original.]

Argued and submitted February 23, 1909.
Decided March 22, 1909.

ORIGINAL BILL in equity filed by the State of Missouri against the State of Kansas to establish the western boundary of the former state. Decree for the defendant.

The facts are stated in the opinion.

Mr. Hunter M. Meriwether argued the cause, and, with Messrs. Elliott W. Major and Henry M. Beardsley, filed a brief for complainant.

Mr. Fred. S. Jackson submitted the cause for defendant. Messrs. John S. Dawson and C. C. Coleman were on the brief.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill to establish the western boundary of the state of Missouri for a short distance above Kansas City in that state. The object of Missouri is to maintain title to an island of about 400 acres in the Missouri river, now lying close to Kansas City, Missouri, and Kansas City, Kansas. The state of Kansas claims the same island by answer and what it terms a cross bill. A few words will explain the issue between the parties. When Missouri was admitted to the Union [3 Stat. at L. 545, chap. 22] its western boundary at this point was a meridian running due north. There was land between a part of this line and the Missouri river. By treaty with the Indians [82] and act of Congress on the petition of Missouri, that state was granted jurisdiction over such land, and its boundary was extended to the Missouri river. Since that time the river has been moving eastward by gradual erosion, and, at the place in controversy, has passed to the east of the original line. The land in question lies to the east of the line, and the claim of Missouri is that, whatever the change in the river, its jurisdiction remains to that line.

Missouri fortifies its claim by an allegation that the line at the place in controversy never was changed. According to the bill, the line as surveyed began at a point on the

left bank of the Missouri river, opposite the mouth of the Kansas or Kaw, for two miles and a half "practically conformed with the left bank of the Missouri," and, by the shifting of the stream, was in the river when the act of Congress was passed, so that there was no land to be added there, and the original boundary remained. Kansas denies that the original line conformed to the left bank of the river, and says that even if Missouri is right with regard to the facts, the result of the change was to make the Missouri river the boundary between the states from the north to the point where the Missouri and the Kansas meet.

To decide the case it is necessary to construe the laws by which the boundary of Missouri was changed. The first step to that end was a memorial of the general assembly of Missouri to Congress, dated January 15, 1831. The sum of it is this: Many inconveniences have arisen from the improvident manner in which parts of the boundaries have been designated. When the state government was formed, the whole country on the west and north was a wilderness and its geography unwritten. The precise position of that part of the line passing through the middle of the mouth of the Kansas river, which lies north of the Missouri, is unknown, but it is believed to run almost parallel with the course of the stream, so as to leave a narrow strip of land, varying in breadth from 15 to 30 miles. Great calamities are to be feared from the Indians on the frontier. Therefore it is necessary to interpose, "whenever it is possible, some visible boundary and natural barrier between the Indians and the whites." The Missouri river will afford this barrier "by extending the north boundary of this state in a straight line westward, until it strikes the Missouri, so as to include within this state the small district of country between that line and the river." There is more, but the main point of the memorial is to secure a natural barrier between Indians and whites, and, in addition, easier access to "the only great road to market." A few square miles, more or less, of savage territory, were of no account, but the object was to get the river for a bound.

There was a report to the Senate on April 8, 1834, which adopted the foregoing reasons, and recommended making the Missouri river "the western boundary to the mouth of the Kansas river." Senate Doc. No. 263, 23d Cong. 1st Sess. On February 12, 1836, there was a report to the House of Representatives on the same subject. It referred to a bill that had been reported, authorizing the President to run the boundary line, and mentioned that the bill had been amended by directing the line to be

NOTE.—On rivers and lakes as state boundaries, see note to *Buck v. Ellenbolt*, 15 L.R.A. 187.

As to judicial settlement of state boundaries—see note to *Nebraska v. Iowa*, 36 L. ed. U. S. 798.

53 L. ed.

run from the mouth of the Kansas river up the Missouri river, etc. It stated that the Indian title to the lands in question might be extinguished and ought to be, because those lands ought to form part of the state of Missouri. As a reason it mentioned that, when Missouri was admitted into the Union, it was expected that other states would be formed on the west, in which case the use of the Missouri would have been equally convenient, whether it was the border line or not; since then, however, the Indians had been located on the frontier, thus hampering access to the river. As a final argument it added that to make the river the boundary would be for the advantage of both the Indians and the whites. In conclusion, 'to carry into effect the ultimate object of the resolution,' it reported "A Bill to Extend the Western Boundary of the State of Missouri to the Missouri River." H. R. No. 379, 24th Cong. 1st. Sess. This bill was passed, and be-
84] came the act of Congress *on which this controversy turns. It provides that "when the Indian title to all the lands lying between the state of Missouri and the Missouri river shall be extinguished, the jurisdiction over said lands shall be hereby ceded to the state of Missouri, and the western boundary of said state shall be then extended to the Missouri river." These are the only material words. Act of June 7, 1836, chap. 86. 5 Stat. at L. 34.

In anticipation of the action of Congress the Constitution of Missouri was amended as follows: "That the boundary of the state be so altered and extended as to include all that tract of land lying on the north side of the Missouri river, and west of the present boundary of this state, so that the same shall be bounded on the south by the middle of the main channel of the Missouri river, and on the north by the present northern boundary line of the state, as established by the Constitution, when the same is continued in a right line to the west, or to include so much of said tract of land as Congress may assent." Amendment ratified at the session of 1834-35, art. 2, § 4. Mo. Rev. Stat. 1856, p. 91. Then, on December 16, 1836, the state assented to the act of Congress by "An Act to Express the Assent of the State of Missouri to the Extension of the Western Boundary Line of the State." Laws 1st Sess. 9th Gen. Assem. p. 28; and, on January 17, 1837, a copy was transmitted to Congress by the President. Meantime, on September 17, 1836 [7 Stat. at L. 511], a treaty was made with the Indians, in which they expressed their belief in the advantage of a natural boundary between

them and the whites, and released their claims. Indian affairs. Laws and Treaties. Compiled by Kappler, 1904, p. 468. On March 28, 1837, the President, by proclamation, declared that the Indian title to lands had been extinguished, in pursuance of the condition in the act of Congress, and the act went into full effect. 5 Stat. at L. 802. Appx. No. 1.

Whatever might be the interpretation of the act, taken by itself and applied between two long-settled communities, we think that the circumstances and the history of the steps that led to it show that the object throughout was that expressed *by the [85 memorial; as we have said, not to gain some square miles of wilderness, but to substitute the Missouri river for an ideal line as the western boundary of the state, so far as possible; that is, from the northern boundary to the mouth of the Kaw. That this was understood by Missouri to be the effect of the act is shown by a succession of statutes declaring the boundaries of the river counties in this part. They all adopted the middle of the main channel of the river; beginning with the act that organized the county of Platte, approved December 31, 1838, Mo. Laws, 1838, pp. 23-25, and going on through the Revised Statutes of 1855, p. 459, § 12 (Clay), p. 466, § 33 (Platte), p. 478, § 65 (Jackson), etc., to 2 Rev. Stat. 1879, chap. 94, §§ 5177, 5198, and 5237. The construction is contemporaneous and long-continued, and we regard it as clear. It is confirmed by the cases of *Cooley v. Golden*, 52 Mo. App. 229, and *St. Joseph & G. I. R. Co. v. Devereux*, 41 Fed. 14, both of which cases notice that the act extended the boundary to the river, and not merely to the bank.

It follows upon our interpretation that it is unnecessary to consider the evidence as to precisely where the line, as surveyed, ran from opposite the mouth of the Kansas or Kaw. If the understanding both of the United States and the state had not been a wholesale adoption of the river as a boundary, without any niceties, still, as the cession "to the river" extended to the center of the stream, it might be argued that, even on Missouri's evidence, there probably was a strip ceded at the place in dispute. But, from the view that we take, such refinements are out of place. The act has to be read with reference to extrinsic facts, because it fixes no limits except by implication. We are of opinion that the limit implied is a point in the middle of the Missouri opposite the middle of the mouth of the Kaw.

Decree for the defendant.

86]*EDWARD BONNER and Edward L. Bonner, Plffs. in Err.,
v.

HENRY P. GORMAN, Administrator of the Estate of Mary A. Cole, Deceased, et al.

(See S. C. Reporter's ed. 86-92.)

Constitutional law — due process of law — judicial error.

1. An erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, contrary to U. S. Const., 14th Amend., where the parties have been fully heard in the regular course of judicial proceedings.

[For other cases, see Constitutional Law, IV. b, in Digest Sup. Ct. 1908.]

Error to state court — Federal question.

2. The Federal Supreme Court has no jurisdiction of a writ of error to a state court in a case in which the only suggestion that a Federal question was involved was put forward after the highest state court had affirmed, on a second appeal, a judgment rendered by the court below in strict obedience to its mandate, compliance with such mandate being in fact the only question open to and determined by the highest court.

[For other cases, see Appeal and Error, 1249-1318, in Digest Sup. Ct. 1908.]

[No. 102.]

Submitted February 23, 1909. Decided April 5, 1909.

IN ERROR to the Supreme Court of the State of Arkansas to review a decree which, on a second appeal, affirmed a decree of the Chancery Court of St. Francis County, in that state, dismissing a bill to enjoin the enforcement of a judgment rendered in an action at law. Dismissed for want of jurisdiction.

See same case below, 82 Ark. 423, 101 S. W. 1153.

The facts are stated in the opinion.

Mr. James P. Clarke submitted the cause for plaintiffs in error. Messrs. Rufus J. Williams and J. R. Beasley were on the brief:

Whether there is a Federal question or not will be determined by the United States Supreme Court for itself upon an examination of the record.

Freeland v. Williams, 131 U. S. 405, 33 L. ed. 193, 9 Sup. Ct. Rep. 763; *Davidson v. New Orleans*, 96 U. S. 97, 24 L. ed. 616.

The supreme court of Arkansas having denied to Edward Bonner a right or privilege existing under the Constitution of the United States, the United States Supreme Court has jurisdiction to review the judgment of the supreme court of the state.

Boyd v. Nebraska, 143 U. S. 135, 36 L. ed. 103, 12 Sup. Ct. Rep. 375.

Raising the Federal question for the first time in the appellate state court, if it be there considered, or necessarily involved in the decision, gives the right of review in this court.

Missouri, K. & T. R. Co. v. Elliott, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446.

Mr. John Gatling submitted the cause for defendants in error:

A real, and not a fictitious, Federal question, is essential to the jurisdiction of this court over the judgments of state courts.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353; *Millingar v. Hartupee*, 6 Wall. 258, 18 L. ed. 829; *New Orleans v. New Orleans Waterworks Co.* 142 U. S. 79-87, 35 L. ed. 943-946, 12 Sup. Ct. Rep. 142.

When parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment to the Constitution of the United States.

Walker v. Sauvinet, 92 U. S. 90, 23 L. ed. 678; *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 26, 28 L. ed. 889, 895, 5 Sup. Ct. Rep. 441; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162, 171, 36 L. ed. 925, 930, 13

NOTE.—As to what constitutes "due process of law"—see notes to *People v. O'Brien*, 2 L.R.A. 255; *Kuntz v. Sumption*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; *Gilman v. Tucker*, 13 L.R.A. 304; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

On the general subject of writs of error from the United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can
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be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to *Chicago, I. & L. R. Co. v. McGuire*, 49 L. ed. U. S. 414.

Sup. Ct. Rep. 54; *Bergemann v. Backer*, 157 U. S. 655, 39 L. ed. 845, 15 Sup. Ct. Rep. 727.

The record must show on what grounds the decision of the matter in which the Federal question is alleged to have been involved was made.

Caperton v. Bowyer, 14 Wall. 216, 20 L. ed. 882; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Murdock v. Memphis*, 20 Wall. 590, 635, 22 L. ed. 429, 444; *California Powder Works v. Davis*, 151 U. S. 389, 393, 38 L. ed. 206, 207, 14 Sup. Ct. Rep. 350; *Rutland R. Co. v. Central Vermont R. Co.* 159 U. S. 630, 40 L. ed. 284, 16 Sup. Ct. Rep. 113; *Hale v. Akers*, 132 U. S. 564, 33 L. ed. 446, 10 Sup. Ct. Rep. 171; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

The Federal question was raised too late.

Union Mut. L. Ins. Co. v. Kirchoff, 169 U. S. 110, 42 L. ed. 680, 18 Sup. Ct. Rep. 260; *Bolln v. Nebraska*, 176 U. S. 83, 44 L. ed. 382, 20 Sup. Ct. Rep. 287; *Citizens' Sav. Bank v. Owensboro*, 173 U. S. 636, 43 L. ed. 840, 19 Sup. Ct. Rep. 530, 571; *Johnson v. New York L. Ins. Co.* 187 U. S. 496, 47 L. ed. 275, 23 Sup. Ct. Rep. 194; *Simmerman v. Nebraska*, 116 U. S. 54, 29 L. ed. 535, 6 Sup. Ct. Rep. 333; *Meyer v. Richmond*, 172 U. S. 82, 43 L. ed. 374, 19 Sup. Ct. Rep. 106.

Mr. Chief Justice **Fuller** delivered the opinion of the court:

In 1893 L. P. Featherstone qualified as administrator of the estate of Mary A. Cole, deceased, in the probate court of St. Francis county, Arkansas, with E. Bonner, one of the plaintiffs in error, as one of the sureties on his bond. In 1894, Featherstone, as administrator, filed his first settlement, and moved from Arkansas to Texas in 1895. Some time after he left the state, Henry P. Gorman, the defendant in error, was appointed by the probate court administrator in succession, and on February 1, 1898, he filed his first settlement, a second settlement in 1901, and in 1903 his third settlement. July 19, 1899, two *of Featherstone's bondsmen, said E. Bonner and W. H. Coffey, appeared in the probate court in obedience to its order and filed the final settlement of Featherstone as administrator, in which there appeared to be a balance due to him of \$23.57. To this settlement Gorman, administrator, and one of the heirs of the estate, appeared and filed exceptions. These exceptions were sustained by the probate court January 29, 1900, and a balance of \$991.28 found due from Featherstone as administrator, and he

was ordered to pay the same over to Gorman, as the administrator in succession. From this order and judgment of the probate court, Featherstone and his sureties, E. Bonner and Coffey, took an appeal to the circuit court, which appeal was dismissed by that court at the March term, 1901, for some informality, as the state supreme court says.

February 12, 1900, suit was brought in the circuit court of St. Francis county by Gorman, administrator, against said Bonner and Coffey, to enforce the payment of the said judgment of \$991.28. In this suit Bonner and Coffey filed an answer and a cross complaint, to which Gorman, as administrator, filed a demurrer, which was sustained by the court, and judgment entered in favor of administrator Gorman against said sureties for \$991.28. From this judgment the sureties appealed to the state supreme court, where it was affirmed October 10, 1903. 71 Ark. 480, 77 S. W. 602.

The court ruled, as sufficiently stated in the headnote, that, "in a suit against the sureties of an administrator to recover the amount that had been adjudged by the probate court to be due by him to the estate, it is no defense that the probate court erred in finding that any amount was due by such administrator, as the error should have been corrected on appeal."

To restrain the enforcement of this judgment, E. Bonner filed a bill in the chancery court of St. Francis county, Arkansas, at the December term, 1903. To this bill administrator Gorman and the heirs filed a demurrer on May 9, 1904, which was overruled by the court, and they then filed an answer. *The chancery court rendered a decree in favor of plaintiff E. Bonner, enjoining Gorman, as administrator, and the heirs at law of Mary A. Cole, from executing that judgment. From this decree Gorman and the heirs at law appealed to the state supreme court, where it was, on October 22, 1906, reversed, annulled, and set aside, and the cause remanded to the chancery court, with directions to dismiss the complaint for want of equity. 80 Ark. 339, 97 S. W. 282.

The rulings of the court were that, "under the code, a defendant cannot permit judgment to go against him upon a legal liability, and then enjoin the judgment in equity upon equitable grounds known before the judgment at law was rendered; a judgment of the circuit court against an administrator and his bondsmen will not be enjoined in equity on the ground that it was based on a void or fraudulent probate judgment, as that was matter of defense which might have been pleaded in the circuit court." The court also added that "it is not alleged or shown that there was any

fraud in the procurement of the judgment at law, and we see no valid reason why it should be enjoined."

At the December term, 1906, of the chancery court, a decree was entered upon, and in accordance with, the mandate of the supreme court, whereupon the said E. Bonner and E. L. Bonner, the latter being the surety on the injunction bond, prayed an appeal to the supreme court, which was granted. Gorman, administrator, and others, then appellees, filed a motion to advance this appeal and affirm the case as a delay case, and the supreme court granted the motion to advance and affirmed the decree. The supreme court rendered a *per curiam* opinion, which is to be found in 82 Ark. 423, 101 S. W. 1153. This memorandum stated that "the only question in the case is whether the decree is in conformity to the mandate of this court. The record has been carefully looked into, and the decree found to be in strict accord with the mandate and opinion of the court, and there is nothing new for consideration. Ordinarily this would stamp this case as a delay case, 91]and it should *be advanced and affirmed, and, under the practice in such cases, the 10 per cent penalty would be added. But it is evident from the record that the appellant has brought this case here in order to seek a writ of error to the Supreme Court of the United States. It will be with the chief justice to decide whether there is a Federal question herein; but, when a case is manifestly brought here in good faith, to obtain a review in the Federal Supreme Court, although there is nothing in it for this court to consider, yet such object prevents it being the class of cases where the penalty should be inflicted."

A writ of error from this court was allowed May 9, 1907, the petition for the writ containing an assignment of errors, of which one was that the judgment of the probate court was null and void, and all other judgments based upon it were void also, so that the Bonners, appellants, by their enforcement, were deprived of their property without due process of law, in violation of the 14th Amendment. The record was filed here June 3, 1907, and the case submitted February 23, 1909.

No Federal question was raised in this case prior to the trial and judgment on the merits. The only suggestion that such a question was involved was put forward after the state supreme court had affirmed, on the second appeal, the judgment rendered by the chancery court in strict obedience to its mandate. Compliance with the mandate was, in fact, the only question open to and determined by the higher court.

It is firmly established that, when par-

ties have been fully heard in the regular course of judicial proceedings, an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law, within the 14th Amendment of the Constitution of the United States (*Central Land Co. v. Laidley*, 159 U. S. 112, 40 L. ed. 94, 16 Sup. Ct. Rep. 80), and that where a Federal question is raised on a second appeal and the state court refuses to consider it, it comes too late (*Union Mut. L. Ins. Co. v. Kirchoff*, 169 U. S. 110, 42 L. ed. 680, 18 Sup. Ct. Rep. 260). And see *Sayward v. Denny*, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 308, 47 L. ed. 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375. Moreover, "according to the well-settled *doctrine of this court[92 with regard to cases coming from state courts, unless a decision upon a Federal question was necessary to the judgment, or in fact was made the ground of it, the writ of error must be dismissed." *Arkansas Southern R. Co. v. German Nat. Bank*, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; *California Powder Works v. Davis*, 151 U. S. 389, 38 L. ed. 206, 14 Sup. Ct. Rep. 350; *St. Louis I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 52 L. ed. 1061, 28 Sup. Ct. Rep. 616.

Writ of error dismissed.

UNITED STATES, Petitioner,

v.

JOHN W. DICKINSON.

(See S. C. Reporter's ed. 92-103.)

Certiorari — as substitute for writ of error.

1. Certiorari cannot, independently, be used to supply the place of a writ of error for the mere correction of errors below, because of the provision of the act of September 24, 1789 (1 Stat. at L. 81, chap. 20, U. S. Comp. Stat. 1901, p. 580), § 14, substantially re-enacted as U. S. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580, giving the Federal Supreme Court power to issue all writs not specially provided for by statute which may be necessary for the exercise of its jurisdiction, and agreeable to the principles and usages of law.

[For other cases, see *Certiorari*, I. b, 2, in Digest Sup. Ct. 1908.]

NOTE.—On certiorari in United States courts—see note to *Clark v. Hackett*, 17 L. ed. U. S. 69.

Certiorari from Federal Supreme Court to circuit courts of appeals.

By the 6th section of the act of Congress creating the circuit courts of appeals (act of March 3, 1891, 26 Stat. at L. 828, chap.

Certiorari — to circuit court of appeals — in criminal case.

2. Certiorari to review a judgment of the circuit court of appeals reversing a conviction below cannot be granted by the Federal Supreme Court under the authority given by the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 6, to require the circuit courts of appeals, by certiorari or otherwise, to certify to the Supreme Court for review any case otherwise made final in those courts.

[For other cases, see *Certiorari*, II. a, in Digest Sup. Ct. 1908.]

Certiorari — to circuit court of appeals — in criminal case.

3. Want of power in the Federal Supreme Court under the act of March 3, 1891, § 6,

517, U. S. Comp. Stat. 1901, p. 550), it is provided that the judgments and decrees of such courts shall be final in certain cases therein enumerated, with the exception that, "in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

This statute furnishes the only basis for the exercise of this power. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

The power will be exercised sparingly, and only when questions of gravity and importance are involved. *Re Lau Ow Bew*, 141 U. S. 583, 35 L. ed. 868, 12 Sup. Ct. Rep. 43; *Re Woods*, 143 U. S. 202, 36 L. ed. 125, 12 Sup. Ct. Rep. 417.

It will be exercised only when demanded by the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeals, or between courts of appeals and the courts of a state, or some matter affecting the interest of the nation in its internal or external relations. *Forsyth v. Hammond*, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

A question of sufficient gravity and importance is involved to justify certiorari from the Federal Supreme Court to a circuit court of appeals where the matter is one of international concern, such as the rights of a Chinese merchant domiciled in the United States, under the Chinese restriction acts and the treaties with China. *Re Lau Ow Bew*, supra.

Whether the law of Minnesota that a judgment of dismissal is not a bar to a second suit for the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment, was properly applied on the trial of a case, are not questions of such gravity and importance as to require the review by the

to review by certiorari a judgment of the circuit court of appeals, reversing a conviction below, cannot be helped out by the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), providing for writs of error on behalf of the government in certain instances in criminal cases, which, being an innovation in criminal jurisdiction in certain classes of prosecutions, cannot be extended beyond its terms.

[For other cases, see *Certiorari*, II. a, in Digest Sup. Ct. 1908.]

[No. 362.]

Argued January 4, 5, 1909. Decided April 5, 1909.

Supreme Court by certiorari of the conclusions of the circuit court of appeals in reference to them. *Re Woods*, supra.

The discretionary power of issuing a writ of certiorari will not be exercised by the Supreme Court to review a decision of the circuit court of appeals in dismissing an appeal from the circuit court, where the only difference that can result will be an affirmance instead of a dismissal, and will not affect the essential rights of the parties. *Smith v. Vulcan Iron Works*, 165 U. S. 518, 41 L. ed. 810, 17 Sup. Ct. Rep. 407.

There being no money value involved in a case of habeas corpus, the judgment of the circuit court of appeals is "final" within the meaning of the act of March 3, 1891, § 6, and can therefore be reviewed by certiorari from the Federal Supreme Court if the question involved is of sufficient gravity and importance. *Lau Ow Bew v. United States*, 144 U. S. 47, 36 L. ed. 340, 12 Sup. Ct. Rep. 517.

Certiorari or other remedy.

Certiorari is the proper remedy to review a decision of the circuit court of appeals dismissing, for want of jurisdiction, a case within the class of cases in which the judgment of that court is made final. *Kingman & Co. v. Western Mfg. Co.* 170 U. S. 675, 42 L. ed. 1192, 18 Sup. Ct. Rep. 786.

Where the question is whether the decree of the circuit court of appeals is void because one of the judges who took part in the decision was forbidden by law to sit at the hearing, a writ of certiorari to that court to bring up its decree is more appropriate than a writ of mandamus to the circuit court to disregard the mandate of the appellate court. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

After judgment has been entered by a circuit court pursuant to the mandate of the circuit court of appeals, the proper remedy, if the latter court erred, or if, for any reason, its judgment can be held void, is by certiorari to the circuit court of appeals, and not by appeal from the circuit court. *Aspen Min. & Smelting Co. v. Bil-*

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review a judgment reversing a conviction in the District Court for the District of Massachusetts for violations of the national bank act. Dismissed for want of jurisdiction.

See same case below, 86 C. C. A. 625, 159 Fed. 801.

The facts are stated in the opinion.

Mr. Asa P. French and Attorney General **Bonaparte** argued the cause, and, with Solicitor General **Hoyt**, filed a brief for petitioner:

The writ of certiorari, under the Constitution and the statutes of the United

States, is strictly the common-law writ of that name, with all its functions and attributes, so far as applicable to our system of jurisprudence.

Re **Chetwood**, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385.

The granting of the writ by this court in the case at bar, and the part taken in these proceedings by the United States, are entirely in accord with the usages and principles of the common law.

4 Bl. Com. p. 321; **Groenvelt v. Burwell**, 1 Ld. Raym. 469; **Forsyth v. Hammond**, 166 U. S. 512, 41 L. ed. 1097, 17 Sup. Ct. Rep. 665; **Fields v. United States**, 205 U. S. 296, 51 L. ed. 810, 27 Sup. Ct. Rep. 543; **American Constr. Co. v. Jacksonville, T. & K. W.**

lings, 150 U. S. 31, 37 L. ed. 986, 14 Sup. Ct. Rep. 4.

Certiorari to the circuit court of appeals will be allowed by the Federal Supreme Court where the importance of the case demands it, to avoid any question as to the jurisdiction of the Supreme Court of a writ of error duly allowed, where an application for certiorari was made after a motion to dismiss the writ of error was filed. **Montana Min. Co. v. St. Louis Min. & Mill. Co.** 204 U. S. 204, 51 L. ed. 444, 27 Sup. Ct. Rep. 254.

See also *infra*, **American Sugar Ref. Co. v. New Orleans**, and **Security Trust Co. v. Dent**.

Certiorari, and not appeal, is the proper method of obtaining a review in the Supreme Court of the United States of a decision of the circuit court of appeals, made in the exercise of its jurisdiction, under the act of July 1, 1898, § 24b, to review, by original petition, proceedings of inferior courts of bankruptcy, which revised an order of the circuit court allowing an exemption, since the revising order of the circuit court of appeals is not "a final decision allowing or rejecting a claim" within the meaning of § 25b, providing for appeals in bankruptcy proceedings to the Supreme Court of the United States. **Holden v. Stratton**, 191 U. S. 115, 48 L. ed. 116, 24 Sup. Ct. Rep. 45.

Time for application.

The court, in **The Conqueror**, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510, seemed of the opinion that, by analogy, the petitioner was entitled to have, for filing his petition, the year within which the appellate jurisdiction of the Federal Supreme Court over the circuit courts of appeals, by appeal or writ of error, may be invoked. Hence, an application for certiorari to review a decree of the circuit court of appeals, entered after the adjournment of the Supreme Court for the term, was, in that case, deemed made with reasonable promptness, where filed during the next term of the court, within a year after the original decree.

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Certiorari to a circuit court of appeals will not be granted upon dismissing, for lack of jurisdiction, a writ of error to that court, where the judgment sought to be reviewed was entered May 27, 1902, the writ of error was allowed May 22, 1903, the cause docketed June 1, 1903, and the petition for certiorari filed February 17, 1905. **Bonin v. Gulf Co.** 198 U. S. 115, 49 L. ed. 970, 25 Sup. Ct. Rep. 608.

Certiorari to the circuit court of appeals, sought because of the well-founded apprehension that a writ of error was improperly sued out, will not be granted where the judgment sought to be reviewed was rendered December 7, 1900, a rehearing denied February 23, 1901, the writ of error brought April 15, 1901, and the record filed and case docketed April 29, 1901, and the motion for such certiorari was not made until October 9, 1902. **Ayres v. Polsdorfer**, 187 U. S. 585, 47 L. ed. 314, 23 Sup. Ct. Rep. 196.

At what stage of proceedings writ may issue.

Certiorari from the Federal Supreme Court to a circuit court of appeals is ordinarily issued after a final decree in the latter court. **Chicago & N. W. R. Co. v. Osborne**, 146 U. S. 354, 36 L. ed. 1002, 13 Sup. Ct. Rep. 281.

But it may be issued before if the Supreme Court is of the opinion that the facts of the case require an earlier interposition. **The Conqueror**, 166 U. S. 110, 41 L. ed. 937, 17 Sup. Ct. Rep. 510; **The Three Friends (United States v. The Three Friends)** 166 U. S. 1, 41 L. ed. 897, 17 Sup. Ct. Rep. 495.

The Federal Supreme Court will not ordinarily issue a writ of certiorari to review a decree of the circuit court of appeals on an appeal from an interlocutory order, but the power of the court to do so is clear, and will be exercised when necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the case. **American Constr. Co. v. Jacksonville, T. & K. W. R. Co.** 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

R. Co. 148 U. S. 383, 384, 37 L. ed. 486, 491, 13 Sup. Ct. Rep. 758.

This court has the same right to review a criminal case on certiorari on the application of the government that it has to review a civil case.

Forsyth v. Hammond, 166 U. S. 511, 41 L. ed. 1097, 17 Sup. Ct. Rep. 665.

The power of Congress, upon the establishment of an inferior, intermediary tribunal, not only to reserve authority in this court to review all important cases, criminal as well as civil, on certiorari, but even to give it jurisdiction to review criminal cases on the appeal or application of the government, by a writ of error or on certiorari, is beyond question.

The power of the Federal Supreme Court to issue certiorari to bring up a case for review from the circuit courts of appeals extends to every case pending in those courts, and may be exercised at any time during such pendency, provided that the case is one which, but for the provision of the statute for a review by certiorari, would be finally determined in those courts. Forsyth v. Hammond, 166 U. S. 506, 41 L. ed. 1095, 17 Sup. Ct. Rep. 665.

The only restriction upon the power of the Federal Supreme Court to require cases to be certified to it from the circuit courts of appeals for review is that the cases must be those in which the statute makes the judgment of those courts final, not cases in which they have rendered final judgment. But the question at what stage of the proceedings, and under what circumstances, the case will be required to be sent up for review, is left to the discretion of the Supreme Court, as the exigencies of each case may require. American Constr. Co. v. Jacksonville, T. & K. W. R. Co. supra.

The error, if any, on the part of the circuit court of appeals on an appeal taken under the act of March 3, 1891, § 7, from an order granting or continuing an injunction, in setting aside so much of the order as appointed a receiver and permitted him to issue receiver's notes, is not so important as to warrant the Federal Supreme Court in undertaking to control the case by certiorari at that stage of the proceedings. Ibid.

No ground for the extraordinary interposition of the Federal Supreme Court by certiorari or mandamus is afforded because the circuit court of appeals erroneously rendered a decision on an interlocutory appeal from an order which could not properly be made the subject of a separate appeal, but which might clearly, so far as material, be brought before the circuit court of appeals on appeal from the final decree, when rendered. Ibid.

The allowance of certiorari by the Federal Supreme Court before a decision was rendered in the circuit court of appeals is justified where the case involves the forfeiture of a vessel alleged to have been

Taylor v. United States, 207 U. S. 120, 127, 52 L. ed. 130, 134, 28 Sup. Ct. Rep. 53; United States v. Bitty, 208 U. S. 393, 399, 400, 52 L. ed. 543, 545, 546, 28 Sup. Ct. Rep. 396; United States v. Sanges, 144 U. S. 310, 323, 36 L. ed. 445, 450, 12 Sup. Ct. Rep. 609.

Mr. Henry W. Dunn argued the cause, and, with Messrs. Samuel L. Powers and Powers & Hall, filed a brief for respondent.

The question of jurisdiction must be decided by construction of the provisions of the act of 1891.

American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 380, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758.

fitted out to cruise or commit hostilities against a foreign state or prince. The Three Friends, supra.

The possibilities of conflict and collision which might arise from adverse decisions of the supreme court of a state and a Federal circuit court of appeals, respecting the validity of the annexation of territory to a city, when the decision of the circuit court of appeals would except from the territorial limits of the city a tract within its exterior boundaries, constitute sufficient reason for requiring the latter court to certify the case to this court, although no final decree has been entered therein, that court having simply reversed the decree below, and remanded the cause for further proceedings. Forsyth v. Hammond, supra.

The fact that the mandate of the circuit court of appeals to the district court, affirming the decree of that court, has gone down, does not preclude a writ of certiorari from the Supreme Court, to review the decision of the circuit court of appeals. The Conqueror, supra.

The lack of finality in a decree reversing an order of a circuit court, granting a preliminary injunction, will not prevent a review in the Supreme Court of the United States by writ of certiorari issued to a circuit court of appeals, where the record presented the whole case to that court, so that it might properly have been finally disposed of in terms by its decree. Harri-man v. Northern Securities Co. 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493.

Certiorari cannot properly be issued to require the circuit court of appeals to send up a cause over which it has no jurisdiction, for determination on the merits, when it has not rendered any decision in the case, but has merely certified the question of its jurisdiction. Good Shot v. United States, 179 U. S. 87, 45 L. ed. 101, 21 Sup. Ct. Rep. 33.

Return.

A writ of certiorari to the circuit court of appeals may be allowed by the Supreme Court of the United States where the cause has been improperly brought up by writ of error; and in such case the copy of the

The grounds of the decision in *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609, are applicable to the same extent and with the same force to the case here presented.

Any consideration of the question here raised must give full weight to the rule expressed in *Cross v. United States*, 145 U. S. 571, 574, 36 L. ed. 821, 822, 12 Sup. Ct. Rep. 842.

This court has no general appellate jurisdiction to review, on error or appeal, decisions of lower Federal courts in criminal cases, and such jurisdiction must be conferred in clear and explicit language.

United States v. More, 3 Cranch, 159, 2 L. ed. 397; *Ex parte Yarbrough*, 110 U. S.

651, 653, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; *Cross v. United States*, 145 U. S. 571, 574, 36 L. ed. 821, 822, 12 Sup. Ct. Rep. 842.

Appeal and writ of error being the appropriate forms of procedure provided by Congress for the mere correction of error, the appellate jurisdiction of this court for that purpose was limited to the cases in which express provision was made for appeals or writs of error. In cases not so provided for, neither habeas corpus nor certiorari could be used to supply the place of a writ of error for the mere correction of error.

Ex parte Gordon, 1 Black, 503, 17 L. ed. 134; *Ex parte Kearney*, 7 Wheat. 38, 42, 43, 5 L. ed. 391, 392; *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S.

record filed under the writ of error may be directed to be taken and deemed a sufficient return to the certiorari. *Security Trust Co. v. Dent*, 187 U. S. 237, 47 L. ed. 158, 23 Sup. Ct. Rep. 61.

On petition for certiorari or mandamus to a circuit court of appeals which has erroneously dismissed a writ of error for want of jurisdiction, where the record is before the Supreme Court on the return to a rule to show cause, and full argument has been had, the writ of certiorari is issued, and the return to the rule is allowed to stand as a return to the writ, and judgment thereupon reversed, and the cause remanded, with a direction to take jurisdiction and dispose of the cause. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646.

Scope of review.

Only the errors assigned by the petitioner on certiorari from a final decree of the circuit court of appeals will be considered, where the respondents have not also applied for the writ. *Hubbard v. Tod*, 171 U. S. 474, 43 L. ed. 246, 19 Sup. Ct. Rep. 14.

The scope of review on certiorari will not be broadened so as to include, in addition to the questions which the petitioner has properly raised, technical questions tending to embarrass the progress and delay the final ending of an action, the merits of which are with the respondents. *Green County v. Thomas*, 211 U. S. 598, ante, 343, 29 Sup. Ct. Rep. 168, 170.

An objection to the sufficiency of an indictment will not be considered by the Federal Supreme Court on certiorari, although the grounds of the demurrer and the general language of the exceptions taken on the trial are broad enough to embrace such objection, where the conduct of counsel for the accused in the courts below is wholly inconsistent with any intention to rely upon such objection, and the point was not referred to in the petition for writ of certiorari, or in the brief submitted in support of that petition. *Great Northern R. Co. v. United States*, 208 U. S. 452, 52 L. ed. 567, 28 Sup. Ct. Rep. 313.

53 L. ed.

Defenses of anticipation and want of infringement will not ordinarily be passed upon by the Federal Supreme Court on certiorari to a circuit court of appeals, to review an order granting a preliminary injunction in a patent suit. *Leeds & C. Co. v. Victor Talking Mach. Co.* 213 U. S. 301, post, 805, 29 Sup. Ct. Rep. 495.

Whether or not the inventions covered by the claims of the patent in suit were exhibited in an expired foreign patent will not be considered by the Federal Supreme Court on certiorari to a circuit court of appeals, to review an order granting a preliminary injunction, where the question is largely one of fact, and pertains rather to the evidence than to a construction of the patents. *Ibid.*

Concurrent findings of the courts below that the Liddell patent No. 558,969, for an improvement in paper-bag machines, which combines a rotary cylinder with a forming plate oscillating about its rear edge upon the surface of the cylinder, is a broad invention, and is infringed by a machine in which the surface of the cylinder is depressed away from the forming plate, while the patent adopts the device of causing the pivot or axis of the forming plate to yield away from the cylinder, will not be disturbed by the Federal Supreme Court on certiorari, as clearly erroneous. *Continental Paper Bag Co. v. Eastern Paper Bag Co.* 210 U. S. 405, 52 L. ed. 1122, 28 Sup. Ct. Rep. 748.

The concurrent findings of the two lower courts that water damage to cargo was caused by hurried and imprudent loading will be accepted by the Federal Supreme Court on certiorari to a circuit court of appeals unless clearly erroneous. *The Germanic (Oceanic Steam Nav. Co. v. Aitken)* 196 U. S. 589, 49 L. ed. 610, 25 Sup. Ct. Rep. 317.

A Canadian statute, used in the trial court by consent of counsel, and shown by affidavit to have been treated as part of the record, though not formally certified as such, but certified by the clerk to be a true copy of the act as published, in response to a writ of certiorari reciting that the statute had been introduced in evidence, and

372, 380, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758.

It would seem that certiorari could be issued, under U. S. Rev. Stat. § 716, U. S. Comp. Stat. 1901, p. 580, as an independent process, to correct excesses of jurisdiction, where the circumstances imperatively demanded such interposition (thus again presenting a strong analogy to *habeas corpus*).

Whitney v. Dick, 202 U. S. 132, 135, 50 L. ed. 963, 964, 26 Sup. Ct. Rep. 584; *Re Chetwood*, 165 U. S. 443, 41 L. ed. 782, 17 Sup. Ct. Rep. 385; *Harris v. Barber*, 129 U. S. 366, 371, 372, 32 L. ed. 697, 700, 9 Sup. Ct. Rep. 314.

When, therefore, Congress, by § 6 of the act of 1891, provided for the use of certiorari as an instrument for the mere correction of error, to have, when once issued, exactly the same effect as an appeal or writ of error, it established an entirely new use of the writ; and the appellate jurisdiction for the correction of error in criminal cases given to this court by that section was an entirely new jurisdiction.

Ex parte Gordon and American Constr. Co. v. Jacksonville, T. & K. W. R. Co. supra.

At least two of the cases cited and relied on by this court in the *Sanges Case* were cases in which the defendant, having been convicted in the trial court, had secured in an appellate court an order setting aside the judgment against him, and directing a new trial, and in which the government sought, as in the present case, to obtain review in a still higher court of the decision of the first appellate court.

People v. Royal, 2 Ill. 557; *People v. Carnal*, 6 N. Y. 463.

It cannot have been an essential ground of the decision in the *Sanges Case* that the jurisdiction of this court was there sought to be invoked by the government as of right,

requiring the clerk to transmit a certified copy thereof to the circuit court of appeals, may be considered on a review of the decision by the Supreme Court of the United States on writ of certiorari. *The New York*, 175 U. S. 187, 44 L. ed. 126, 20 Sup. Ct. Rep. 67.

Judgment.

The exemption of express companies by the amendatory act of March 2, 1901, from the requirement of the war revenue act of June 13, 1898, in relation to adhesive stamps to be placed upon bill of lading, manifests, or other evidences of the receipt of goods for carriage or transportation, requires the affirmance on certiorari, without reference to the merits of the case as affected by the earlier act, of a judgment of the circuit court of appeals effecting the dismissal of a suit to prevent the applica-

since the government had, since 1789, had the right to invoke the jurisdiction of this court in criminal cases, before decision in the court below, whenever there was a difference of opinion between the judges of the circuit court.

United States v. Holmes, 5 Wheat. 412, 415, 5 L. ed. 122, 123; *United States v. Wilson*, 7 Pet. 150, 154, 8 L. ed. 640, 641; *United States v. Brewster*, 7 Pet. 164, 165, 8 L. ed. 645; *United States v. Bailey*, 9 Pet. 238, 9 L. ed. 113; *United States v. Bailey*, 9 Pet. 267, 271, 9 L. ed. 124, 125; *United States v. Britton*, 107 U. S. 655, 660, 27 L. ed. 520, 2 Sup. Ct. Rep. 512; *United States v. Hess*, 124 U. S. 483, 31 L. ed. 516, 8 Sup. Ct. Rep. 571.

Mr. Chief Justice Fuller delivered the opinion of the court:

Dickinson and one Foster were jointly indicted under § 5209 of the Revised Statute of the United States (U. S. Comp. Stat. 1901, p. 3497), which is a part of the national bank act. Foster, the principal defendant, was cashier of the South Danvers National Bank, and was charged with wilfully misapplying the funds of the bank, and Dickinson was charged with aiding and abetting. Both having been convicted, Dickinson sued out a writ of error from the circuit court of appeals for the first circuit, and after argument that court held his conviction invalid by reason of the fact that the verdict against him was found by a jury of only ten men. 86 C. C. A. 625, 159 Fed. 801. On a writ of certiorari issued on petition of the United States, the case was brought to this court.

It appeared in the course of the trial that one of the jurors, by reason of illness, was unable to sit further, whereupon the

tion by an express company of any of its moneys to meet this requirement. *Dinsmore v. Southern Exp. Co.* 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45.

The Supreme Court of the United States will, by its direction to the circuit court, finally dispose of a cause brought before it on writ of certiorari to a circuit court of appeals, where the record presented the whole case to that court, so that it might properly have been finally disposed of by its decree, although it did nothing more than to reverse the decree of the circuit court, granting a preliminary injunction. *Harriman v. Northern Securities Co.* 197 U. S. 244, 49 L. ed. 739, 25 Sup. Ct. Rep. 493. See also supra, *American Sugar Ref. Co. v. New Orleans*.

On the general subject of the exceptions to the rule that certiorari will not lie where there is an appeal—see note to *State ex rel. Hamilton v. Guinotte*, 50 L.R.A. 787.

following agreement, signed by the parties, was filed of record:

"Whereas, one of the jurors impaneled to try the above-entitled indictment is unable, by reason of illness, to further sit therein,

"Now, therefore, we consent and agree that the said juror, to wit, Charles F. Low, may be discharged from the further trial of this indictment, and that the trial now pending may proceed before the remaining eleven jurors with the same force and effect as if said juror had not been discharged."

The court then proceeded with the trial with the remaining eleven jurors. Subsequently, the trial being still unfinished, death occurred in the family of one of them, and another like agreement was filed of record as to him.

The trial proceeded with the remaining ten jurors, who returned a verdict of guilty, and thereupon a motion in arrest of judgment was filed as follows:

"And now, after verdict against the said John W. Dickinson, and before sentence, comes the said John W. Dickinson, by his attorneys, and moves the court here to arrest judgment herein and not pronounce the same, because of manifest errors in the record appearing, to wit: Because the said verdict against the said John W. Dickinson was found by a so-called jury consisting of ten (10) jurors only, and not by a jury of 97]twelve (12) *jurors, as required by the Constitution and laws of the United States, and because no judgment against him, the said John W. Dickinson, can be lawfully rendered on said verdict."

This motion was overruled, and a bill of exceptions to the ruling was duly allowed on the same day, and defendant was sentenced by the court to nine years' imprisonment in the jail at Dedham.

The judgment of the circuit court of appeals was—

"The judgment of the district court and the verdict therein are set aside; and the case is remanded to that court for further proceedings in accordance with law."

Application was then made to this court for a writ of certiorari, which, because of the urgency of the government as to the importance of the particular decision, was granted, notwithstanding the judgment of the court of appeals was not final.

Nevertheless, we are met at the threshold by the objection that the writ of certiorari cannot be granted under the act of 1891 in a criminal case, whatever the supposed importance of the question involved.

In our opinion it is clear that the question of jurisdiction must be decided by the proper construction of the act of March 3, 1891. That act (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488) was 53 L. ed.

framed for the purpose of relieving the Supreme Court from the excessive burden imposed upon it by its increasingly crowded docket, and assigned to the circuit courts of appeals thereby established a considerable part of the appellate jurisdiction formerly exercised by the Supreme Court. *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758.

Section 6 reads as follows:

"The circuit courts of appeals . . . shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding action of this act, . . . and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the *jurisdiction is dependent[98 entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases, excepting that, in every such subject within its appellate jurisdiction, the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision.

"And, thereupon, the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

"And excepting also that, in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

At the time when this act was passed the only existing method by which a decision of the Supreme Court could be obtained on a question of law arising in a criminal case not capital was upon certificate of difference of opinion by the judges of the circuit court, under §§ 651 and 697 of the Revised Statutes. In capital cases, by the act of Febru-

ary 6, 1889 (25 Stat. at L. 656, chap. 113, § 6, U. S. Comp. Stat. 1901, p. 569), the defendant was given the right to obtain a review in this court by writ of error. The act of 1891 superseded the existing statutory provisions as to a certificate of difference of opinion. *United States v. Rider*, 163 U. S. 132, 41 L. ed. 101, 16 Sup. Ct. Rep. 983; *The Habana*, 175 U. S. 677, 44 L. ed. 320, 20 Sup. Ct. Rep. 290.

By clause 5, appeals or writs of error 99] from the district and *circuit courts direct to the Supreme Court might be taken in cases involving the construction or application of the Constitution of the United States, or where the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority was drawn in question, and in cases in which the constitution or law of a state was claimed to be in contravention of the Constitution of the United States.

The clauses as to appeals or writs of error where constitutional questions were involved made no distinction in their language between civil and criminal cases, and no distinction as to the party who was aggrieved by the decision in the court below; but in *United States v. Sanges*, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609 (decided April 4, 1892), it was held, on great consideration, that the right of review given by that provision of § 5, so far as it related to criminal cases, must be limited to review at the instance of the defendant after a decision in favor of the government. The decision was reached after a thorough examination of the Federal legislation as to appellate jurisdiction in criminal cases and of the authorities in England and in the United States relating to criminal appeals, in which the court finds no precedent without express statutory enactment for any review of any judgment in favor of the accused. And the case proceeded upon the grounds thus summed up in the concluding paragraph of the opinion:

"In none of the provisions of this act, defining the appellate jurisdiction either of this court or of the circuit court of appeals is there any indication of an intention to confer upon the United States the right to bring up a criminal case of any grade after judgment below in favor of the defendant. It is impossible to presume an intention on the part of Congress to make so serious and far-reaching an innovation in the criminal jurisprudence of the United States."

As we have before observed, the certiorari in this case is the certiorari provided for by the act of 1891, being in the nature of an appeal or writ of error for the mere correction of error,—a new use of the writ.

100] *Section 14 of the judiciary act of 718

1789 gave to the Supreme Court and the circuit and district courts "power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the principles and usages of law" [1 Stat. at L. 81, chap. 20, U. S. Comp. Stat. 1901, p. 580]; but that was not a grant to this court of appellate jurisdiction to review by certiorari, for the mere correction of error, any or all decisions of the lower Federal courts not otherwise reviewable.

In *United States v. More*, 3 Cranch, 159, 172, 2 L. ed. 397, 401, Mr. Chief Justice Marshall said:

"In support of the jurisdiction of the court, the attorney general has adverted to the words of the Constitution, from which he seemed to argue that, as criminal jurisdiction was exercised by the courts of the United States under the description of 'all cases in law and equity arising under the laws of the United States,' and as the appellate jurisdiction of this court was extended to all enumerated cases other than those which might be brought on originally, 'with such exceptions, and under such regulations, as the Congress shall make,' that the Supreme Court possessed appellate jurisdiction in criminal as well as civil cases, over the judgments of every court whose decisions it would review, unless there should be some exception or regulation made by Congress which should circumscribe the jurisdiction conferred by the Constitution.

"This argument would be unanswerable if the Supreme Court had been created by law, without describing its jurisdiction. The Constitution would then have been the only standard by which its powers could be tested, since there would be clearly no Congressional regulation or exception on the subject.

"But, as the jurisdiction of the court has been described, it has been regulated by Congress, and an affirmative description of its powers must be understood as a regulation, under the Constitution, prohibiting the exercise of other powers than those described."

Ex parte *Yarbrough*, 110 U. S. 651, 653, 28 L. ed. 274, 4 Sup. Ct. Rep. 152; **Cross* [101 v. *United States*, 145 U. S. 571, 574, 36 L. ed. 821, 822, 12 Sup. Ct. Rep. 842. In the latter case we said:

"We have, of course, no general authority to review, on error or appeal, the judgments of the circuit courts of the United States in cases within their criminal jurisdiction, or those of the supreme court of the District of Columbia or of the territories; and when such jurisdiction is intended to be

conferred, it should be done in clear and explicit language."

The decisions to that effect are very numerous, and it is quite inadmissible to hold that criminal cases cannot be reviewed here by writ of error or appeal without express statutory authority, but may be by certiorari under Revised Statutes, § 716 (U. S. Comp. Stat. 1901, p. 580), for the correction of any error that may have been committed by the lower courts; and our decisions are to the contrary.

In *Ex parte Gordon*, 1 Black, 503, 17 L. ed. 134, it was ruled that neither a writ of error, a writ of prohibition, nor certiorari, would lie from the Supreme Court to a circuit court of the United States in a criminal case, and that the only case in which the court was authorized even to express an opinion on the proceedings in a circuit court in a criminal case was where the judges of the circuit court were opposed in opinion upon a question arising at the trial, and certified it to this court for its decision.

It is true that in *Re Chetwood*, 165 U. S. 443, 462, 41 L. ed. 782, 788, 17 Sup. Ct. Rep. 385, we allowed the writ to bring up for review certain final orders of the circuit court, which interfered with causes pending in this court; and the question of the issue of the writ by this court in the exercise of an inherent general power under the Constitution did not arise. *Re Tampa Suburban R. Co.* 168 U. S. 583, 42 L. ed. 589, 18 Sup. Ct. Rep. 177.

And in *Whitney v. Dick*, 202 U. S. 132, 50 L. ed. 963, 26 Sup. Ct. Rep. 584, it was said that the power of the court to issue original and independent writs of certiorari might be upheld under the authority given by § 716, citing *Ex parte Vallandigham*, 1 Wall. 243, 17 L. ed. 589, and cases; *Ewing v. St. Louis*, 5 Wall. 413, 18 L. ed. 657; *Ex parte Lange*, 18 Wall. 163, 21 L. ed. 872; and quoting from the opinion of Mr. Justice Gray in *American Constr. Co. v. Jacksonville, T. & K. W. R. Co.* 148 U. S. 372, 37 L. ed. 486, 13 Sup. Ct. Rep. 758, 102] where an *application was made for mandamus and certiorari, as follows:

"Under this provision, the court might doubtless issue writs of certiorari in proper cases. But the writ of certiorari has not been issued as freely by this court as by the court of Queen's bench in England. *Ex parte Vallandigham*, 1 Wall. 243, 249, 17 L. ed. 589, 592. It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court. *Fowler v. Lindsey*, 3 Dall. 411, 413, 1 L. ed. 658, 659; *Patterson v. United States*, 2 53 L. ed.

Wheat. 221, 225, 226, 4 L. ed. 224-226; *Ex parte Hitz*, 111 U. S. 766, 28 L. ed. 592, 4 Sup. Ct. Rep. 698. It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court. *Barton v. Petit*, 7 Cranch, 288, 3 L. ed. 347; *Ex parte Gordon*, supra; *United States v. Adams* (*United States v. Child*), 9 Wall. 661, 19 L. ed. 808; *United States v. Young*, 94 U. S. 258, 24 L. ed. 153; *Luxton v. North River Bridge Co.* 147 U. S. 337, 341, 37 L. ed. 194, 195, 13 Sup. Ct. Rep. 356."

But the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one, and the rule remains that appeal and writ of error, being the proper forms of procedure provided for the mere correction of error, the appellate jurisdiction of this court for that purpose is limited to the cases in which express provision is made for appeals or writs of error, and that certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error.

The construction of the act of 1891 must be arrived at without reference to such recent legislation as the act of Congress of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), providing for writs of error in certain instances in criminal cases, in respect of which this court held in *United States v. Keitel*, 211 U. S. 398, ante, 244, 29 Sup. Ct. Rep. 123, "that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor *of[103 the United States is limited by the very terms of the statute to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

So far as that statute is an innovation in criminal jurisdiction in certain classes of prosecutions, it cannot be extended beyond its terms.

Writ of certiorari dismissed.

Mr. Justice Moody took no part in the consideration and disposition of this case.

WILLIAM HEPNER

v.

UNITED STATES.

(See S. C. Reporter's ed. 103-115.)

Debt — to recover penalty — alien contract labor.

1. The penalty incurred under the act of March 3, 1903 (32 Stat. at L. 1213, 1214, chap. 1012), §§ 4, 5, for inducing an alien to migrate to the United States for the purpose of performing labor there, may be recovered by a civil action of debt brought by the United States.

[For other cases, see Debt, 13-17, in Digest Sup. Ct. 1908.]

Trial — directed verdict — action for penalty.

2. The trial court may direct a verdict in favor of the government plaintiff in an action of debt to recover the penalty incurred under the act of March 3, 1903, §§ 4, 5, for inducing an alien to migrate to the United States for the purpose of performing labor there, where it appears, by undisputed testimony, that the defendant has committed the offense out of which the cause of action arises.

[For other cases, see Trial, VI. d, 3, in Digest Sup. Ct. 1908.]

[No. 626.]

Argued and submitted March 2, 1909. Decided April 5, 1909.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting the question whether the trial court may direct a verdict in favor of the government, plaintiff in an action to recover the penalty incurred for inducing a violation of the alien contract labor law. Answered in the affirmative.

The facts are stated in the opinion.

Mr. S. P. McConnell submitted the cause for Hepner.

Assistant to the Attorney General Ellis argued the cause, and, with Mr. Edwin P. Grosvenor, filed a brief for the United States:

An action to recover a penalty is a civil suit, in the course of which the rules of procedure followed in civil actions generally apply.

United States v. Zucker, 161 U. S. 475, 40 L. ed. 777, 16 Sup. Ct. Rep. 641; Four Packages v. United States (Seitz v. United States) 97 U. S. 404, 24 L. ed. 1031; Lees

v. United States, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163; Stockwell v. United States, 13 Wall. 531, 20 L. ed. 491; Atcheson v. Everitt, Cowp. pt. 1, p. 382; Mitchell v. State, 12 Neb. 538, 11 N. W. 848; People v. Briggs, 114 N. Y. 56, 20 N. E. 820; Roberage v. Burnham, 124 Mass. 277; Hitchcock v. Munger, 15 N. H. 97; Webster v. People, 14 Ill. 365; Hawlowetz v. Kass, 23 Blatchf. 395, 25 Fed. 765; United States v. Mundell, 1 Hughes, 415, Fed. Cas. No. 15,834; United States v. Baltimore & O. S. W. R. Co. 86 C. C. A. 223, 159 Fed. 33; Stearns v. United States, 2 Paine, 300, Fed. Cas. No. 13,341; Wilson v. Rastall, 4 T. R. 753; Calcraft v. Gibbs, 5 T. R. 19; United States v. Halberstadt, Gilpin. 268, Fed. Cas. No. 15,276; State v. Brown. 16 Conn. 59; United States v. Younger, 92 Fed. 672; Jacob v. United States, 1 Brock. 520, Fed. Cas. No. 7,157.

The reports, state and Federal, contain a number of penalty actions in which the trial court directed a verdict against the defendant. In all these cases the right to direct a verdict for the plaintiff, in an action to recover penalties for the violation of a statute, was assumed by court and counsel. In some of these cases the propriety of such a direction, under the evidence, was challenged. In none was the right denied.

People v. Girard, 73 Hun, 457, 26 N. Y. Supp. 272; affirmed in 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; Fielding v. La Grange, 104 Iowa, 530, 73 N. W. 1038; United States v. Thompson, 41 Fed. 28; Moller v. United States, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 490; Hines v. Darling, 99 Mich. 47, 57 N. W. 1081; Four Packages v. United States (Seitz v. United States) 97 U. S. 404, 24 L. ed. 1031.

The term "criminal prosecution" implies a proceeding commenced by indictment or information against a person accused, who, in answer to the charge, pleads "guilty" or "not guilty."

Counselman v. Hitchcock, 142 U. S. 547, 563, 35 L. ed. 1110, 1114, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; Post v. United States, 161 U. S. 583, 587, 40 L. ed. 816, 817, 16 Sup. Ct. Rep. 611; Atty. Gen. v. Radloff, 10 Exch. 96, 26 Eng. L. & Eq. 416.

Mr. Justice Harlan delivered the opinion of the court:

This action of debt was brought by the United States to recover a penalty under the statute of Congress of March 3d, 1903, regulating the immigration of aliens into this country. 32 Stat. at L. 1213, 1214, chap. 1012. The case is now before this court upon a question certified by the judges of

NOTE.—On the importation of contract labor—see note to United States v. Parsons, 66 C. C. A. 133.

As to when a verdict may be directed by the court—see note to Grand Chute v. Winegar, 21 L. ed. U. S. 74.

the circuit court of appeals under the authority of § 6 of the judiciary act of March 3d, 1891. 26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488.

Sections 4 and 5 of the act of 1903 are as follows:

"§ 4. That it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any alien into the United States, in pursuance of any offer, solicitation, promise, or agreement, parol or special, expressed or implied, made previous to the importation of such alien to perform labor or service of any kind, skilled or unskilled, in the United States.

"§ 5. That for every violation of any of the provisions of section four of this act the person, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any alien to the United States to perform labor or service of any kind by reason of any offer, solicitation, promise, or agreement, express or implied, parol or special, to or with such alien, shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his 105]action therefor *in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

In the present action there was a judgment for the United States against the defendant, Hepner, for the prescribed penalty of \$1,000. It is certified by the judges of the circuit court of appeals, to which the case was taken upon writ of error, that the testimony showed that an alien was induced by an offer, solicitation, or promise of the defendant, to migrate to the United States for the purpose of performing labor here.

The question propounded to this court by the judges of the circuit court of appeals is: "When it appears by undisputed testimony that a defendant has committed an offense against §§ 4 and 5 of the act of March 3, 1903, may the trial judge direct a verdict in favor of the government, plaintiff, which has sued for the \$1,000 forfeited by such offense under said § 5?"

Is this to be deemed as, in all substantial respects, a civil suit, as distinguished from 53 L. ed.

a strictly criminal case or criminal prosecution? This must be first determined before answering the specific question propounded by the judges below. It is well to look at some of the adjudications in suits for statutory penalties.

In *Stockwell v. United States*, 13 Wall. 531, 542, 543, 20 L. ed. 491, 493, which was an action of debt, brought by the United States to recover forfeitures and penalties incurred under the act of Congress of March 3d, 1823 (3 Stat. at L. 781, chap. 58, U. S. Comp. Stat. 1901, p. 3099), relating to the entry of merchandise imported into the United States from any adjacent territory, the question arose whether a civil action could be maintained by the government. That act provided, among other things, [106 that anyone receiving, concealing, or buying goods, wares, or merchandise, knowing them to have been illegally imported and liable to seizure, "shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise so received, concealed, or purchased." The defendant in that case insisted that the government could not proceed by a civil suit to recover the penalty specified in the statute—based, as that penalty was, on an offense against law—except by indictment or information. The court rejected that view, and, speaking by Mr. Justice Strong, said: "No authority has been adduced in support of this position, and it is believed that none exists. It cannot be that whether an action of debt is maintainable or not depends upon the question who is the plaintiff. Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty,—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained. The act of 1823 fixes the amount of the liability at double the value of the goods received, concealed, or purchased, and the only party injured by the illegal acts which subject the perpetrators to the liability is the United States. It would seem, therefore, that whether the liability incurred is to be regarded as a penalty, or as liquidated damages for an injury done to the United States, it is a debt, and, as such, it must be recoverable in a civil action. But all doubts respecting the matter are set at rest by the 4th section of the act, which enacted that all penalties and forfeitures incurred by force thereof shall be sued for, recovered, distributed, and accounted for in the manner prescribed by the act of March 2d, 1799, entitled, 'An Act to Regulate the Collection of

Duties on Imports and Tonnage.' By referring to the 89th section of that act [1 Stat. at L. 627, 695, chap. 22], it will be seen that it directs all penalties accruing by any breach of the act to be sued for and recovered, with costs of suit, in the name of **107]**the United States *of America, in any court competent to try the same; and the collector within whose district a forfeiture shall have been incurred is enjoined to cause *suits* for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no *action* or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred, accordingly, it has frequently been ruled that debt will lie, at the suit of the United States, to recover the penalties and forfeitures imposed by statutes. It is true that the statute of 1823 imposes the forfeiture and liability to pay double the value of the goods received, concealed, or purchased, with knowledge that they had been illegally imported, 'on conviction thereof.' It may be, therefore, that an indictment or information might be sustained. But the question now is whether a civil action can be brought; and, in view of the provision that all penalties and forfeitures incurred by force of the act shall 'be sued for and recovered,' as prescribed by the act of 1799, we are of opinion that debt is maintainable. The expression, 'sued for and recovered,' is primarily applicable to civil actions, and not to those of a criminal nature."

In *Jacobs v. United States*, 1 Brock, 520, 525, Fed. Cas. No. 7,157, the question arose whether the United States could maintain an action of debt to recover the specific sum which an act of Congress (1 Stat. at L. 76, chap. 20) providing for additional revenue declared should be forfeited and paid by any person guilty of the offense of forcibly rescuing or causing to be arrested, any spirits, etc., after the same had been seized by the collector. Chief Justice Marshall held that an action of that kind was a "civil cause" within the meaning of the 9th section of the judiciary act of 1789, defining the jurisdiction of the district courts of the United States. In *Stearns v. United States*, 2 Paine, 300, Fed. Cas. No. 13,341, Mr. Justice Thompson, in the circuit court of the United States for the district of Vermont, **108]**held that actions *for penalties were civil actions, both in form and in substance,—citing 3 Bl. Com. 158, and *Atcheson v. Everitt*, 1 Cowp. 382, 391. In the latter case, which was an action of debt, based upon an English statute, Lord Mansfield said that a

penal action "is as much a civil action as an action for money had and received." A similar ruling was made by Mr. Justice Iredell in *United States v. Mundell*, 1 Hughes, 415, 423, 6 Call (Va.) 245, 253, Fed. Cas. No. 15,834, which was an action of debt by the United States to recover a penalty prescribed by an act of Congress. The court said: "It is scarcely necessary to stop here to observe that the proceeding in question was not a proceeding in a criminal case within the meaning of the provisions of Congress, but was in truth a civil suit, though for an act of disobedience for which a criminal prosecution might possibly have been commenced if the act of Congress does not expressly or impliedly exclude it,—a point not now material to consider, because the civil suit has, in this instance, been in fact adopted. A criminal proceeding, unquestionably, can only be by indictment or information. The proceeding in question was neither." Similar views as to the civil nature of actions for penalties were expressed in *United States v. Younger*, 92 Fed. 672; *United States v. Baltimore & O. S. W. R. Co.* 86 C. C. A. 223, 159 Fed. 33, 38; *Hawlowetz v. Kass*, 23 Blatchf. 395, 25 Fed. 765. See also *Chaffee v. United States*, 18 Wall. 516, 538, 21 L. ed. 908, 911; *Wilson v. Rastall*, 4 T. R. 753; *Roberge v. Burnham*, 124 Mass. 277, 279; *People v. Briggs*, 114 N. Y. 56, 64, 65, 20 N. E. 820; *Mitchell v. State*, 12 Neb. 538, 540, 11 N. W. 848; *Webster v. People*, 14 Ill. 365, 367; *Hitchcock v. Munger*, 15 N. H. 97, 103, 104; *State v. Brown*, 16 Conn. 54, 59.

It must be taken as settled law that a certain sum, or a sum which can readily be reduced to a certainty, prescribed in a statute as a penalty for the violation of law, may be recovered by civil action, even if it may also be recovered in a proceeding which is technically criminal. Of course, if the statute by which the penalty was imposed contemplated recovery only by a criminal proceeding, a civil remedy could not be adopted. *United States v. Claffin*, 97 U. S. 546, 24 L. ed. 1082. But there can be no *doubt that the words of the statute on **109** which the present suit is based are broad enough to embrace, and were intended to embrace, a civil action to recover the prescribed penalty. It provides that the penalty of \$1,000 may be "sued for" and recovered by the United States or by any "person" who shall first bring his "action" therefor "in his own name and for his own benefit," "as debts of like amount are now recovered in the courts of the United States;" and "separate suits" may be brought for each alien thus promised labor or service of any kind. The district attorney is required to prosecute every such

"suit" when brought by the United States. These references in the statute to the proceeding for recovering the penalty plainly indicate that a civil action is an appropriate mode of proceeding.

A case to which attention is called by both sides is *United States v. Zucker*, 161 U. S. 475, 481, 40 L. ed. 777, 779, 16 Sup. Ct. Rep. 641, 643. What was that case? It makes, we think, for the government rather than the defendant; for that was a *civil* action to recover from the defendants a certain sum as the value of merchandise originally belonging to them and alleged to have been forfeited to the United States under the customs administrative act of June 10th, 1890, chap. 407. 26 Stat. at L. 131, 135, U. S. Comp. Stat. 1901, pp. 1886, 1895. That act provided in reference to merchandise entered by means of fraudulent or false invoices, etc., that "such merchandise, or the value thereof, to be recovered from the person making the entry, shall be forfeited, . . . and such person shall, upon conviction, be fined for each offense a sum not exceeding five thousand dollars, or be imprisoned for a time not exceeding two years, or both, in the discretion of the court." § 9. At the trial, the government offered in evidence, against the defendants, a deposition taken in Paris, properly authenticated. It was not objected, in that case, that a civil action could not be brought by the government to recover the penalty prescribed. The question considered was whether a deposition of an absent witness could be used against the objection of the defendants, who insisted that the action, although civil in form, was, in substance, a criminal case, 110] and that they*were, for that reason, entitled, under the 6th Amendment of the Constitution, to be confronted, in court, with the witnesses against them. The objection was sustained by the trial court, but this court, upon writ of error sued out by the United States, held that that Amendment related to a prosecution of an accused that was technically criminal in its nature. The court said: "The words in the 6th Amendment, 'to be informed of the nature and cause of the accusation,' obviously refer to a person accused of crime, whether a felony or misdemeanor, for which he is prosecuted by indictment or presentment, or in some other authorized mode which may involve his personal security. So the clause declaring that the accused, in a criminal prosecution, is entitled 'to be confronted with the witnesses against him,' has no reference to any proceeding (although the evidence therein may disclose, of necessity, the commission of a public offense) which is not directly against a person who is accused, and upon whom a fine or imprisonment, or

both, may be imposed. A witness who proves facts entitling the plaintiff in a proceeding in a court of the United States, even if the plaintiff be the government, to a judgment for money only, and not to a judgment which directly involves the personal safety of the defendant, is not, within the meaning of the 6th Amendment, a witness against an 'accused' in a criminal prosecution; and his evidence may be brought before the jury in the form of a deposition, taken as prescribed by the statutes regulating the mode in which depositions to be used in the courts of the United States may be taken. The defendant, in such a case, is no more entitled to be confronted at the trial with the witnesses of the plaintiff than he would be in a case where the evidence related to a claim for money that could be established without disclosing any facts tending to show the commission of crime." Again: "An action in which a judgment for money only is sought, even if in some aspects it is one of a penal nature, may be brought wherever the defendant is found and is served with process, unless some statute requires it to be brought in a particular jurisdiction."

*Two things, then, appear from the [111 *Zucker Case*: 1. That it recognize an action to recover a penalty to be a civil action, and a proper mode of procedure. 2. That in such an action the defendant was not entitled, by virtue of the Constitution, to be confronted in court with the witnesses against him. No such question as the last one arises in this case. But the decision in the *Zucker Case* is important in that it recognizes the right of the government, by a civil action of debt, to recover a statutory penalty, although such penalty arises from the commission of a public offense. It is important also in that it decides that an action of that kind is not of such a criminal nature as to preclude the government from establishing, according to the practice in strictly civil cases, its right to a judgment by depositions taken in the usual form, without confronting the defendant with the witnesses against him.

The defendant insists that the case of *Lees v. United States*, 150 U. S. 476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163, is an authority in his favor. This view cannot be sustained. That case was a civil action to recover a penalty for importing an alien into the United States to perform labor, in violation of the act of February 26th, 1885. 23 Stat. at L. 332, chap. 164, U. S. Comp. Stat. 1901, p. 1290. In that case the trial court compelled one of the defendants to testify for the United States and furnish evidence against himself. This court held

that that could not be done; saying that "this, though an action civil in form, is unquestionably criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself,"—meaning thereby only that the action was of such a criminal nature as to prevent the use of depositions. Among the authorities cited in the *Lees Case* was *Boyd v. United States*, 116 U. S. 616, 634, 39 L. ed. 746, 752, 6 Sup. Ct. Rep. 524. In the latter case it was adjudged that penalties and forfeitures incurred by the commission of offenses against the law are of such a quasi-criminal nature that they come within the reason of criminal proceedings for the purposes of the 4th Amendment of the Constitution and of that part of the 5th Amendment declaring that no person shall be compelled in any criminal case to be a witness against himself.

112] *So that the *Lees* and *Boyd* Cases do not modify or disturb but recognize the general rule that penalties may be recovered by civil actions, although such actions may be so far criminal in their nature that the defendant cannot be compelled to testify against himself in such actions in respect to any matters involving, or that may involve, his being guilty of a criminal offense. Those cases do not negative the proposition that the court may direct a verdict for the plaintiff in a civil action to recover statutory penalties of forfeitures, if the evidence is "undisputed" that the defendant, by his acts, incurred the penalty for the offense out of which the civil cause of action arises. That proposition has the support both of reason and authority. Certainly, if the evidence in this case, beyond all dispute, showed that the *plaintiff* was *not* entitled to judgment, then the duty of the court would have been to direct a verdict for the defendant. The general rule on that point is thus stated in *Pleasants v. Fant*, 22 Wall. 116, 122, 22 L. ed. 780, 783: "In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether, on all the evidence, the preponderating weight is in his favor, that is the business of the jury; but, conceding to all the evidence offered the greatest probative force which, according to the law of evidence, it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that, if the jury should

find a verdict in favor of plaintiff, that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury." This rule has been often approved by this court, and is steadily *enforced [113 in the courts of the United States. The same rule must obtain as to the duty of the court when the undisputed testimony shows that the defense is without any foundation upon which to rest, and that the plaintiff is indisputably entitled, upon the facts and as matter of law, to a judgment. In *Herbert v. Butler*, 97 U. S. 319, 320, 24 L. ed. 958, this court, referring to *Schuylkill & D. Improv. & R. Co. v. Munson*, 14 Wall. 442, 20 L. ed. 867, and *Pleasants v. Fant*, above cited, and speaking by Mr. Justice Bradley, said, "that although there may be some evidence in favor of a party, yet, if it is insufficient to sustain a verdict, so that one based thereon would be set aside, the court is not bound to submit the case to the jury, but may direct them what verdict to render." In *Bowditch v. Boston*, 101 U. S. 16, 18, 25 L. ed. 980, 981, the court said: "It is now a settled rule in the courts of the United States that whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that, if such a verdict were rendered, the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court. Such is the constant practice, and it is a convenient one. It saves time and expense. It gives scientific certainty to the law in its application to the facts, and promotes the ends of justice." In *Anderson County v. Beal*, 113 U. S. 227, 241, 28 L. ed. 966, 971, 5 Sup. Ct. Rep. 433, the court, referring to *Herbert v. Butler*, above cited, and other cases, said: "It is true that, in the above cases, the verdict was directed for the defendant. But where the question, after all the evidence is in, is one entirely of law, a verdict may, at the trial, be directed for the plaintiff; and where the bill of exceptions, as here, sets forth all the evidence in the case, this court, if concurring with the court below in its views on the questions of law presented by the bill of exceptions and the record, will affirm the judgment."

True, the cases just cited were purely civil in their nature, and there is in the present case no bill of exceptions, disclosing the evidence adduced at the trial, but we have something here more specific,—a certi-

fied question which, in effect, requires the **114]***court to assume, as the basis of any answer to the question, that according to the undisputed testimony, the government proved the alleged violation of law. In such a case there are no facts for the jury to consider. Whether, under the undisputed testimony, the plaintiff was entitled to judgment, was manifestly only a question of law, in respect of which it was the duty of the jury to follow the direction of the court. Even in technical criminal cases it is the duty of the jury to accept the law as declared by the court. *Sparf v. United States*, 156 U. S. 51, 101, 39 L. ed. 343, 361, 15 Sup. Ct. Rep. 273, and cases there cited. If, in a civil action to recover a penalty, the defendant is entitled, the evidence being undisputed, to have a peremptory instruction in his behalf, it is difficult to perceive why the government is not entitled to a peremptory instruction in its favor, where the undisputed testimony left no facts for the jury to consider, but established, beyond all question and as matter of law, its right to judgment for the prescribed penalty. In *Four Packages v. United States* (*Seitz v. United States*) 97 U. S. 404, 412, 24 L. ed. 1031, 1032, which was a proceeding for the forfeiture of goods because of their having been taken from the steamer bringing them into the country, without a permit from the collector, the jury was directed to find a verdict for the government. 1 Stat. at L. 665, chap. 22; Gen. Reg. (1857) 145. That ruling being assigned for error, this court said: "Taken as a whole, the evidence fully proved that the packages were unladen and delivered without the permit required by the act of Congress; and inasmuch as there was no opposing testimony, the direction of the court to the jury to return a verdict for the plaintiffs was entirely correct,"—citing *Schuyllkill & D. Improv. & R. Co. v. Munson*, supra; *Ryder v. Wombwell*, L. R. 4 Exch. 39; *Giblin v. McMullen*, L. R. 2 P. C. 335. In *United States v. Thompson*, 41 Fed. 28, which was an action to recover a penalty of \$1,000 under the contract labor law, the court directed a verdict, saying: "There certainly is no question here for the jury, as there is no conflict of testimony. . . . I shall therefore direct a verdict for the government for the full amount,—\$1,000." See also *Hines v. Darling*, 99 Mich. 47, 57 N. W. 1081.

115] *The objection made in behalf of the defendant, that an affirmative answer to the question certified could be used so as to destroy the constitutional right of trial by jury, is without merit and need not be discussed. The defendant was, of course, entitled to have a jury summoned in this case, but that right was subject to the condition,

fundamental in the conduct of civil actions, that the court may withdraw a case from the jury and direct a verdict according to the law if the evidence is uncontradicted and raises only a question of law.

Restricting our decision to civil cases in which the testimony is undisputed, and without qualifying former decisions requiring the court to send a case to the jury, under proper instructions as to the law, where the evidence is conflicting on any essential point, we answer the question here certified in the affirmative. Let this answer be certified to the court below.

Mr. Justice Brewer dissents.

UNITED STATES, Plff. in Err.,
v.
WILLIAM R. MASON and Joseph Vanderweide.

(See S. C. Reporter's ed. 115-126.)

Appeal — by government in criminal case — scope of review.

1. The various grounds of demurrer to the indictment cannot be considered on a writ of error sued out by the government in a criminal case, under the act of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), to review a judgment "sustaining a special plea in bar when the defendant has not been put in jeopardy," but the court has jurisdiction to review only the ruling of the court below on the sufficiency of such plea.

[For other cases, see *Appeal and Error*, I. e, in *Digest Sup. Ct.* 1908.]

Criminal law — former jeopardy — conspiracy — effect of acquittal in state court.

2. An acquittal of murder after a regular trial in a state court having full jurisdiction in the premises is a bar to so much of an indictment for conspiring criminally in violation of U. S. Rev. Stat. §§ 5508, 5509, U. S. Comp. Stat. 1901, p. 3712, as seeks, by charging defendants with the commission of such murder, to enforce the provision of § 5509, that if, in carrying out such conspiracy, an offense against the state has been committed, the punishment provided for by the state for such offense shall be imposed.

[For other cases, see *Criminal Law*, II., in *Digest Sup. Ct.* 1908.]

[No. 642.]

NOTE.—On the right of a state to appeal in a criminal case—see note to *People ex rel. Hodson v. Minor*, 19 L.R.A. 342.

On former jeopardy—see notes to *Com. v. Fitzpatrick*, 1 L.R.A. 451; *Altenburg v. Com.* 4 L.R.A. 543; *Re Lange*, 21 L. ed. U. S. 872; *United States v. Perez*, 6 L. ed. U. S. 165; and *Silsby v. Foote*, 14 L. ed. U. S. 394.

Argued March 5, 1909. Decided April 5, 1909.

IN ERROR to the District Court of the United States for the District of Colorado to review a judgment sustaining special pleas of former acquittal in bar of parts of an indictment for conspiracy. Affirmed.

The facts are stated in the opinion.

Assistant Attorney General Fowler argued the cause and filed a brief for plaintiff in error.

Mr. John M. Waldron argued the cause, and, with Messrs. Reese McCloskey and N. W. Dixon, filed a brief for defendants in error.

Mr. Justice Harlan delivered the opinion of the court:

This is a criminal prosecution under §§ 5508 and 5509 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3712). The substantial provisions of each of those sections were reproduced from the act of May 31st, 1870, chap. 114, 16 Stat. at L. 140, passed for the purpose of enforcing the right of citizens to vote in the several states, and for other purposes.

Those sections are as follows: "§ 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and 119]imprisoned not *more than ten years, and shall, moreover, be thereafter ineligible to any office or place of honor, profit, or trust created by the Constitution or laws of the United States. § 5509. If, in the act of violating any provision in either of the two preceding sections, any other felony or misdemeanor be committed, the offender shall be punished for the same with such punishment as is attached to such felony or misdemeanor by the laws of the state in which the offense is committed." Section 5507 prescribes a different offense from that specified in § 5508, has no bearing on the present case, and need not therefore be given here.

The first count of the indictment—stating it generally—charged the defendants with an unlawful, malicious, and felonious conspiracy to injure, oppress, threaten, and intimidate certain named persons, citizens of

the United States, in the free exercise and enjoyment of a right and privilege secured to them and to each of them by the Constitution and laws of the United States, in this,—that the said conspirators injured, oppressed, threatened, and intimidated those citizens, in the free exercise and enjoyment of their right and privilege as special agents and employees of the Department of Justice, and as citizens and agents of the United States, to investigate, discover, inform of, and report to the proper officer all violations of the laws of the United States and the evidence relating thereto, in the matter of the fraudulent and unlawful entry of coal and other public lands of the United States in Colorado, theretofore subject to entry under the laws of the United States. It was further charged in the same count that, in pursuance of such unlawful and felonious conspiracy, *and to effect the object thereof*, the defendants, within the district of Colorado, did kill and murder one Joseph A. Walker.

The second count differs from the first only in the particular that it charges that the alleged conspiracy and murder was because of the persons against whom the conspiracy was formed *having freely exercised* the right and privilege specified in the first count.

*The third count charges substan-[120 tially the commission of the same offense of conspiracy and murder, because of the exercise by the citizens named of the right and privilege secured to them by the Constitution and laws of the United States to accept public employment from and to enter the service of the United States as officers, agents, and employees, and to be secure in their persons from bodily harm, injury, and cruelties while discharging the duties belonging to them as such officers, agents, and employees.

It was stipulated by the parties that the defendants might file a demurrer to the indictment and to each count thereof, as well as "a plea in bar in the nature of a plea of former acquittal" to so much of each count as charged them with the crime of having killed and murdered one Walker, named in the indictment,—the stipulation reciting, "said charge of murder being based upon § 5509 of the Revised Statutes, and that the filing of said demurrer shall be without prejudice, in any respect, to the said plea, and likewise the said plea shall be without prejudice, in any respect, to the said demurrer."

The court made an order of record recognizing and giving effect to the above stipulation. The defendants filed a joint and several demurrer, assailing the sufficiency of each count of the indictment. In view of the state of the record and of the conclusions

reached by the court, we need not set out at large the various grounds of that demurrer.

The defendants filed special pleas in bar of so much of each count of the indictment as charged that the defendants' *in the act of violating* § 5508, killed and murdered Walker for the purpose of giving effect to the alleged conspiracy. To each special plea the government filed a demurrer.

The special pleas charged in substance that theretofore, in a named court of Colorado, the defendants were charged with the commission of the same murder as that referred to in the indictment herein; that they were arrested and tried in that court (which had full jurisdiction to try the offense charged) and were duly and regularly **121**acquitted of the above charge *of murder, and discharged from custody. This acquittal was pleaded as a bar to so much of the indictment in the present conspiracy case in the Federal court as sought to enforce, notwithstanding the acquittal of the defendants in the state court, the provisions of § 5509 of the Revised Statutes.

The court below overruled the demurrer to the indictment, and adjudged each plea in bar to be sufficient. The government, electing to stand by its demurrer to the special pleas, the district court of the United States, by an order to that effect, discharged the defendants from that part of each count in the indictment which related to the charge of their having murdered Walker, in violation of the laws of the state, in the act of committing the alleged conspiracy in violation of the statute of the United States.

The United States thereupon prosecuted the present writ of error under the act of March 2d, 1907, chap. 2564, authorizing the United States to prosecute writs of error in criminal cases on certain points. That act is as follows: "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any court thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. *From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.* The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been ren-

dered, and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provid-**[122]**ed, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." 34 Stat. at L. 1246, U. S. Comp. Stat. Supp. 1907, p. 209.

Only that part of the above act of March 2d, 1907, is applicable to the present case which authorizes a writ of error by the United States "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy." In reviewing that decision, may we go beyond the ruling in the court below on the special pleas in bar, and consider the various grounds of demurrer to the indictment? That question is answered in the much-considered case of *United States v. Keitel*, decided at the present term, 211 U. S. 370, 398, ante, 230, 244, 29 Sup. Ct. Rep. 123, 132. It was there said: "That act, we think, plainly shows that, in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides, it contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case. We think this conclusion arises not only because the giving of the exceptional right to review in favor of the United States is limited, by the very terms of the statute, to authority to re-examine the particular decisions which the statute embraces, but also because of the whole context, which clearly indicates that the purpose was to confine the right given to a review of the decisions enumerated in the statute, leaving all other questions to be controlled by the general mode of procedure governing the same."

We can, then, consider, on the present writ of error, only the specific question whether the special pleas in bar were sufficient to exclude inquiry in the Federal court into the facts of the alleged murder of Walker, for the purpose of ascertaining the punishment to be inflicted by that court upon the defendants if it should be found in that court that they had conspired to *injure, oppress,**[123]** threaten, and intimidate the persons named in the indictment in the free exercise and enjoyment of their constitutional rights, in violation of the laws of the United States.

Previous to the filing of the special pleas, the defendants had been legally tried and acquitted in the state court of the charge of having violated the laws of the state in murdering Walker. When, therefore, this case was called for trial in the Federal court, and he government was about to inquire whether the defendants had, in the act of violating the provisions of § 5508, committed the crime of murdering Walker,—an offense against the state,—the district court of the United States was confronted with the fact that the defendants had been already acquitted of that charge after a regular trial in the state court.

The question thus presented is within a very narrow compass, and involves an inquiry as to the meaning and scope of § 5509. The conspiracy for which the defendants were indicted was an offense against the laws of the United States. It is none the less so, notwithstanding the requirement in that section as to the punishment to be inflicted upon its appearing that, in the act of committing the alleged Federal offense, the defendants committed some felony or misdemeanor against the laws of the state. The reference in that section to an offense committed against the state was not for the purpose of restricting or suspending the power of the state to determine whether its laws had been violated, and to punish the offender therefor. That reference was for the purpose only of measuring the punishment for the *conspiracy* charged by the United States, upon its being found, at the trial in the Federal court, that such conspiracy in violation of the Federal statute had been aggravated by the commission of an offense against the state; "an aggravation merely of the substantive offense of conspiracy," not a distinct, separate offense against the United States, to be punished by it without reference to the conspiracy charged in the indictment. *Rakes v. United States*, 212 U. S. 57, ante, 401, 29 Sup. Ct. Rep. 244; *Davis v. United States*, 46 C. C. A. 619, 107 Fed. 753. Where the commission of a Federal offense is accompanied by an offense committed against the laws of the state, *it is no doubt competent to so measure the punishment for the Federal offense as to make it equal to the punishment prescribed by the state for the crime committed against the state in the act of violating the Federal law. But is § 5509 so worded as to *require* the Federal court, *after* the defendants have been lawfully tried and acquitted as to the identical crime of murder mentioned in the indictment in that court, to enter upon a judicial investigation to ascertain whether the defendants committed the alleged crime against the state of the murder mentioned in that indictment?

We think not. The murder in question, if committed at all, was, as a distinct offense, a crime only against the state; and after the defendants were acquitted of that crime by the only tribunal that had jurisdiction it is to be taken that no such crime of murder as charged in the indictment was in fact committed by them. If this be not so, it follows that, notwithstanding the lawful acquittal of the defendants by the only tribunal that could lawfully try them for the alleged offense against the state, the United States may, in this case, in the district court dictation of it *as an offense against the state*, of the United States, punish them *for the conspiracy charged*, precisely as the state court could have punished them for murder if the defendants had been previously found guilty of that crime in the state court. We do not think that § 5509 is necessarily to be so construed. Nor do we think that Congress intended any such result to occur. Such a result should be avoided if it be possible to do so. We hold that it can be avoided without doing violence to the words of the statute. The language of that section is entirely satisfied and the ends of justice met if the statute is construed as *not* embracing, nor intended to embrace, any felony or misdemeanor against the state of which, *prior to the trial in the Federal court of the Federal offense charged*, the defendants had been lawfully acquitted of the alleged state offense by a state court having full jurisdiction in the premises. This interpretation recognizes the power of the state, by its own tribunals, to try offenses against its laws, and to acquit or punish the alleged offender, as the facts may justify.

*In this connection it has been suggested that the state might, under this interpretation, defeat the full operation of the act of Congress. Not at all. The interpretation we have given to § 5509 will not prevent the trial of the defendants upon the charge of conspiracy, and their punishment, if guilty, according to § 5508, namely, by a fine not exceeding \$5,000 and imprisonment not more than ten years. The only result of the views we have expressed is that, in the trial of this case in the Federal court, § 5509 cannot be applied, because it has been judicially ascertained and determined by a tribunal of competent jurisdiction—the only one that could finally determine the question—that the defendants did not murder Walker. The Federal court may proceed as indicated in § 5508, without reference to § 5509. The lawful acquittal of the defendants of the charge of murder makes § 5509 inapplicable in the present trial for conspiracy in the Federal court. In other words, the Federal

court may proceed—the defendants having been lawfully acquitted in the state court of the crime of murdering Walker—just as if no such crime was committed or alleged to have been committed by them in the act of violating the provisions of § 5508. As a general rule, the Federal courts accept the judgment of the state court as to the meaning and scope of a state enactment, whether civil or criminal. Much more should the Federal court accept the judgment of a state court, based upon a verdict of acquittal of a crime *against the state*, whenever, in a case in the Federal court, it becomes material to inquire whether that particular crime against the state was committed by the defendants on trial in the Federal court for an offense against the United States.

It should be said that the record discloses nothing that impeaches the good faith of the state court in its trial of these defendants on the charge of having murdered Walker. There is nothing to show, if that be material, that the trial in the state court was hastened or wrongly conducted in order that it might have effect upon the trial for conspiracy in the Federal court.

126] *Without discussing other aspects of the case referred to by counsel, we hold, for the reasons stated, that the special pleas in bar were properly sustained, and that the judgment as respects those pleas must be affirmed.

It is so ordered.

J. E. HURLEY, Cyrus Leland, Jr., and Walter Reeves, Trustees in Bankruptcy of the Estate of Mount Carmel Coal Company, Bankrupt, Appts.,

v.

ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Osage Carbon Company, and Cherokee & Pittsburg Coal & Mining Company.

(See S. C. Reporter's ed. 126-135.)

Appeal — from circuit court of appeals — in bankruptcy case.

1. An appeal lies to the Federal Supreme Court from a judgment of a circuit court of appeals, entered on an appeal from a court of bankruptcy, sustaining the contention, asserted by a petition in intervention, that advances made by a railway company to enable a coal company under contract to supply the railway company with coal

NOTE.—On appellate jurisdiction of Federal Supreme Court over circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. ante, 605.

On appeals and review in bankruptcy proceedings—see note to Re Eggert, 43 C. C. A. 9.

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to meet its pay rolls amount to a pledge, enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued performance of the contract, of such a quantity of coal when mined as the moneys so advanced would pay for according to the terms of the original contract.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

Bankruptcy — equitable pledge — validity as against trustee.

2. Advances made by a railway company to enable a coal company under contract to supply the railway company with coal to meet its pay rolls amount to a pledge, enforceable as a preferential claim against the assets of the bankrupt estate of the coal company in the hands of its trustees, who assumed and continued performance of the contract, of such a quantity of coal when mined as the moneys so advanced would pay for according to the terms of the original contract.

[For other cases, see Bankruptcy, 192-201, in Digest Sup. Ct. 1908.]

[No. 95.]

Argued January 26, 27, 1909. Decided April 5, 1909.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which, reversing a judgment of the District Court for the District of Kansas, sustained the contention, asserted by a petition in intervention, that advances made to a bankrupt amounted to an equitable pledge, enforceable as a preferential claim against the assets of the bankrupt estate in the hands of the trustee. Affirmed.

See same case below, 82 C. C. A. 453, 153 Fed. 503.

Statement by Mr. Justice Brewer:

There is practically no controversy in respect to the facts in this case. We take the following statement from the opinion of the circuit court of appeals: In 1896 the Osage Carbon Company and the Cherokee & Pittsburg Coal & Mining Company, as parties of the first part, and Charles J. Devlin, as party of the second part, and the railway company as party of the third part, entered into an agreement whereby the parties of the first part leased to Devlin, for a term of three years, certain coal lands located in the state of Kansas, with the right to mine coal therefrom, and Devlin, the party of the second part, agreed *to sell and deliver to the railway com- [127 pany, and the latter to buy from him daily, all the coal required by it in the operation of certain of its lines of railroad in the state of Kansas at prices stated in the lease,

payment to be made by the railway company on the 15th day of each month for all coal delivered to it during the preceding calendar month. Power was conferred upon the railway company to terminate the lease for failure by Devlin to perform any of his undertakings, and the right to assign the lease was made subject to the consent of the railway company. Subsequently, Devlin duly assigned to the Mount Carmel Coal Company all his rights under the lease. By two successive agreements this contract was extended until June, 1906. All the parties continued in the performance of their respective obligations until July, 1905, when the Mount Carmel Company was adjudicated a bankrupt. Receivers were appointed and authorized to conduct the business of the bankrupt in the usual course until trustees should be chosen. The receivers and the subsequently-appointed trustees successively continued to operate the mines under the orders of the court, and to deliver the coal as required by the contract. While the receivers were in charge, the railway company and the two coal companies, the original lessors, filed their joint intervening petition, setting forth their relations to the bankrupt under the contract, their rights thereunder, as already stated, and, in substance, that, by an agreement between them and the bankrupt, the contract had been modified to the extent that the railway company had agreed that, without waiting until the 15th day of the month to make its payment for coal theretofore purchased, it would, in order to accommodate the Mount Carmel Coal Company, and enable it to pay off laborers and keep the mines going, make advance payments from time to time when necessary for those purposes. In pursuance of that agreement, and for the purposes stated, it had advanced \$57,304.16, with the understanding that it should be repaid by the subsequent delivery of coal; that the intervening bankruptcy proceedings of July 7 and the appointment of receivers by the 128] court alone prevented the bankrupt from carrying out its agreement and delivering the coal as required by the contract. The petitioners prayed that the lease be declared forfeited and void and the mines delivered back to them, or that the receivers be directed to deliver to the railway company the amount of coal so paid for in advance.

A referee, to whom the intervening petition was referred, reported unfavorably to the granting of any relief. His report was afterwards confirmed by the district court and the petition dismissed. The referee found and reported that the amount claimed by the railway company was as

stated in the intervening petition, and was advanced to enable the bankrupt to meet its pay rolls, but found that there was no testimony indicating an intention to modify the written lease. The district court, in reviewing the action of the referee, said: "True, at the time the sums of money were advanced it was no doubt contemplated and agreed by the parties that the bankrupt would repay the money by furnishing the coal at the price of the coal, measured in money by the terms of the contract, and would furnish such coal in July and August, as claimed; but, at the time of the failure of the bankrupt, the coal remained in the ground, unmined." Both the referee and the district court found that the agreement for the advance of the money was a separate, independent, parol contract, and had nothing to do with the original written contract, as shown by the lease, and that, being such an independent parol contract, there was no lien upon any of the property for its payment.

The circuit court of appeals (82 C. C. A. 453; 153 Fed. 503) reversed the judgment of the district court, and held that that court should have directed a surrender of the leased premises, or required the trustees, upon assumption of the lease, to mine and deliver to the railway company sufficient coal to cover its advances; and it further held that, the lease having expired, the assets of the estate, consisting in part of the money received for coal delivered to the railway company, should be subject to the payment of such debt as a preferential claim.

Mr. Frank Hagerman argued the cause, and, with Mr. John S. Dean, filed a brief for appellants:

There was the right of appeal to this court, irrespective of the bankrupt act.

Hewit v. Berlin Mach. Works, 194 U. S. 296, 300, 48 L. ed. 986, 988, 24 Sup. Ct. Rep. 690; First Nat. Bank v. Klug, 186 U. S. 203, 205, 46 L. ed. 1127, 1128, 22 Sup. Ct. Rep. 899; Huntington v. Saunders, 163 U. S. 319, 320, 41 L. ed. 174, 175, 16 Sup. Ct. Rep. 1120; Elliott v. Toepfner, 187 U. S. 327, 334, 47 L. ed. 200, 203, 23 Sup. Ct. Rep. 133.

Hence, general order 36 has no application.

Hewit v. Berlin Mach. Works, *supra*.

There was no assignment if the payment was to be from the fund in hands of the debtor.

Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; Christmas v. Russell (Christmas v. Gaines) 14 Wall. 69, 84, 20 L. ed. 762, 764; Dillon v. Barnard, 21 Wall. 430, 440, 22 L.

ed. 673, 677; *Meyer v. Delaware & R. Constr. Co.* 100 U. S. 457, 477, 25 L. ed. 593, 600; *Ex parte Tremont Nail Co.* Fed. Cas. No. 14,168; *Putnam Sav. Bank v. Beal*, 54 Fed. 579; *Badgerow v. Manhattan Trust Co.* 74 Fed. 926; *Commercial Bank v. Rufe*, 92 Fed. 795; *Hale v. Dressen*, 76 Minn. 183, 78 N. W. 1046; *Fairbanks, M. & Co. v. Welshans*, 55 Neb. 385, 75 N. W. 873; *Hicks v. Roanoke Brick Co.* 94 Va. 746, 27 S. E. 596; *Hossack v. Graham*, 20 Wash. 192, 55 Pac. 37; *Silent Friend Min. Co. v. Abbot*, 7 Colo. App. 73, 42 Pac. 319.

Had there been no bankruptcy, the alleged agreement created nothing more than a general debt, enforceable at law.

Ex parte Tremont Nail Co. and Silent Friend Min. Co. v. Abbot, supra.

There having been no reservation of the right of re-entry for a breach of the modified agreement, there was no right to a surrender of the property, which was the only relief sought.

18 Am. & Eng. Enc. Law, 2d ed. p. 369; *Hague v. Ahrens*, 3 C. C. A. 426, 3 U. S. App. 231, 53 Fed. 60; *Re Pennewell*, 55 C. C. A. 571, 119 Fed. 139; *Doe ex dem. Spencer v. Godwin*, 4 Maule & S. 265; *Crawley v. Price*, L. R. 10 Q. B. 302; *Den ex dem. Bockover v. Post*, 25 N. J. L. 285; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391; *Wheeler v. Dascomb*, 3 Cush. 285; 1 Washb. Real. Prop. § 504.

The alleged oral modification must have been clearly proven.

Thomson v. Simpson, L. R. 5 Ch. 659; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 649, 41 L. ed. 855, 863, 17 Sup. Ct. Rep. 439; *Purcell v. Miner* (*Purcell v. Coleman*) 4 Wall. 513, 18 L. ed. 435; *McKinnon v. McKinnon*, 46 Fed. 718; *Marr v. Shaw*, 51 Fed. 864; *Walcott v. Watson*, 53 Fed. 429; *Semmes v. Worthington*, 38 Md. 298; *Langston v. Bates*, 84 Ill. 524, 25 Am. Rep. 466.

Upon bankruptcy, the trustee has the election whether he will adopt or reject the terms of an existing lease.

Watson v. Merrill, 69 L.R.A. 719, 69 C. C. A. 185, 136 Fed. 363; *Re Chambers*, 98 Fed. 865; *Ex parte Houghton*, 1 Low. Dec. 554, Fed. Cas. No. 6,725.

The same principle applies to receiverships; and mere use of the property, no matter how long continued, does not operate as an election.

St. Joseph & St. L. R. Co. v. Humphreys, 145 U. S. 105, 113, 36 L. ed. 640, 643, 12 Sup. Ct. Rep. 795; *United States Trust Co. v. Wabash Western R. Co.* 150 U. S. 287, 37 L. ed. 1085, 14 Sup. Ct. Rep. 86; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.* 58 Fed. 268; *Ames v. Union P. R. Co.* 60 Fed. 971.

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There must, however, be a purpose and intention to assume the lease and become the assignee thereof, otherwise there is no assumption. If one is put to an election, he is never bound thereby until he knows the facts.

2 Story, Eq. Jur. 13th ed. § 1098.

Mr. Robert Dunlap argued the cause, and, with Mr. Gardiner Lathrop, filed a brief for appellees:

The appeal should be dismissed for failure to comply with clause 3 of general order in bankruptcy 36, made by this court.

Chapman v. Bowen, 207 U. S. 91, 52 L. ed. 117, 28 Sup. Ct. Rep. 32; *Gray v. Howe*, 108 U. S. 12, 27 L. ed. 634, 1 Sup. Ct. Rep. 136; *Salina Stock Co. v. Salina Creek Irrig. Co.* 163 U. S. 117, 118, 41 L. ed. 93, 16 Sup. Ct. Rep. 1036; *United States Trust Co. v. New Mexico*, 183 U. S. 540, 46 L. ed. 319, 22 Sup. Ct. Rep. 172.

The case is not appealable to this court, as the question involved is not one which might have been taken on appeal from the highest court of a state to this court.

Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32; *De Lamar's Nevada Gold Min. Co. v. Nesbitt*, 177 U. S. 523, 44 L. ed. 872, 20 Sup. Ct. Rep. 715; *Leyson v. Davis*, 170 U. S. 37, 42 L. ed. 940, 18 Sup. Ct. Rep. 500; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 309, 47 L. ed. 480, 484, 485, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375; *Capital Nat. Bank v. First Nat. Bank*, 172 U. S. 426, 43 L. ed. 502, 19 Sup. Ct. Rep. 202; *Bausman v. Dixon*, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316.

Messrs. Robert Dunlap, William R. Smith, and Gardiner Lathrop also filed a brief for appellees:

The case is similar to that disposed of in the memorandum decision of this court in *Savings Deposit Bank & T. Company v. Loesser*, 209 U. S. 542, 52 L. ed. 918, 28 Sup. Ct. Rep. 760, in which there was an appeal from a decision of the circuit court of appeals, sixth circuit (78 C. C. A. 597, 148 Fed. 975), reversing a decree of a bankruptcy court allowing a chattel mortgage as a lien upon certain property of the bankrupt. The appeal to this court was dismissed for want of jurisdiction.

See also *First Nat. Bank v. Klug*, 186 U. S. 202, 46 L. ed. 1127, 22 Sup. Ct. Rep. 899; *Loesser v. Savings Deposit Bank & T. Co.* 89 C. C. A. 642, 163 Fed. 212; *Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

There was no Federal question set up in this case.

Kizer v. Texarkana & Ft. S. R. Co. 179 U. S. 199, 45 L. ed. 152, 21 Sup. Ct. Rep. 100; Hulbert v. Chicago, 202 U. S. 275, 280, 50 L. ed. 1026, 1028, 26 Sup. Ct. Rep. 617.

Parties to a stipulation in a contract have the same power to modify the same, change the mode of performance, waive conditions, or prescribe others in their places, as they have to make an original agreement.

Youngberg v. Lamberton, 91 Minn. 100, 97 N. W. 571; Teal v. Bilby, 123 U. S. 578, 31 L. ed. 263, 8 Sup. Ct. Rep. 239; Bryant v. Stephens, 58 Ala. 636; Holman v. Georgia R. Co. 67 Ga. 595; Cline v. Shell, 43 Or. 372, 73 Pac. 12; Hull v. Pitrat, 45 Fed. 94; Philadelphia, W. & B. R. Co. v. Trimble, 10 Wall. 376, 383, 19 L. ed. 951, 953; Phoenix Mut. L. Ins. Co. v. Hinesley, 75 Ind. 1; Prudential Ins. Co. v. Sullivan, 27 Ind. App. 30, 59 N. E. 873; 2 Page, Contr. 608; 1 Greenl. Ev. 16th ed. § 304.

The advances were made on the faith of, and in reliance upon, the contract obligation of the Mount Carmel Company to furnish coal.

Carr v. Hamilton, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; Fourth Street Nat. Bank v. Yardley, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439; Jennings v. Bank of California, 79 Cal. 323, 5 L.R.A. 233, 12 Am. St. Rep. 145, 21 Pac. 852.

The receivers and trustees in bankruptcy, in assuming to take the benefits under or to carry out the lease and agreement of the Mount Carmel Coal Company, stood in the same plight as that company in respect to such contract, and could only assume it or take the benefits thereunder subject to all adjustments theretofore made, and to all equities in favor of all the other parties to such agreement, and in the exact condition in which such contract was at the date of the adjudication in bankruptcy.

Chapman v. Tanner, 1 Vern. 267; 2 Story, Eq. Jur. 12th ed. § 1038; Anson, Contr. Knowlton 2d Am. ed. *232; York Mfg. Co. v. Cassell, 201 U. S. 344, 352, 50 L. ed. 782, 785, 26 Sup. Ct. Rep. 481; Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; Stewart v. Platt, 101 U. S. 731, 25 L. ed. 816; Yeatman v. New Orleans Sav. Inst. 95 U. S. 764, 24 L. ed. 589; Thompson v. Fairbanks, 196 U. S. 526, 49 L. ed. 586, 25 Sup. Ct. Rep. 306; Hauselt v. Harrison, 105 U. S. 401, 26 L. ed. 1075; Scott v. Armstrong, 146 U. S. 499, 36 L. ed. 1059, 13 Sup. Ct. Rep. 148; Winsor v. McLellan, 2 Story, 492, Fed. Cas. No. 17,887; Winsor v. Kendall, 3 Story, 507, Fed. Cas. No. 17,886; Ex parte Newhall, 2 Story, 360, Fed. Cas. No. 10,159; Mitchell v. Winslow, 2 Story, 630, Fed. Cas. No. 9,673; Mitford v. Mit-

ford, 9 Ves. Jr. 100; Brown v. Heathcote, 1 Atk. 162; Collier, Bankr. 5th ed. 554; Chattanooga Nat. Bank v. Rome Iron Co. 102 Fed. 760; Lindeke v. Associates Realty Co. 77 C. C. A. 56, 146 Fed. 631; Whitney v. Eaton, 15 Gray, 225; Lamb v. Hall, 147 Cal. 44, 81 Pac. 288; Foster v. Hackley, 2 Nat. Bankr. Reg. 417, Fed. Cas. No. 4,971; Chace v. Chapin, 130 Mass. 129; Sayre v. Weil, 94 Ala. 466, 15 L.R.A. 544, 10 So. 546; Hasbrouck v. Stokes, 13 N. Y. Supp. 333; Spencer v. World's Columbian Exposition, 58 Ill. App. 637; Longstreth v. Pennock, 9 Phila. 394, Fed. Cas. No. 8,488; O'Hara v. Jones, 46 Ill. 289; Fourth Street Nat. Bank v. Yardley, 165 U. S. 635, 41 L. ed. 856, 17 Sup. Ct. Rep. 439; Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17, 13 S. W. 41; Beach, Receivers, Alderson's ed. § 328; Knowles v. Lord, 4 Whart. 500, 34 Am. Dec. 525; Re MacDonald, 138 Fed. 463; Re Rockford, R. I. & St. L. R. Co. 1 Low. Dec. 345, Fed. Cas. No. 11,978; Re Standard Laundry Co. 112 Fed. 126; Re Kellogg, 112 Fed. 52; Goddard v. Weaver, 1 Woods, 257, Fed. Cas. No. 5,495; Van Waggoner v. Moses, 26 N. J. L. 570.

Under the bankruptcy law the bankruptcy court is regarded as a court of equity, and is invested with equity jurisdiction.

Re Kane, 62 C. C. A. 616, 127 Fed. 553; Bardes v. First Nat. Bank, 178 U. S. 535, 44 L. ed. 1181, 20 Sup. Ct. Rep. 1000.

It is bound not only to deal equitably, but to see that its officers set an example of honesty and fairness.

Re Tyler [1907] 1 K. B. 865; Re Chase, 59 C. C. A. 629, 124 Fed. 753; Hutchinson v. Le Roy, 51 C. C. A. 159, 113 Fed. 202; Hutchinson v. Otis, 53 C. C. A. 419, 115 Fed. 937; Batchelder & L. Co. v. Whitmore, 58 C. C. A. 517, 122 Fed. 355; Re Rochford, 59 C. C. A. 388, 124 Fed. 182.

Preferential claims have been established against the bankrupt estate by reason of the dealings and acts of the trustees.

William Openhym & Sons v. Blake, 87 C. C. A. 122, 157 Fed. 536; Erie R. Co. v. Dial, 72 C. C. A. 183, 140 Fed. 689; Re J. F. Grandy & Son, 146 Fed. 319; Baer Sons Grocer Co. v. Williams, 43 W. Va. 323, 27 S. E. 345; Re Cramond, 145 Fed. 976; Re Royea, 143 Fed. 182; Re Loveland, 84 C. C. A. 72, 155 Fed. 838; Hanson v. W. L. Blake & Co. 155 Fed. 342; Frazer v. Hallowell, 1 Binn. 126; Howe v. Harding, 76 Tex. 17, 18 Am. St. Rep. 17, 13 S. W. 41; Clyde v. Richmond & D. R. Co. 63 Fed. 21; Spencer v. World's Columbian Exposition, 58 Ill. App. 637; Legard v. Hodges, 1 Ves. Jr. 478, affirmed in 4 Bro. Ch. 421.

By knowingly taking any benefit under the lease and agreement, the receivers and trustees must be deemed to have assumed

the same with its burdens for the benefit of the estate.

White v. Griffing, 44 Conn. 449; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 397, 35 L. ed. 1056, 12 Sup. Ct. Rep. 188; *Chicago, R. I. & P. R. Co. v. Denver & R. G. R. Co.* 143 U. S. 608, 609, 36 L. ed. 280, 281, 12 Sup. Ct. Rep. 479.

Had the receivers declined to assume the agreement, and the bankrupt been unable fully to carry out and perform the same, then, clearly, the railway company would have been entitled to terminate the entire agreement, and to prove all damages which would have resulted to it by reason of such breach of the entire agreement.

Re Stern, 54 C. C. A. 60, 116 Fed. 604.

The appellate court had ample power to direct the lower court to rectify the wrong and see that justice was done.

1 Enc. Pl. & Pr. p. 488; *Estho v. Lear*, 7 Pet. 130, 8 L. ed. 632; *Crocket v. Lee*, 7 Wheat. 522, 5 L. ed. 514, *The Divina Pastora*, 4 Wheat. 52, 4 L. ed. 512; *Wiggins Ferry Co. v. Ohio & M. R. Co.* 142 U. S. 396, 413-416, 35 L. ed. 1055, 1061, 1062, 12 Sup. Ct. Rep. 188; *Union Cent. L. Ins. Co. v. Phillips*, 41 C. C. A. 272, 102 Fed. 19; *Hubbard v. Manhattan Trust Co.* 30 C. C. A. 526, 57 U. S. App. 730, 87 Fed. 51; *Elliott*, App. Proc. § 21; *Nelson v. Bridges*, 2 Beav. 239; *Cathcart v. Robinson*, 5 Pet. 264, 8 L. ed. 120; *Tayloe v. Merchants' F. Ins. Co.* 9 How. 390, 403, 13 L. ed. 187, 192; 1 Pom. Eq. Jur. 3d ed. § 237, pp. 341, 342; *Morss v. Elmendorf*, 11 Paige, 277; *Wiswall v. McGown*, 2 Barb. 281; *Andrews v. Brown*, 3 Cush. 130; *Milkman v. Ordway*, 106 Mass. 232; *Martin v. Martin*, 44 Kan. 295, 24 Pac. 418; *Re Tyler* [1907] 1 K. B. 870.

Mr. Justice Brewer delivered the opinion of the court:

We shall not stop to discuss the question of jurisdiction. That whole subject has been so fully considered in the case just decided of *Coder v. Arts* [213 U. S. 223, post, 772, 29 Sup. Ct. Rep. 436], that any further discussion of the subject would be superfluous.

We pass directly to the merits, and, in order to a clear understanding of them, the facts of the dealings between the coal company and the railway company must be borne in mind. The railway company entered into its original contract for the sake of securing the constant supply of coal necessary for the operation of part of its railway. It was to take from the coal company daily all the coal required therefor at prices fixed in the contract, and to make payment therefor on the 15th day of each month for all coal delivered to it during the preceding calendar month. It was not en-

gaged in the business of money *lend-[132 ing. Its entire arrangement was for the purpose of securing daily its needed coal, and that was fully understood by all the parties. After a while the coal company became embarrassed, found difficulty in securing money for the payment of its employees, whereupon, and in order to prevent any delay on the part of the coal company, or any embarrassment which it, the railway company, might suffer from failing to receive from the coal company the needed amount of coal, it advanced money to the coal company to enable it to pay its employees, and thus to continue the performance of its obligation to mine and deliver the coal. The railway company was simply paying in advance instead of waiting until the 15th day of the succeeding month, and the money by it loaned was not loaned as an independent transaction,—such as would be made by an ordinary money lender,—but an advancement made in anticipation of the delivery of the coal. To ignore this element and make the bankruptcy proceedings operate to discharge this obligation of the coal company, and leave the transaction as one of an independent loan of money to the coal company, would result in destroying the full, equitable obligations of the coal company, and place the parties in their relations to each other on an entirely different basis from what had been contemplated by them when they entered into this original arrangement. While decisions directly in point may not be found, yet, see *Ketchum v. St. Louis*, 101 U. S. 306-317, 25 L. ed. 999-1003; *Hauselt v. Harrison*, 105 U. S. 401, 26 L. ed. 1075; *Carr v. Hamilton*, 129 U. S. 252, 32 L. ed. 669, 9 Sup. Ct. Rep. 295; *Fourth Street Nat. Bank v. Yardley*, 165 U. S. 634, 41 L. ed. 855, 17 Sup. Ct. Rep. 439. In *Re Chase*, 59 C. C. A. 629, 631, 124 Fed. 753, 755, Circuit Judge Putnam, delivering the opinion of the circuit court of appeals of the first circuit, says:

"It is settled that a trustee in bankruptcy has no equities greater than those of the bankrupt, and that he will be ordered to do full justice, even in some cases where the circumstances would give rise to no legal right, and, perhaps, not even to a right which could be enforced in a court of equity as against an ordinary litigant. *Williams*, Bankr. 7th ed. 191. Indeed, bankruptcy proceeds on equitable principles so *broad that it will order a repayment[133 when such principles require it, notwithstanding the court or the trustee may have received the fund without such compulsion or protest as is ordinarily required for recovery in the courts either of common law or chancery."

In *Thompson v. Fairbanks*, 196 U. S. 516,

526, 49 L. ed. 577, 586, 25 Sup. Ct. Rep. 306, this court said:

"Under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt, except in cases where there has been a conveyance or encumbrance of the property which is void as against the trustee by some positive provision of the act."

The purpose of the parties is very clearly expressed in the following quotation from the opinion of the court of appeals:

"It appears that the coal company, while the contract was still in force and being executed, became embarrassed and unable to meet its payrolls; as a result, it might not be able to mine or deliver the coal which it had agreed to mine and deliver to the railway company, and which the latter imperatively required for its daily consumption. In this state of things the railway company agreed to waive its right to withhold payment for fifteen days after coal was delivered to it, and pay for some of it before it was delivered; and the coal company agreed, as found by the trial court, to repay such advances, not in money, but by furnishing coal in the months of July and August following, at the price fixed by the original contract. This arrangement, made when the coal company was in embarrassed circumstances, and obviously inspired by the necessity of meeting the payrolls, and for the ultimate purpose of securing performance of the only part of the original contract in which the railway company was interested, namely, securing its supply of coal, is so intimately and vitally related to the original contract that we are unable to agree with the trial court that it was intended to be independent and separate from it. It was not, in our opinion, a modification of any of the substantive 134]*provisions of the contract, but was a change rendered necessary by subsequent events in the method of its execution only. It was an arrangement in no manner inconsistent with any of the provisions of the original contract, but only in aid of its execution.

"The contract, after the new arrangement, remained as before. The coal company still had a right to mine coal on the same terms and conditions as before, and was bound to supply the daily needs of the railway company as before. The money paid in advance entitled the railway company to an amount of coal which the money so advanced would pay for according to the terms of the original contract. We think the inevitable meaning of the new arrange-

ment, interpreted in the light of the conditions surrounding the parties, and as necessarily intended by them, was to set apart a sufficient amount of coal after it should be mined as security for the payment of advances made. This result is not expressed in the conventional form of a mortgage or pledge, but the method of producing it was devised for the purpose of acquiring the needed money by the coal company, and of furnishing security for its repayment. If the parties intended the arrangement to be one for borrowing and securing the repayment of money, we ought, as between them, to so regard it, and to treat it as creating an equitable charge or lien, however inartificially it may have been expressed."

We fully approve of this interpretation of the transaction. Equity looks at the substance, and not at the form. That the coal for which this money was advanced was not yet mined, but remained in the ground to be mined and delivered from day to day, as required, does not change the transaction into one of an ordinary independent loan on the credit of the coal company or upon express mortgage security. It implies a purpose that the coal, as mined, should be delivered, and is, from an equitable standpoint, to be considered as a pledge of the unmined coal to the extent of the advancement. The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. All obligations of a legal and equitable nature *remained undisturbed thereby.[135 If there had been no bankruptcy proceedings, the coal as mined was, according to the understanding of the parties, to be delivered as already paid for by the advancement.

We think the conclusions of the Circuit Court of Appeals are right, and its judgment is affirmed.

Mr. Justice Holmes concurs in the judgment.

JAMES S. KEERL, Plff. in Err.,

v.

STATE OF MONTANA.

(See S. C. Reporter's ed. 135-138.)

Error to state court — Federal question — former jeopardy.

1. A specific contention on the trial of a criminal cause in a state court, that the denial to the accused of the benefit of his

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western*

plea of former jeopardy operates to deprive him of his liberty without due process of law, contrary to U. S. Const., 14th Amend., raises a Federal question which will sustain a writ of error from the Federal Supreme Court to review the judgment of the highest court of the state, affirming the conviction below.

[For other cases, see Appeal and Error, 1898-1913, 2033, in Digest Sup. Ct. 1908.]

Criminal law — former jeopardy — discharge of jury.

2. A plea of former jeopardy cannot be based upon a discharge of the jury on a prior trial after they had been out at least twenty-four hours, and the trial court had found that there was a reasonable probability that the jury could not agree.

[For other cases, see Criminal Law, 64-68, in Digest Sup. Ct. 1908.]

[No. 113.]

Argued March 15, 1909. Decided April 5, 1909.

IN ERROR to the Supreme Court of the State of Montana to review a judgment which affirmed a conviction of murder had in the District Court of Lewis and Clark County, in that state, on a trial at which the plea of former jeopardy was interposed. Affirmed.

See same case below, 33 Mont. 501, 85 Pac. 862.

Statement by Mr. Justice Brewer:

On April 24, 1902, an information was 136] filed in the district *court of Lewis and Clark county, Montana, charging the defendant, now plaintiff in error, with the crime of murder. Upon a trial he was found guilty of murder in the second degree, and sentenced to imprisonment for life. The judgment was reversed by the supreme court and a new trial ordered. 29 Mont. 508, 101 Am. St. Rep. 579, 75 Pac. 362. The record recites that, on the second trial, the jury retired for deliberation on July 12, 1904, and that, on July 14, 1904, they returned into court, "whereupon it satisfactorily appearing to the court that there is a reasonable probability that the jury cannot agree, the court ordered the jury discharged from the further consideration of this cause," and remanded the defendant to

the custody of the sheriff. On the third trial the defendant interposed a plea of once in jeopardy, on the ground that the jury was improperly discharged at the end of the second trial. The Montana statute provides:

"Except as provided in the last section [a section respecting sickness or accident], the jury cannot be discharged after the cause is submitted to them until they have agreed upon their verdict, and rendered it in open court, unless by consent of both parties, entered upon the minutes, or unless, at the expiration of such time as the court may deem proper, it satisfactorily appears that there is reasonable probability that the jury cannot agree." Penal Code, § 2125; Montana Code, vol. 2, p. 1061.

The court overruled the plea, and, as a result of the trial, the defendant was found guilty of manslaughter, and sentenced to imprisonment for the term of ten years. This judgment was sustained by the supreme court. 33 Mont. 501, 85 Pac. 862. Thereupon the case was brought here on writ of error.

Mr. Thomas J. Walsh argued the cause, and, with Mr. Cornelius B. Nolan, filed a brief for plaintiff in error:

Jeopardy begins when the jury is impaneled and sworn for the trial of a valid indictment in a court of competent jurisdiction; and, if the trial be thereafter terminated without verdict, by the discharge of the jury in an improper manner, or otherwise than for a manifest necessity, accused cannot be again put on trial for the same offense. Failing to object to illegal discharge of jury does not prevent accused from availing himself of the jeopardy.

7 Current Law, 1013; Cooley, Const. Lim. 6th ed. p. 399; 1 Bishop, Crim. Law, 5th ed. p. 1016; 1 Bishop, Crim. Proc. 821; 12 Cyc. Law & Proc. pp. 269, 270; State v. M'Kee, 1 Bail. L. 651, 21 Am. Dec. 499; 17 Am. & Eng. Enc. Law, 1261, note 8; People v. Webb, 38 Cal. 468; People v. Hunckeler, 48 Cal. 334; Kepner v. United States, 195 U. S. 100-121, 49 L. ed. 114-121, 24 Sup. Ct. Rep. 797, 1 A. & E. Ann. Cas. 655; State v. Nelson, 19 R. I. 467, 33 L.R.A. 559,

Land Co. 37 L. ed. U. S. 267; Re Buchanan, 39. L. ed. U. S. 884; and Kipley v. Illinois, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

53 L. ed.

On writs of error to state courts in cases involving questions of due process of law—see note to Burt v. Smith, 51 L. ed. U. S. 121.

On former jeopardy—see notes to Com. v. Fitzpatrick, 1 L.R.A. 451; Altenburg v. Com. 4 L.R.A. 543; Re Lange, 21 L. ed. U. S. 872; United States v. Perez, 6 L. ed. U. S. 165; and Silsby v. Foote, 14 L. ed. U. S. 394.

As to discontinuance, *nolle prosequi*, or dismissal as bar to subsequent prosecution—see note to United States v. A Lot of Precious Stones and Jewellery, 68 C. C. A. 4.

61 Am. St. Rep. 780, 34 Atl. 990; Bagwell v. State, 129 Ga. 170, 58 S. E. 650; State v. Richardson, 47 S. C. 166, 35 L.R.A. 238, 25 S. E. 220; Ex parte Ulrich, 42 Fed. 587.

A discharge, except under an imperious necessity, will operate as an acquittal.

Ex parte Glenn, 111 Fed. 261; McCorkle v. State, 14 Ind. 39; State v. Allen, 59 Kan. 758, 54 Pac. 1060; Helm v. State, 66 Miss. 537, 6 So. 322; Ex parte Maxwell, 11 Nev. 435; State v. Callendine, 8 Iowa, 288.

To warrant a second trial of the defendant after a discharge of the jury, the record must show the necessity for the prior discharge

1 Bishop, Crim. Law, 837; 17 Am. & Eng. Enc. Law, 2d ed. p. 1255; People v. Cage, 48 Cal. 327, 17 Am. Rep. 436; State v. Shuchardt, 18 Neb. 454, 25 N. W. 722; Upchurch v. State, 36 Tex. Crim. Rep. 624, 44 L.R.A. 699, 38 S. W. 206; State v. Nelson, 19 R. I. 467, 33 L.R.A. 559, 61 Am. St. Rep. 780, 34 Atl. 990; Dobbins v. State, 14 Ohio St. 499; Ex parte Maxwell, 11 Nev. 437; State v. Allen, 59 Kan. 758, 54 Pac. 1060; State v. Klauer, 70 Kan. 384, 78 Pac. 802; State v. Smith, 44 Kan. 75, 8 L.R.A. 774, 21 Am. St. Rep. 266, 24 Pac. 84; 17 Am. & Eng. Enc. Law, p. 593; 1 Bishop, Crim. Law, 5th ed. § 1036.

Mr. W. H. Poorman argued the cause, and, with Messrs. Albert J. Galen and E. M. Hall, filed a brief for defendant in error:

The fact alone that the jury have been in retirement for forty hours or more without reaching a verdict is, of itself, sufficient ground for the discharge of the jury by the presiding judge, in the sound exercise of his discretion.

Logan v. United States, 144 U. S. 297, 298, 36 L. ed. 441, 12 Sup. Ct. Rep. 617; Dreyer v. Illinois, 187 U. S. 71, 85, 86, 47 L. ed. 79, 86, 23 Sup. Ct. Rep. 28; Thompson v. United States, 155 U. S. 271, 274, 39 L. ed. 146, 149, 15 Sup. Ct. Rep. 73; Simmons v. United States, 142 U. S. 148, 154, 35 L. ed. 968, 971, 12 Sup. Ct. Rep. 171; United States v. Perez, 9 Wheat. 579, 6 L. ed. 165; Ex parte Lange, 18 Wall. 163, 165, 21 L. ed. 872, 875; State v. Nelson, 26 Ind. 366; People v. Green, 13 Wend. 57.

The burden is upon the plaintiff in error to show that the record of the discharge of the jury sustains the defense of plea of former jeopardy.

State v. Pianfetti, 79 Vt. 236, 65 Atl. 84, 9 A. & E. Ann. Cas. 127; O'Connor v. State, 28 Tex. App. 288, 13 S. W. 14; State v. Heath, 8 Mo. App. 99; People v. Trimble, 67 Hun, 364, 15 N. Y. Supp. 60; 9 Enc. Pl. & Pr. p. 637.

The defendant is not entitled to impeach the record by extrinsic evidence of facts

showing an erroneous exercise of judicial discretion in discharging the jury.

People v. Smalling, 94 Cal. 116, 29 Pac. 421.

*Mr. Justice Brewer delivered the [137] opinion of the court:

The defendant during the trial having specifically claimed that the action of the court in denying him the benefit of the plea of once in jeopardy operated to deprive him of his liberty without due process of law, contrary to the 14th Amendment to the Constitution of the United States, our jurisdiction of the writ of error cannot be questioned. Boston Beer Co. v. Massachusetts, 97 U. S. 25-30, 24 L. ed. 989-991; Bohanan v. Nebraska, 118 U. S. 231, 30 L. ed. 71, 6 Sup. Ct. Rep. 1049; Boyd v. Nebraska, 143 U. S. 135-161, 36 L. ed. 103-109, 12 Sup. Ct. Rep. 375.

On the merits, there is little room for controversy. In United States v. Perez, 9 Wheat. 579, 580, 6 L. ed. 165, 166, this court passed upon the question arising under the 5th Amendment, whose language is in this respect more specific than that in the 14th Amendment, the former applying to the courts of the United States, the latter to the action of the state, and it was held:

"We think that, in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion rests, in this as in other cases, upon the responsibility of the judges, under their oaths of office. We are aware that there is some diversity of opinion and practice on this subject in the American courts; but, after weighing the question with due deliberation, we are of opinion that such a discharge constitutes no bar to further proceedings, and gives no right of exemption to the prisoner from being again put upon trial."

This has been the settled law of the

Federal courts ever since that time. *Logan v. United States*, 144 U. S. 263-297, 36 L. ed. 429-441, 12 Sup. Ct. Rep. 617; *Thompson v. United States*, 155 U. S. 271-274, 39 L. ed. 146-149, 15 Sup. Ct. Rep. 73; *Dreyer v. Illinois*, 187 U. S. 71-85, 47 L. ed. 79-86, 23 Sup. Ct. Rep. 28.

Those decisions dispose of the question here presented, without considering whether the 14th Amendment in itself forbids a state from putting one of its citizens in second jeopardy,—a question which, as it is unnecessary, we do not decide. The record shows that the jury were kept out at least twenty-four hours, and probably more, and the trial court found that there was a reasonable probability that the jury could not agree. This is the only Federal question, and, finding no error therein, the judgment of the Supreme Court of Montana is affirmed.

JOSEPH KELLER, Plff. in Err.,

v.

UNITED STATES. (No. 653.)

LOUIS ULLMAN, Plff. in Err.,

v.

UNITED STATES. (No. 654.)

(See S. C. Reporter's ed. 138-151.)

Alien immigrants — congressional control — punishing keeping for immoral purposes.

Congress had not the power to enact the provisions of the act of February 20, 1907 (34 Stat. at L. 898, chap. 1134), § 3, for the criminal punishment of the mere keeping, maintaining, supporting, or harboring, for the purpose of prostitution, any alien woman within three years after she shall have entered the United States.

[For other cases, see Aliens, VI. a; States, IV. k, in Digest Sup. Ct. 1908.]

[Nos. 653, 654.]

Argued March 1, 1909. Decided April 5, 1909.

IN ERROR to the District Court of the United States for the Northern District of Illinois to review convictions for keeping an alien woman for the purpose of prostitution. Reversed and remanded with instructions to quash the indictment.

Statement by Mr. Justice Brewer:

Section 3 of the act of Congress of February 20, 1907 (34 Stat. at L. 898, 899, chap. 1134, U. S. Comp. Stat. Supp. 1907, pp. 389, 392), entitled "An Act to Regulate the Immigration of Aliens into the United States," reads as follows:

"Sec. 3. That the importation into the 53 L. ed.

United States of any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or *whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and, on conviction thereof, be imprisoned not more than five years, and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practising prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States, and shall be deported as provided by sections twenty and twenty-one of this act.*"

The plaintiffs in error were indicted for a violation of this section, the charge against them being based upon that portion of the section which is in italics, and, in terms, that they "wilfully and knowingly did keep, maintain, control, support, and harbor in their certain house of prostitution" (describing it), "for the purpose of prostitution, a certain alien woman, to wit, Irene Bodi," who was, as they well knew, a subject to the *King of Hungary, who had [140 entered the United States within three years. A trial was had upon this indictment; the plaintiffs in error were convicted and sentenced to the penitentiary for eighteen months.

Mr. Benjamin C. Bachrach argued the cause, and, with Mr. Elijah N. Zoline, filed a brief for plaintiffs in error:

The Constitution of the United States is one of limited and expressly delegated powers, which can only be exercised as granted, or in the cases enumerated.

M'Culloch v. Maryland, 4 Wheat. 405, 4 L. ed. 601; *Houston v. Moore*, 5 Wheat. 48, 5 L. ed. 30; *Civil Rights Cases*, 109 U. S. 3, 27 L. ed. 835, 3 Sup. Ct. Rep. 18; *License Cases*, 5 How. 576, 12 L. ed. 288; *Gibbons v. Ogden*, 9 Wheat. 203, 6 L. ed. 71.

The state has the power, and the exclusive power, to regulate vice and morality, and to pass necessary laws for the protection of its citizens with reference thereto.

License Cases, 5 How. 582, 583, 12 L. ed.

291, 292; *King v. American Transp. Co.* 1 Flipp. 1, Fed. Cas. No. 7,787; *Passenger Cases*, 7 How. 287, 405, 12 L. ed. 704, 753; 2 *Tiedeman, State & Federal Control of Persons & Property*, 1019; *United States v. Dewitt*, 9 Wall. 41, 19 L. ed. 593; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. ed. 1115, 1116; *Pine Grove Twp. v. Talcott*, 19 Wall. 670, 22 L. ed. 227; *New York v. Miln*, 11 Pct. 102, 138, 9 L. ed. 648, 662; *Slaughter-House Cases*, 16 Wall. 64, 21 L. ed. 404; *Cooley, Const. Lim.* 574; *United States v. E. C. Knight Co.* 156 U. S. 11, 39 L. ed. 328, 15 Sup. Ct. Rep. 249; *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S. 555, 35 L. ed. 574, 11 Sup. Ct. Rep. 865.

Granted that, under the commerce clause of the Constitution, Congress has plenary power to legislate concerning all matters affecting interstate commerce or commerce with foreign nations, when Congress enacts a law under this power with reference to alien women, to what extent can Congress go in enacting laws in order to make the legislation effective?

Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 147; *Trade-Mark Cases*, 100 U. S. 96, 25 L. ed. 552; *Williams v. Fears*, 179 U. S. 270, 45 L. ed. 186, 21 Sup. Ct. Rep. 131.

The power exercised by Congress in enacting laws with reference to Chinese, paupers, convicts, prostitutes, etc., is obtained in one of two ways: either from the commerce clause of the Constitution, or because the United States, as a nation, on the accepted principle of international law, has the power inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.

United States v. Craig, 28 Fed. 796; *Head Money Cases* (*Edye v. Robertson*) 112 U. S. 591, 28 L. ed. 801, 5 Sup. Ct. Rep. 247; *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977; *United States ex rel. Turner v. Williams*, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 722.

Assistant Attorney General Fowler argued the cause, and filed a brief for defendant in error:

If the clause of § 3 of the act of February 20, 1907, which is here in question, relates to or materially affects the importation of aliens into this country, or the conditions under which they may remain therein, or their expulsion therefrom, then its enactment was within the power of Congress, regardless of the police powers of the states.

United States ex rel. Turner v. Williams,

194 U. S. 289, 48 L. ed. 983, 24 Sup. Ct. Rep. 719; *Fong Yue Ting v. United States*, 149 U. S. 708, 37 L. ed. 911, 13 Sup. Ct. Rep. 1016; *Head Money Cases* (*Edye v. Robertson*) 112 U. S. 580, 591, 28 L. ed. 798, 801, 5 Sup. Ct. Rep. 247; *Lees v. United States*, 150 U. S. 476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; *United States v. Bitty*, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396.

The question is, Do the provisions of the act and the fact that those who are guilty of such conduct as that for which plaintiffs in error have been convicted may be prosecuted in the United States courts, materially reduce the importation of females for immoral purposes, and thus restrain an evil with reference to which it has been universally held that Congress has the power to legislate? If they do, then this provision falls within the purview of congressional legislation, and is valid, notwithstanding the fact that the state has, in the exercise of its reserved powers, the right to punish plaintiffs in error for the same conduct.

United States v. Coombs, 12 Pet. 72, 9 L. ed. 1004; *McCulloch v. Maryland*, 4 Wheat. 316, 417, 4 L. ed. 579, 604; *United States v. Marigold*, 9 How. 560, 568, 13 L. ed. 257, 261; *United States v. Bridleman*, 7 Sawy. 243, 7 Fed. 894; *United States v. Holliday*, 3 Wall. 407, 18 L. ed. 182.

There is nothing antagonistic or conflicting in the existence of dual punishments for the same acts, inasmuch as they constitute two distinct offenses,—the one against the state government, and the other against the national government; and the right of each of these two governments to inflict punishment for the same act has repeatedly been recognized by this court.

Moore v. Illinois, 14 How. 14, 20, 14 L. ed. 306, 309; *Coleman v. Tennessee*, 97 U. S. 509, 24 L. ed. 1118; *Grafton v. United States*, 206 U. S. 333, 354, 51 L. ed. 1084, 1091, 27 Sup. Ct. Rep. 749, 11 A. & E. Ann. Cas. 640.

Mr. Justice Brewer delivered the opinion of the court:

The single question is one of constitutionality. Has Congress power to punish the offense charged, or is jurisdiction thereover solely with the state? Undoubtedly, as held, "Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers." [144

United States ex rel. Turner v. Williams, 194 U. S. 279, 289, 48 L. ed. 979, 983, 24 Sup. Ct. Rep. 719. See also Fong Yue Ting v. United States, 149 U. S. 698, 708, 37 L. ed. 905, 911, 13 Sup. Ct. Rep. 1016; Head Money Cases (Edye v. Robertson) 112 U. S. 580, 591, 28 L. ed. 798, 801, 5 Sup. Ct. Rep. 247; Lees v. United States, 150 U. S. 476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; United States v. Bitty, 208 U. S. 393, 52 L. ed. 543, 28 Sup. Ct. Rep. 396.

It is unnecessary to determine how far Congress may go in legislating with respect to the conduct of an alien while residing here, for there is no charge against one; nor to prescribe the extent of its power in punishing wrongs done to an alien, for there is neither charge nor proof of any such wrong. So far as the statute or the indictment requires, or the testimony shows, she was voluntarily living the life of a prostitute, and was only furnished a place by the defendants to follow her degraded life. While the keeping of a house of ill-fame is offensive to the moral sense, yet that fact must not close the eye to the question whether the power to punish therefor is delegated to Congress or is reserved to the state. Jurisdiction over such an offense comes within the accepted definition of the police power. Speaking generally, that power is reserved to the states, for there is in the Constitution no grant thereof to Congress.

In *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. ed. 1115, 1116, is this declaration:

"In the American constitutional system," says Mr. Cooley, "the power to establish the ordinary regulations of police has been left with the individual states, and cannot be assumed by the national government." Cooley, *Const. Lim.* 574. While it is confessedly difficult to mark the precise boundaries of that power, or to indicate, by any general rule, the exact limitations which the states must observe in its exercise, the existence of such a power in the states has been uniformly recognized in this court. *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23; *License Cases*, 5 How. 504, 12 L. ed. 256; *Gilman v. Philadelphia*, 3 Wall. 713, 18 L. ed. 96; *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 23 L. ed. 543; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989. It is embraced in what Mr. Chief Justice Marshall, in *Gibbons v. Ogden*, calls that [145] "immense mass *of legislation" which can be most advantageously exercised by the states, and over which the national authorities cannot assume supervision or control."

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And in *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357, 359, it is said:

"But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."

Further, as the rule of construction, Chief Justice Marshall, speaking for the court in the great case of *M'Culloch v. Maryland*, 4 Wheat. 316, 405, 4 L. ed. 579, 601, declares:

"This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise, as long as our system shall exist."

In *Houston v. Moore*, 5 Wheat. 1, 48, 5 L. ed. 19, 30, Mr. Justice Story says:

"Nor ought any power to be sought, much less to be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the national government beyond what the people have granted by the Constitution."

Art. 10 of Amendments; *New York v. Miln*, 11 Pet. 102, 133, 9 L. ed. 648, 660; *License Cases*, 5 How. 504, 608, 630, 12 L. ed. 256, 303, 313; *United States v. Dewitt*, 9 Wall. 41, 44, 19 L. ed. 593, 594; *Patterson v. Kentucky*, 97 U. S. 501, 503, 24 L. ed. 1115, 1116; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Re Rahrer* (*Wilkerson v. Rahrer*) 140 U. S. 545, 555, 35 L. ed. 572, 574, 11 Sup. Ct. Rep. 865; *United States v. E. C. Knight Co.* 156 U. S. 1, 11, 39 L. ed. 325, 328, 15 Sup. Ct. Rep. 249; Cooley, *Const. Lim.* 574.

Doubtless it not infrequently happens that the same act *may be referable [146] to the power of the state, as well as to that of Congress. If there be collision in such a case, the superior authority of Congress prevails. As said in *New York v. Miln*, 11 Pet. 102, 137, 9 L. ed. 648, 661:

"From this it appears that whilst a state is acting within the legitimate scope of its

power as to the end to be attained, it may use whatsoever means, being appropriate to that end, it may think fit, although they may be the same, or so nearly the same as scarcely to be distinguishable from those adopted by Congress, acting under a different power, subject only, say the court, to this limitation, that, in the event of collision, the law of the state must yield to the law of Congress. The court must be understood, of course, as meaning that the law of Congress is passed upon a subject within the sphere of its power."

In *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802, 804, the rule is stated in these words:

"Generally it may be said, in respect to laws of this character, that, though resting upon the police power of the state, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the states, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution.' *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 271, 23 L. ed. 543, 548. 'Definitions of the police power must, however, be taken subject to the condition that the state cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land.' *New Orleans Gas-light Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 661, 29 L. ed. 516, 520, 6 Sup. Ct. Rep. 252, 258. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this court that, where such powers are so exercised as to come within the domain of Federal authority as defined *by the Constitution, the latter must prevail.' *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 464, 30 L. ed. 237, 241, 6 Sup. Ct. Rep. 1114, 1118."

See also *Lottery Case* (*Champion v. Ames*) 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

The question is, therefore, whether there is any authority conferred upon Congress by which this particular portion of the statute can be sustained. By § 2 of article 2 of the Constitution, power is given to the President, by and with the advice and consent of the Senate, to make treaties, but there is no suggestion in the record or in

the briefs of a treaty with the King of Hungary under which this legislation can be supported.

The general power which exists in the nation to control the coming in or removal of aliens is relied upon, the government stating in its brief these two propositions:

"The clause in question should be held valid because it relates to and materially affects the conditions upon which an alien female may be permitted to remain in this country, and the grounds which warrant her exclusion.

"The validity of the provision in question should be determined from its general effect upon the importation and exclusion of aliens."

But it is sufficient to say that the act charged has no significance in either direction.

As to the suggestion that Congress has power to punish one assisting in the importation of a prostitute, it is enough to say that the statute does not include such a charge; the indictment does not make it; and the testimony shows, without any contradiction, that the woman Irene Bodi came to this country in November, 1905; that she remained in New York until October, 1907; then came to Chicago, and went into the house of prostitution which the defendants purchased in November, 1907, finding the woman then in the house; that she had been in the business of a prostitute only about ten or eleven months prior to the trial of the case in October, 1908, and that the defendants did not know her until November, 1907. In view of those facts, the question of the power of Congress to punish *those who assist in the importation[148 of a prostitute is entirely immaterial.

The act charged is only one included in the great mass of personal dealings with aliens. It is her own character and conduct which determine the question of exclusion or removal. The acts of others may be evidence of her business and character. But it does not follow that Congress has the power to punish those whose acts furnish evidence from which the government may determine the question of her expulsion. Every possible dealing of any citizen with the alien may have more or less induced her coming. But can it be within the power of Congress to control all the dealings of our citizens with resident aliens? If that be possible, the door is open to the assumption by the national government of an almost unlimited body of legislation. By the census of 1900 the population of the United States between the oceans was, in round numbers, 76,000,000. Of these, 10,000,000 were of foreign birth, and 16,000,000 more were of foreign parentage. Doubtless some

have become citizens by naturalization, but certainly scattered through the country there are millions of aliens. If the contention of the government be sound, whatever may have been done in the past, however little this field of legislation may have been entered upon, the power of Congress is broad enough to take cognizance of all dealings of citizens with aliens. That there is a moral consideration in the special facts of this case, that the act charged is within the scope of the police power, is immaterial, for, as stated, there is in the Constitution no grant to Congress of the police power. And the legislation must stand or fall according to the determination of the question of the power of Congress to control generally dealings of citizens with aliens. In other words, an immense body of legislation, which heretofore has been recognized as peculiarly within the jurisdiction of the states, may be taken by Congress away from them. Although Congress has not largely entered into this field of legislation, it may do so, if it has the power. Then we should be brought face to face with such a change in the internal conditions of this country 149]*as was never dreamed of by the framers of the Constitution. While the acts of Congress are to be liberally construed in order to enable it to carry into effect the powers conferred, it is equally true that prohibitions and limitations upon those powers should also be fairly and reasonably enforced. *Fairbank v. United States*, 181 U. S. 283, 45 L. ed. 862, 21 Sup. Ct. Rep. 648. To exaggerate in the one direction and restrict in the other will tend to substitute one consolidated government for the present Federal system. We should never forget the declaration in *Texas v. White*, 7 Wall. 700, 725, 19 L. ed. 227, 237, that "the Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states."

The judgments are reversed, and the cases remanded to the District Court of the United States for the Northern District of Illinois, with instructions to quash the indictment.

Mr. Justice Holmes, dissenting:

For the purpose of excluding those who unlawfully enter this country Congress has power to retain control over aliens long enough to make sure of the facts. *Japanese Immigrant Case (Yamataya v. Fisher)* 189 U. S. 86, 47 L. ed. 721, 23 Sup. Ct. Rep. 611. To this end it may make their admission conditional for three years. *Pearson v. Williams*, 202 U. S. 281, 50 L. ed. 1029, 26 Sup. Ct. Rep. 608. If the ground of exclusion is their calling, practice of it within a short time after arrival is or may be made evidence of what it was when they

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came in. Such retrospective presumptions are not always contrary to experience or unknown to the law. *Bailey v. Alabama*, 211 U. S. 452, 454, ante, 278, 279, 29 Sup. Ct. Rep. 141. If a woman were found living in a house of prostitution within a week of her arrival, no one, I suppose, would doubt that it tended to show that she was in the business when she arrived. But how far back such an inference shall reach is a question of degree, like most of the questions of life. And, while a period of three years seems to be long, I am not prepared to say, against the judgment of Congress, that it is too long.

The statute does not state the legal theory upon which it was enacted. If the ground is that which I have suggested, it is fair *to observe that the presumption[150 that it creates is not open to rebuttal. I should be prepared to accept even that, however, in view of the difficulty of proof in such cases. Statutes of which the justification must be the same are familiar in the states. For instance, one creating the offense of being present when gaming implements are found (*Com. v. Smith*, 166 Mass. 370, 375, 376, 44 N. E. 503), or punishing the sale of intoxicating liquors without regard to knowledge of their intoxicating quality (*Com. v. Hallett*, 103 Mass. 452), or throwing upon a seducer the risk of the woman turning out to be married or under a certain age (*Com. v. Elwell*, 2 Met. 190, 35 Am. Dec. 398; *R. v. Prince*, L. R. 2 C. C. 154). It is true that, in such instances, the legislature has power to change the substantive law of crimes, and it has been thought that when it is said to create a conclusive presumption as to a really disputable fact, the proper mode of stating what it does, at least, as a general rule, is to say that it has changed the substantive law. 2 Wigmore, Ev. §§ 1353 et seq. This may be admitted without denying that considerations of evidence are what lead to the change. And if it should be thought more philosophical to express this law in substantive terms, I think that Congress may require, as a condition of the right to remain, good behavior for a certain time, in matters deemed by it important to the public welfare, and of a kind that indicates a pre-existing habit that would have excluded the party if it had been known. Therefore I am of opinion that it is within the power of Congress to order the deportation of a woman found practising prostitution within three years.

If Congress can forbid the entry and order the subsequent deportation of professional prostitutes, it can punish those who cooperate in their fraudulent entry. "If Congress has power to exclude such laborers . . . it has the power to punish any who

assist in their introduction." That was a point decided in *Lees v. United States*, 150 U. S. 476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163, 164. The same power must exist as to coöperation in an equally unlawful stay. The indictment sets forth the facts 151] that constitute such coöperation, *and need not allege the conclusion of law. On the principle of the cases last cited, in order to make its prohibition effective, the law can throw the burden of finding out the fact and date of a prostitute's arrival from another country upon those who harbor her for a purpose that presumably they know, in any event, to be contrary to law. Therefore, while I have admitted that the time fixed seems to me to be long, I can see no other constitutional objection to the act, and, as I have said, I think that that one ought not to prevail.

Mr. Justice Harlan and Mr. Justice Moody concur in this dissent.

W. J. MURRAY, John McSween, and Avery Patton, Constituting the State Dispensary Commission of South Carolina, et al.,
Petitioners,

v.

WILSON DISTILLING COMPANY et al.
and the Fleischmann Company.

(See S. C. Reporter's ed. 151-173.)

States — immunity from suit — suit against state officer.

The existing relation of debtor and creditor between the state of South Carolina and the vendors of liquor under the state dispensary acts was not so altered by the winding-up act of February 16, 1907, providing for the appointment of a commission to close out the state dispensary business and turn over to the state treasury the surplus funds remaining after liquidating and paying claims out of the state assets, as to enable a Federal circuit court to take jurisdiction of a bill filed by such vendors, which seeks to enjoin the commission from disposing of the fund until their claims are paid, and asks for the appointment of a receiver, on the theory that, by such statute, the assets of the dispensary were placed in the hands of the commission as a trust fund for the benefit of all creditors having valid claims against such fund, which they are entitled to enforce by judicial action against the commission, without the presence of the state as a necessary party.

[For other cases, see *States*, 282-325, in Digest Sup. Ct. 1908.]

[No. 625.]

NOTE.—On suits against state officers as suits against state—see notes to *Sanders v. Saxton*, 1 L.R.A.(N.S.) 727; *Ex parte Young*, 13 L.R.A.(N.S.) 932; and *Beers v. Arkansas*, 15 L. ed. U. S. 991.

Argued February 26 and March 1, 1909.
Decided April 5, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the District of South Carolina, enjoining, *pendente lite*, the disposition by the state dispensary commission of the assets of the state dispensary, and appointing receivers of such assets. Decrees of both courts reversed, and the cause remanded to the circuit court for dismissal of the suit.

See same case below, 164 Fed. 1.

The facts are stated in the opinion.

Mr. B. L. Abney argued the cause, and, with Mr. J. Fraser Lyon, filed a brief for petitioners:

At the time the state dispensary was abolished, on the 16th of February, 1907, the relation existing between the state and the alleged vendors of alcoholic liquors was that of debtor and creditor; and the state dispensary board was simply the agent through whom the alleged contracts were made; being, as declared both by the statutes and by the decisions of the courts of the state, construing such statutes, officers of the state.

State ex rel. Hay v. Farnum, 73 S. C. 165, 53 S. E. 83.

The commission, as individuals, have no interest in the fund. They are mere agents holding a fund, with the power, after they shall have determined what is a just liability, to pay the same over out of the fund. The assets are still the assets of the state. Being officers of the state, with the funds of the state in their possession, belonging to the state, and these suits being brought by alleged creditors of the state, the state is the real party in interest, and the suit is virtually against the state.

McHose v. Dutton, 55 Iowa, 728, 8 N. W. 667; *Brown University v. Rhode Island College*, 56 Fed. 55; *Yale College v. Sanger*, 62 Fed. 177; *Lowry v. Thompson*, 25 S. C. 416, 1 S. E. 141; *Board of Public Works v. Gannt*, 76 Va. 455; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608.

These suits fall into that class of cases where the action of the court will have the effect of depriving the state of funds or property in its possession, which class of cases comes into conflict with the 11th Amendment.

Louisiana v. Jumel, supra; *Farmers' Nat. Bank v. Jones*, 105 Fed. 459; *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; *Brown University v. Rhode Island College*; *Lowry*
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v. Thompson and Board of Public Works v. Gannt,—supra.

It was competent for the state to couple with its consent to be sued the condition that the suit be brought in one of its own courts.

Chandler v. Dix, 194 U. S. 590, 48 L. ed. 1129, 24 Sup. Ct. Rep. 766; Maury v. Com. 92 Va. 310, 23 S. E. 757.

The highest court of the state is, except in the matter of contracts, the ultimate tribunal to determine the meaning of its statutes.

Bachtel v. Wilson, 204 U. S. 36, 51 L. ed. 357, 27 Sup. Ct. Rep. 243.

The Federal courts will follow, in this case, the decision of the supreme court of the state of South Carolina, construing the act of 1907, unless this court shall take the view that the act of 1907 created a contract with the claimants, creditors of the state, which the state cannot, by subsequent legislation, interfere with.

Elmendorf v. Taylor, 10 Wheat. 152, 6 L. ed. 289; Jefferson Branch Bank v. Skelly, 1 Black, 436, 17 L. ed. 173; McCullough v. Virginia, 172 U. S. 102, 43 L. ed. 382, 19 Sup. Ct. Rep. 134; Mobile Transp. Co. v. Mobile, 187 U. S. 480, 47 L. ed. 267, 23 Sup. Ct. Rep. 170; Jack v. Kansas, 199 U. S. 372, 50 L. ed. 234, 26 Sup. Ct. Rep. 73, 4 A. & E. Ann. Cas. 689; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Louisville Trust Co. v. Cincinnati, 22 C. C. A. 334, 47 U. S. App. 36, 76 Fed. 296; DeSaussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Lewis's Sutherland, Stat. Constr. ¶ 313.

Where the Federal courts are not by rule bound to follow the decisions of the state courts in cases falling within the exception, they will consider such decisions upon the point in question, and will incline to an agreement with the state courts.

Mead v. Portland, 200 U. S. 163, 50 L. ed. 420, 26 Sup. Ct. Rep. 171; Blair v. Chicago, 201 U. S. 400, 50 L. ed. 801, 26 Sup. Ct. Rep. 427; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695; Chicago Theological Seminary v. Illinois, 188 U. S. 662, 47 L. ed. 641, 23 Sup. Ct. Rep. 386; Tampa Waterworks Co. v. Tampa, 199 U. S. 241, 50 L. ed. 170, 26 Sup. Ct. Rep. 23; Douglas v. Kentucky, 168 U. S. 502, 42 L. ed. 557, 18 Sup. Ct. Rep. 199.

The state is a necessary and indispensable party.

Gregory v. Stetson, 133 U. S. 586, 33 L. ed. 794, 10 Sup. Ct. Rep. 422; Dan. Ch. Pl. & Pr. 246; Minnesota v. Northern Securities Co. 184 U. S. 235, 46 L. ed. 515, 22 Sup. Ct. Rep. 308; Garzot v. Rios de Rubio, 209 U. S. 297, 52 L. ed. 800, 28 Sup. Ct. 53 L. ed.

Rep. 548; Cunningham v. Macon & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; Christian v. Atlantic & N. C. R. Co. supra; Vetterlein v. Barnes, 124 U. S. 169, 31 L. ed. 400, 8 Sup. Ct. Rep. 441; Perry, Tr. 3d ed. § 595; Story, Eq. Pl. 10th ed. §§ 149, 153, 207; 6 Pom. Eq. Jur. §§ 713, 891; Barney v. Baltimore, 6 Wall. 280, 18 L. ed. 825; Williams v. Bankhead, 19 Wall. 563, 571, 22 L. ed. 184, 187; United States v. Howland, 4 Wheat. 108, 4 L. ed. 526; Mallow v. Hinde, 12 Wheat. 194, 6 L. ed. 599; Chadbourn v. Coe, 45 Fed. 822; Ribon v. Chicago, R. I. & P. R. Co. 16 Wall. 450, 21 L. ed. 368; Shields v. Barrow, 17 How. 130, 15 L. ed. 158.

Mr. Daniel W. Rountree also argued the cause, and, with Messrs. Clifford L. Anderson and Thomas B. Felder, filed a brief for petitioners:

The commissioners are mere public agents, charged with the performance of an important public duty.

Florida C. R. Co. v. Schutte, 103 U. S. 118, 26 L. ed. 327; Littlefield v. Internal Improv. Fund (Littlefield v. Blotham) 117 U. S. 419, 29 L. ed. 930, 6 Sup. Ct. Rep. 793; Vose v. Reed, 1 Woods, 647, Fed. Cas. No. 17,011; Vose v. International Improv. Fund, 2 Woods, 647, Fed. Cas. No. 17,008; Union Trust Co. v. Southern Inland Nav. & Improv. Co. 130 U. S. 567, 32 L. ed. 1043, 9 Sup. Ct. Rep. 606; Florida v. Anderson, 91 U. S. 667, 690, 23 L. ed. 290, 460.

All persons materially interested, either legally or beneficially, in the subject-matter of the suit, are necessary parties to it.

Minnesota v. Northern Securities Co. 184 U. S. 199, 46 L. ed. 499, 22 Sup. Ct. Rep. 308.

The state is an indispensable party to the suit.

Florida v. Anderson, 91 U. S. 676, 23 L. ed. 297.

The construction by a court of last resort of a state, of a statute of that state, will be accepted by the Supreme Court of the United States as controlling.

Wilson v. North Carolina, 169 U. S. 593, 42 L. ed. 870, 18 Sup. Ct. Rep. 435; Hartford F. Ins. Co. v. Chicago, M. & St. P. R. Co. 175 U. S. 100, 44 L. ed. 89, 20 Sup. Ct. Rep. 33; Forsyth v. Hammond, 166 U. S. 520, 41 L. ed. 1100, 17 Sup. Ct. Rep. 665; Western U. Teleg. Co. v. Poe, 64 Fed. 14; State Railroad Tax Cases, 92 U. S. 575-618, 23 L. ed. 663-675; Suydam v. Williamson, 24 How. 427, 16 L. ed. 742; Fairfield v. Gallatin County, 100 U. S. 47, 25 L. ed. 544; Osborne v. Florida, 164 U. S. 650-656, 41 L. ed. 586-588, 17 Sup. Ct. Rep. 214; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 219, 41 L. ed. 694, 17 Sup. Ct. Rep. 305.

Mr. W. F. Stevenson also argued the cause, and, with Mr. D. S. Matheson, filed a brief for petitioners:

No decree can be rendered on any claim in suit that will not affect directly the pecuniary interest of South Carolina by either increasing or diminishing the amount of the surplus going to her. This brings the case squarely within the case of *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 388, 38 L. ed. 1020, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

The action is essentially against the state, and will result in the enforcement of the performance by the state of an alleged contract, which makes it a suit against the state.

Hagood v. Southern, 117 U. S. 67, 68, 29 L. ed. 810, 6 Sup. Ct. Rep. 608.

If the trust theory is correct, respondents are claiming under the trust, suing to enforce it, and represent an interest antagonistic to the state, which is also a *cestui que trust*, entitled to be heard as to any judgment for respondents which will affect the amount of its judgment.

Vetterlein v. Barnes, 124 U. S. 172, 31 L. ed. 401, 8 Sup. Ct. Rep. 441; *Sears v. Hardy*, 120 Mass. 529.

The state of South Carolina is a necessary party.

Gregory v. Stetson, 133 U. S. 586, 33 L. ed. 794, 10 Sup. Ct. Rep. 422; 1 Dan. Ch. Pl. & Pr. 246; *Shields v. Barrow*, 17 How. 130, 141, 142, 15 L. ed. 158, 161; *Coiron v. Millaudon*, 19 How. 114, 115, 15 L. ed. 575, 576; *California v. Southern P. Co.* 157 U. S. 249, 39 L. ed. 690, 15 Sup. Ct. Rep. 591; 1 Dan. Ch. Pl. & Pr. 4th Am. ed. 190; *West v. Randall*, 2 Mason, 181, Fed. Cas. No. 17,424; *Wormley v. Wormley*, 8 Wheat. 451, note, 5 L. ed. 659, note; *Mallow v. Hinde*, 12 Wheat. 198, 6 L. ed. 600.

Mr. A. S. Barnard argued the cause, and, with Mr. George B. Lester, filed a brief for respondent the Fleischmann Company:

The act of February 16, 1907, providing for the disposition of all the property connected with the South Carolina state dispensary, and to wind up its affairs, created a trust, and the funds in the hands of the commission are a trust fund, held by them for the benefit of the creditors of the state dispensary.

Perry, Tr. 5th ed. § 30; *Beach, Trusts & Trustees*, 1897 ed. § 3; *Sinking Fund Comrs. v. Walker*, 6 How. (Miss.) 143, 38 Am. Dec. 433; *Board of Liquidation v. McComb*, 92 U. S. 541, 23 L. ed. 628; *Chaffraix v. Board of Liquidation*, 11 Fed. 638; *Swasey v. North Carolina R. Co.* 1 Hughes, 17, Fed. Cas. No. 13,679; *Vose v. International Improv. Fund*, 2 Woods, 647, Fed.

Cas. No. 17,008; *Ford v. Delta & P. Land Co.* 164 U. S. 662, 675, 41 L. ed. 590, 595, 17 Sup. Ct. Rep. 230; *Baring v. Dabney*, 19 Wall. 1, 22 L. ed. 90; *Clews v. Jamieson*, 182 U. S. 461, 479, 480, 45 L. ed. 1183, 1192, 1193, 21 Sup. Ct. Rep. 845; *McKee v. Lamont*, 159 U. S. 317, 40 L. ed. 165, 16 Sup. Ct. Rep. 11; *Gibbs v. Green*, 54 Miss. 592; *Maenhaut v. New Orleans*, 2 Woods, 108, Fed. Cas. No. 8,939.

This case is not within the rule which requires this court to follow state decisions in the construction of state statutes.

Pease v. Peek, 18 How. 595, 15 L. ed. 518; *Burgess v. Seligman*, 107 U. S. 20, 33, 27 L. ed. 359, 365, 2 Sup. Ct. Rep. 10; *Carroll County v. Smith*, 111 U. S. 556, 28 L. ed. 517, 4 Sup. Ct. Rep. 539; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *Pleasant Twp. v. Aetna L. Ins. Co.* 138 U. S. 67, 34 L. ed. 864, 11 Sup. Ct. Rep. 215; *Great Southern Fire Proof Hotel Co. v. Jones*, 193 U. S. 533, 48 L. ed. 778, 24 Sup. Ct. Rep. 576; *Wicomico County v. Baneroft*, 203 U. S. 112, 51 L. ed. 112, 27 Sup. Ct. Rep. 21.

This is not a suit against the state.

Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden) 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Davis v. Gray*, 16 Wall. 220, 21 L. ed. 453; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Board of Liquidation v. McComb*, 92 U. S. 531, 541, 23 L. ed. 623, 628; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Cunningham v. Maeon & B. R. Co.* 109 U. S. 455, 27 L. ed. 995, 3 Sup. Ct. Rep. 292, 609; *Re Ayers*, 123 U. S. 492, 31 L. ed. 225, 8 Sup. Ct. Rep. 164; *Pennoyer v. McConnaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Swasey v. North Carolina R. Co. and Chaffraix v. Board of Liquidation*, supra; *Tindal v. Wesley*, 167 U. S. 220, 42 L. ed. 142, 17 Sup. Ct. Rep. 770; *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; *Ex parte Young*, 209 U. S. 158, 52 L. ed. 728, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441; *Western U. Teleg. Co. v. Myatt*, 98 Fed. 335; *Prentiss v. Atlantic Coast Line R. Co.* 211 U. S. 210, ante, 150, 29 Sup. Ct. Rep. 67; *Hagood v. Southern*, 117 U. S. 70, 29 L. ed. 811, 6 Sup. Ct. Rep. 608.

Is the state an indispensable party?

United States v. Peters, 5 Cranch, 136, 3 L. ed. 59; *Louisville, C. & C. R. Co. v. Leston*, 2 How. 551, 11 L. ed. 375; *Bank of United States v. Planters' Bank*, 9 Wheat. 904, 6 L. ed. 244; *Tindal v. Wesley*, supra; *Gunter v. Atlantic Coast Line R. Co.* 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep.

252; *Horn v. Lockhart*, 17 Wall. 579, 21 L. ed. 660; *Elmendorf v. Taylor*, 10 Wheat. 152, 166, 167, 6 L. ed. 289, 294; *Dandridge v. Washington*, 2 Pet. 370, 7 L. ed. 454; *Murray v. Wilson Distilling Co.* 164 Fed. 22; *Payne v. Pook*, 7 Wall. 425, 19 L. ed. 260; *Omaha Hotel Co. v. Wade*, 97 U. S. 13, 24 L. ed. 917.

Mr. T. Moultrie Mordecai also argued the cause, and, with Messrs. Frank Carter, Simeon Hyde, and H. C. Chedester, filed a brief for respondent the Wilson Distilling Company:

These are not suits against the state.

Louisiana v. Jumel, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Rolston v. Missouri Fund Comrs. (Rolston v. Crittenden)* 120 U. S. 390, 30 L. ed. 721, 7 Sup. Ct. Rep. 599; *Osborn v. Bank of United States*, 9 Wheat. 739, 6 L. ed. 204; *Board of Liquidation v. McComb*, 92 U. S. 531, 23 L. ed. 623; *Pennoyer v. McConaughy*, 140 U. S. 1, 35 L. ed. 363, 11 Sup. Ct. Rep. 699; *Davis v. Gray*, 16 Wall. 203, 21 L. ed. 447; *Tomlinson v. Branch*, 15 Wall. 460, 21 L. ed. 189; *Litchfield v. Webster County*, 101 U. S. 773, 25 L. ed. 925; *Allen v. Baltimore & O. R. Co.* 114 U. S. 311, 29 L. ed. 200, 5 Sup. Ct. Rep. 925, 962; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Tindal v. Wesley*, 167 U. S. 204, 42 L. ed. 137, 17 Sup. Ct. Rep. 770; *United States v. Lee*, 106 U. S. 218, 27 L. ed. 181, 1 Sup. Ct. Rep. 240; *Ex parte Young*, 209 U. S. 158, 52 L. ed. 728, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441.

The United States courts are not bound in this proceeding to follow the decision of the state supreme court, rendered in a case instituted after this proceeding was begun, and after the question involved had been passed upon by the United States circuit court in such proceeding.

Burgess v. Seligman, 107 U. S. 33, 27 L. ed. 365, 2 Sup. Ct. Rep. 10; *Pease v. Peck*, 18 How. 599, 15 L. ed. 520; *Louisville & N. R. Co. v. Palmes*, 109 U. S. 244, 27 L. ed. 922, 3 Sup. Ct. Rep. 193; *Buncombe County v. Tommey*, 115 U. S. 122, 29 L. ed. 305, 5 Sup. Ct. Rep. 626, 1186; *Gibson v. Lyon*, 115 U. S. 439, 29 L. ed. 440, 6 Sup. Ct. Rep. 129; *Carroll County v. Smith*, 111 U. S. 557, 28 L. ed. 518, 4 Sup. Ct. Rep. 539; *Anderson v. Santa Anna Twp.* 116 U. S. 356, 29 L. ed. 633, 6 Sup. Ct. Rep. 413; *Bolles v. Brimfield*, 120 U. S. 759, 30 L. ed. 786, 7 Sup. Ct. Rep. 736; *Bucher v. Cheshire R. Co.* 125 U. S. 555, 31 L. ed. 795, 8 Sup. Ct. Rep. 974; *German Sav. Bank v. Franklin County*, 128 U. S. 526, 32 L. ed. 519, 9 Sup. Ct. Rep. 159; *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 166 U. S. 83, 41 L. ed. 925, 17 Sup. Ct. Rep. 488; 53 L. ed.

Wade v. Travis County, 174 U. S. 499, 43 L. ed. 1060, 19 Sup. Ct. Rep. 715; *Warburton v. White*, 176 U. S. 495, 44 L. ed. 559, 20 Sup. Ct. Rep. 404; *Flanigan v. Sierra County*, 196 U. S. 553, 49 L. ed. 597, 25 Sup. Ct. Rep. 314; *Yazoo & M. Valley R. Co. v. Adams*, 181 U. S. 580, 45 L. ed. 1011, 21 Sup. Ct. Rep. 729.

The state is not a necessary or indispensable party.

Cunningham v. Maine & B. R. Co. 109 U. S. 446, 27 L. ed. 992, 3 Sup. Ct. Rep. 292, 609; *Barney v. Baltimore*, 6 Wall. 280, 18 L. ed. 825; *Shields v. Barrow*, 17 How. 130, 15 L. ed. 158; *Davis v. Gray*, supra; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 43 S. C. 154, 20 S. E. 1002; *Re Ayers*, 123 U. S. 500, 31 L. ed. 228, 8 Sup. Ct. Rep. 164; *Lord v. Bates*, 48 S. C. 95, 26 S. E. 213; *Arthur v. Hughes*, 4 Beav. 506; *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260; *Williams v. Bankhead*, 19 Wall. 571, 22 L. ed. 187; *Chadbourn v. Coe*, 45 Fed. 822; *Ribon v. Chicago, R. I. & P. R. Co.* 16 Wall. 450, 21 L. ed. 368.

When a government becomes a partner in any trading company it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen.

Bank of United States v. Planters' Bank, 9 Wheat. 904, 6 L. ed. 244. See also *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737.

The circuit court had jurisdiction of the subject-matter and of the parties to these suits.

Gunter v. Atlantic Coast Line R. Co. 200 U. S. 273, 50 L. ed. 477, 26 Sup. Ct. Rep. 252; *Chaffraix v. Board of Liquidation*, 11 Fed. 638.

The fund in the commissioners' hands constitutes a trust fund.

McKee v. Lamon, 159 U. S. 317, 40 L. ed. 165, 16 Sup. Ct. Rep. 11; *Clews v. Jamieson*, 182 U. S. 461, 45 L. ed. 1183, 21 Sup. Ct. Rep. 845; *Baring v. Dabney*, 19 Wall. 1, 22 L. ed. 90; *Maenhaut v. New Orleans*, 2 Woods, 108, Fed. Cas. No. 8,939; *Case v. Beauregard (Case v. New Orleans & C. R. Co.)* 101 U. S. 688, 25 L. ed. 1004; *Board of Liquidation v. McComb*, supra; 1 Dan. Ch. Pl. & Pr. p. 243. See also *Piqua Branch of State Bank v. Knoop*, 16 How. 369, 14 L. ed. 977; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Davis v. Gray*, supra.

Mr. Justice White delivered the opinion of the court:

The state of South Carolina, in the year

1892, assumed the exclusive management of all traffic in liquor. To carry out this purpose a board of control was created, composed of the governor, the comptroller general, and the attorney general, clothed with power to supervise the system of liquor traffic which the act embodied, and to adopt general rules and regulations pertaining to the subject. All liquor intended for consumption was required to be bought by an officer styled a commissioner, upon whom was cast the duty of distributing the liquor to local officials, known as dispensers. The funds to initiate the business were drawn from the state treasury. The general features of the act of 1892 were preserved in a statute approved January 2, 1895. S. C. Acts 1895, p. 721. This last-mentioned act is set out in full in a marginal note to the opinion in *Scott v. Donald*, 165 U. S. 58, 41 L. ed. 632, 17 Sup. Ct. Rep. 265. In that case it was recognized that the act of 1895 provided for the purchase by the state, through its officers or agents, of all liquor to be sold in South Carolina, and although the act was held to be repugnant to the Constitution of the United States, the ruling was not based upon the conception that there was a want of governmental power in the state to become the sole purchaser and seller within its borders of liquor, but exclusively upon the ground that particular provisions contained in the statute discriminated against the products of other states. A new state Constitution was ratified, which went into effect from and after December 31, 1895. Therein it was provided as follows:

158] *Article 8, § 11, Constitution, 1895.

"In the exercise of the police power the general assembly shall have the right to prohibit the manufacture and sale and retail of alcoholic liquors or beverages within the state. The general assembly may license persons or corporations to manufacture and sell and retail alcoholic liquors or beverages within the state, under such rules and restrictions as it deems proper; or the general assembly may prohibit the manufacture and sale and retail of alcoholic liquors and beverages within the state, and may authorize and empower state, county, and municipal officers, all or either, under the authority and in the name of the state, to buy in any market and retail within the state liquors and beverages in such packages and quantities, under such rules and regulations, as it deems expedient: Provided, that no license shall be granted to sell alcohol beverages in less quantities than one-half pint, or to sell them between sundown and sunrise, or to sell them to be drunk on the premises: And provided, further, that the general as-

sembly shall not delegate to any municipal corporation the power to issue licenses to sell the same."

Article 11, § 12, Constitution, 1895.

"All the net income to be derived by the state from the sale or license for the sale of spirituous, malt, vinous, and intoxicant liquors and beverages, not including so much thereof as is now or may hereafter be allowed by law to go to the counties and municipal corporations of the state, shall be applied annually in aid of the supplementary taxes provided for in the sixth section of this article; and if, after said application, there should be a surplus, it shall be devoted to public school purposes, and apportioned as the general assembly may determine: Provided, however, that the said supplementary taxes shall only be levied when the net income aforesaid from the sale or license for the sale of alcoholic liquors or beverages are not sufficient to meet and equalize the deficiencies for which the said supplementary taxes are provided."

*Under these provisions, in 1896 (S. C. Acts 1896, p. 123) a new law concerning the liquor traffic was enacted. The statute provided for the election by the general assembly of a state board of control, clothed with power to purchase all liquors for use in the state. A state commissioner, to be appointed by such board, was empowered to furnish liquors to the various local dispensaries provided for in the statute, which were under the immediate authority of county boards having power to appoint officers, known as dispensers, to sell liquors direct to consumers. The act of 1896 was amended in particulars not necessary to be detailed, in March, 1897. In *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674, the contention that the act of 1896, as amended by the act of 1897, was repugnant to the commerce clause of the Constitution, of the United States, was passed upon. The limited ruling made in *Scott v. Donald* was stated. It was expressly held that the act in question was a manifestation of the police power of the state, and therefore was within the purview of the provisions of the act of Congress commonly referred to as the Wilson act. [26 Stat. at L. 313, chap. 728, U. S. Comp. Stat. 1901, p. 3177.] It was decided that, as the provisions in the prior act, which were held in *Scott v. Donald* to be discriminatory, had been eliminated, the act was not repugnant to the commerce clause of the Constitution in so far as it exerted the absolute control of the state over the purchase and sale of liquor within the state.

In *State ex rel. Hay v. Farnum*, 73 S. C. 165, 53 S. E. 83, decided in 1905, the su-

preme court of South Carolina interpreted the dispensary act of 1896, as amended, and expressly held that "the offices and place of business of the dispensary stand precisely in the same relation to the state as the state treasurer's office." And, speaking of dispensary system, it was said (p. 171):

"The state has undertaken to take charge of the entire liquor business of the state, and to prohibit any private person or corporation from dealing in liquor, except as they may find warrant in the Constitution and laws of the United States."

The law of 1896, as amended, was repealed on February 16, 1907. S. C. Acts 1907, p. 463. The repealing act did away 160]*with the general control of the traffic by means of a state board, and therefore abolished that board. Instead of the system previously existing, a more local one was substituted. The question whether liquor should be sold in a particular county was left to the voters of the county. If, as the result of an election, it was determined that the traffic in liquor should exist in the county, it was provided that such traffic should be exclusively carried on by means of county boards, appointed by the governor. Conformably to the Constitution, these boards were authorized to buy, "in the name of the state," liquors to be sold within the county, with a proviso, however, restricting the liability of the state to the sum of the assets of the local dispensary.

On the same day that the foregoing act was approved there was also approved a statute entitled, "An Act to Provide for the Disposition of All Property Connected with the State Dispensary, and to Wind up Its Affairs." The text of this act is in the margin.† Summarily stated, the act created 161]a commission to *consist of five members, to be appointed by the governor, who were required to give bond to the state for the faithful discharge of their duties. To

this body was given the control of all the funds, assets, and property, other than real estate, of the state dispensary. It was made the duty of the commission to investigate all facts concerning outstanding claims against the state dispensary, and, for that purpose, to employ counsel as might be approved by the attorney general, and such expert accountants and clerks as were necessary, and to make full report to the governor on the subject. The commission was also authorized, after investigation, to pay, from the proceeds of the dispensary assets which might come into its hands, such claims as were found to be valid, and to turn over the surplus to the state treasury.

The commission thus authorized was appointed and began the discharge of its duties. To this end a list of the outstanding claims asserted to be due was made up, and a hearing concerning their amount and validity was commenced. For the purpose *of this hearing a call was made by the[162 commission for the production by the parties asserting claims of original books of entry, showing the previous transactions with the state from which the claims arose, and the production for oral examination of certain witnesses. The right of the commission to enter upon this investigation was disputed by some of the claimants, and they refused to comply with the call made for books and papers and the production of witnesses. Thereupon certain of such claimants invoked the authority of the circuit court of the United States for the district of South Carolina by the commencement of the suits which are now before us. The first was brought against the members of the commission by the Wilson Distilling Company, a New Jersey corporation, having its principal place of business in the city of Baltimore, the bill being filed not only on its own account but on behalf of all others who might join in the cause. The complainant

†An Act to Provide for the Disposition of all Property Connected with the State Dispensary, and to Wind Up Its Affairs.

Section 1. Be it enacted by the general assembly of the state of South Carolina, that immediately upon the approval of this act the governor shall appoint a commission of well-known business men, consisting of five members, none of whom shall be members of the general assembly, to be known as the state dispensary commission, who shall each give bond for the faithful performance of the duties required in the sum of \$10,000.

Sec. 2. Said commission shall immediately organize by the election of a chairman and secretary from their number.

Sec. 3. It shall be the duty of said commission to close out the entire business and property of the state dispensary except real estate, and including stock in the

several county dispensaries, by disposing of all goods and property connected therewith, by collecting all debts due, and by paying from the proceeds thereof all just liabilities at the earliest date practicable. Said commission shall be at liberty to make such disposition upon such terms, times, and conditions as their judgment may dictate: Provided, that no alcoholic liquor or beers shall be disposed of within this state except to county dispensary boards, and all liquors illegally bought by the present management may be returned to the persons, firms, or corporations from whom purchased, and, for determining the legality of said purchases, they are hereby authorized and directed to investigate fully the circumstances surrounding all contracts for liquors, and to employ such assistant counsel as may be approved by the attorney general, and such expert accountants and stenographers and

in the second suit, which was also against the members of the commission, both officially and individually, was the Fleischmann Company, an Ohio corporation. Without detailing the proceedings by which 163]*other claimants were joined as co-complainants in the Wilson suit, and by which relief sought in that case and in the Fleischmann Case—which was somewhat divergent in the earlier stage of the litigation—was made to harmonize, it suffices to say that, in their ultimate form, both bills of complaint rested the jurisdiction of the court upon diversity of citizenship, asserted the existence of a valid claim against the dispensary fund in favor of each complainant for liquor sold, and that each was entitled to be paid out of the fund in the hands of, and under the control of, the commission. The bills also proceeded upon the theory that the act of 1907 had placed the assets of the dispensary in the hands of the commission as a trust fund for the benefit of all creditors having valid claims against the fund, which they were entitled to enforce by judicial action against the commission, without the presence of the state as a necessary party. Upon this assumption, and upon the averment that the members of the commission were refusing to discharge the duty cast upon them by the state law, of ascertaining and paying the just claims against the trust fund, an injunction was prayed, restraining the commission from in any way disposing of the fund until the claims of the complainants were paid. A receiver was also asked for the purpose of taking charge of the assets, paying the

valid claims against the same, including those of the complainants, and otherwise settling, under the direction of the court, the affairs of the state dispensary.

In both cases a temporary restraining order was allowed, and a rule was granted to show cause why an injunction *pendente lite* should not be made and a receiver appointed as prayed. Again omitting detail as to the form of the pleadings, it suffices to say that, by return to the rules to show cause and by answers, the commission, besides traversing most of the averments contained in the bills, set up in substance that each suit was against the state, and that the state had not consented to be sued, and could not be impleaded without violating the 11th Amendment to the Constitution. It was expressly averred that the assets and property in the hands of the commission belonged to *the state, were 164 held by the commission as its agent, and could not be administered without the presence of the state, which was an indispensable party to the cause. The claim was also made that the commission was a judicial tribunal, and was not subject to be restrained by an injunction from a Federal court.

After the allowance of the temporary restraining order in the Fleischmann Case, various banks in which the commission had deposited to its credit dispensary funds were made parties defendant, and enjoined from paying out such funds except upon the order of the court. Subsequently, in the same case, after a hearing on January 29, 1908, upon the rule to show cause, an order

any other person or persons the commission may deem necessary for the ascertainment of any fact or facts connected with said state dispensary and its management or control at any time in the past, and to take testimony, either within or without the state: Provided further, That all payments shall be made in gold and silver coin of the United States, in United States currency, or in national bank notes.

Sec. 4. The compensation of each member of said commission shall be \$5 per day for each day actually employed about the business, and actual expenses for the time engaged: Provided, That they shall receive no compensation for services rendered on this commission after January 1, 1908.

Sec. 5. The said commission shall pay to the state treasurer, after deducting their compensation and other expenses allowed by this act, all surplus funds on hand after paying all liabilities.

Sec. 6. The said commission is hereby authorized to employ such bookkeepers, accountants, clerks, assistants, and employees as they may deem necessary, and to contract with them at the time of employment for their compensation,

Sec. 7. The said commission shall submit to the governor, at the earliest day practicable, a complete inventory of all property received by them, with a statement of the liabilities of the state dispensary, and, as soon as the affairs are liquidated, a report in full of their actings and doings.

Sec. 8. That said commission shall have full power and authority to investigate the past conduct of the affairs of the dispensary, and all the power and authority conferred upon the committee appointed to investigate the affairs of the dispensary, as prescribed by an act to provide for the investigation of the dispensary, approved 24th January, A. D. 1906, be, and hereby is, conferred upon the commission provided for under this act: Provided, That, for the purpose of the investigation of the affairs of the dispensary, as herein provided, each and every member of said commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole commission.

Approved the 16th day of February, A. D., 1907.

was entered on March 2, 1908, continuing the temporary restraining order until the final determination of the suit. The motion for the appointment of a receiver was, however, continued without prejudice. The opinion of the court is reported in 161 Fed. 152. A like order was also contemporaneously entered in the Wilson Case, and in that case, likewise, an order was entered on March 5, 1908, making the banks who had the dispensary funds on deposit parties defendant, and restraining them from paying them out. In this connection it is to be remarked that the banks who were thus restrained in both cases, as security for the dispensary funds placed with them by the commission, had each delivered to that body bonds, stock, and other collaterals, and the same had been by the commission deposited in the state treasury.

After the submission, and before the court had decided the rules to show cause, the legislature of South Carolina passed two statutes concerning the state dispensary fund. By the first the winding-up act of 1907 was amended by increasing the compensation of the commission, by directing the sale of the dispensary real estate, etc., and the payment out of the fund of a certain judgment for damages. The 11th section of the act was amended so as to read as follows:

"Sec. 11. That said commission is hereby declared to possess full power to pass upon, fix, and determine all claims against the state growing out of dealings with the dispensary, and to *pay for the state any and all just claims which have been submitted to and determined by it, and no other, out of the assets of the dispensary which have been, or may hereafter be, collected by said state dispensary commission: Provided, that each and every person, firm, or corporation presenting a claim or claims to said commission shall have the right to appeal to the supreme court as in cases at law: Provided further, that notice of intention to appeal shall be served upon said commission within ten days of rendition of judgment by the said commission, and the practice in taking all steps in perfecting the appeal shall conform to the practice in other appeals for the supreme court."

By the second act the commission was directed to pay \$15,000 into the state treasury, to be used for the expenses of criminal prosecutions for violations of the laws relating to "the late institution called the state dispensary." The commissioners refused to pay out of the dispensary funds in their hands the \$15,000 directed by the last-mentioned statute, on the ground that they were under an injunction from the circuit court of the United States. Thereupon,

the attorney general of the state began proceedings by mandamus in the supreme court of South Carolina to compel compliance with the act. The case was decided on March 14, 1908. The court, in an elaborate, careful, and perspicuous opinion, reviewed the dispensary legislation, expressly held that the statutes governing the same made the state the purchaser of the liquors bought for consumption, and, therefore, that those who had sold the liquor to the state dispensary had contracted with the state, and with the state alone; that all the assets and property of the dispensary belonged to the state, and that the commissioners appointed to wind up and liquidate its affairs were state officers, intrusted with a public duty on behalf of the state. As a result of these conclusions it was determined that the circuit court of the United States was without jurisdiction to enjoin the commissioners, as state officers, from disposing of the state property as the state statute directed, *and therefore a right[166] existed to a peremptory mandamus. The issuing of the peremptory writ, however, was left in abeyance, the court—doubtless for the purpose of avoiding an unseemly conflict with the circuit court—saying that it would not assume "that the construction which it has placed upon the state Constitution and the statutes in question will be disregarded by the Federal court." 79 S. C. 316, 60 S. E. 928. A few days before this decision was announced, and in consequence of representations made to the circuit court that a bill had been introduced in the general assembly of South Carolina, directing the commission to turn into the state treasury the dispensary funds, the circuit court appointed the members of the commission temporary receivers of the fund, with directions to hold the same subject to the orders of the court. Subsequently, on March 9, 1909, the circuit court entered an order, consolidating the two causes, and appointing three persons receivers of the dispensary fund, two of those thus appointed being at that time, or having been, shortly prior thereto, members of the commission.

Following the decision of the supreme court of South Carolina in the case last referred to, and on March 27, 1908, the defendants in the consolidated causes filed a motion "for an order revoking the former orders of the said court, granting an injunction, and appointing receivers, on the ground that the supreme court of South Carolina has now construed the statutes of South Carolina and the Constitution of the said state, under which the complainants claim their rights, and has construed it differently from the said circuit court's construction, which construction, if followed, ousts the jurisdiction of the circuit

court." The motion was denied. 161 Fed. 162. Thereafter the Wilson Distilling Company, by leave, filed in the consolidated cause an amendment to its bill, setting up the claim that the "acceptance by the defendants constituting the said dispensary commission, as trustees, of the trust created by said act [of February 16, 1907], and the acceptance by the complainants and the other creditors of said state dispensary, as 167] *cestuis *que trust*, of the benefits of the trust so created, constituted a valid, binding, and irrevocable contract within the meaning and protection of the Constitution of the United States, and of article 1, § 10, thereof, the protection whereof is hereby expressly claimed by your orators." Following said averment it was alleged that the act approved February 24, 1908, heretofore referred to, was repugnant to article 1, § 10, of the Constitution of the United States, and to the 14th Amendment, "for that same impairs, and attempts to impair, the obligation of the contract set out in the last preceding paragraph hereof, and deprives and attempts to deprive the complainants of their property without due process of law, and denies, and attempts to deny, to them the equal protection of the law, in violation of the aforesaid provisions of the Constitution of the United States." In a separate paragraph it was averred that the object and purpose of the institution of the mandamus suit in the state court "was to hinder, delay, and defeat the enforcement by this court of the trust created by said act of 1907, and the administration of said trust by this court in the above-entitled causes." The circuit court, on its own motion, made an order directing the payment to the attorney general of South Carolina of the sum of \$15,000 upon his application therefor, and modified the former orders of the court to the extent necessary to permit the receivers to make such payment.

To reverse the interlocutory orders granting an injunction *pendente lite* and appointing receivers, an appeal was prosecuted to the circuit court of appeals for the fourth circuit by the three members of the commission then in office, officially and individually, and by certain of the banks which had been made defendants. The circuit court of appeals on September 15, 1908, affirmed the action of the lower court. 164 Fed. 1. This writ of certiorari was thereupon allowed.

Underlying all the contentions made in the cause is the fundamental question whether the suits were, in substance, suits against the state, and therefore beyond the 168] jurisdiction of the *circuit court, because of the express prohibition of the 11th Amendment. As that question is the pivotal one, we come at once to its consideration.

If we consider as an original question the provisions of the Constitution of South Carolina on the subject, and the terms of the statutes of that state, establishing the dispensary system, we think it is apparent that the purchases which were made by the state officers or agents, of liquor for consumption in South Carolina, were purchases made by the state for its account, and, therefore, that the relation of debtor and creditor arose from such transactions between the state and the persons who sold the liquor. And this irresistible conclusion, arising from the very face of the Constitution and statutes, is removed beyond all possible controversy by the decision of this court in *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674, and by the construction given by the supreme court of South Carolina to the state statute prior to the commencement of this litigation, in *State ex rel. Hay v. Farnum*, 73 S. C. 165, 53 S. E. 83, as well as by the convincing opinion expressed by that court in reviewing the state statutes in the mandamus case already referred to, as reported in 79 S. C. 316, 60 S. E. 928.

We could not, therefore, sustain the exercise of jurisdiction by the circuit court without in effect deciding that the state can be compelled, by compulsory judicial process, to perform a contract obligation. It is certain that, at least by indirection, the bills of complaint sought to compel the state to specifically perform alleged contracts with the vendors of liquor by paying for liquor alleged to have been supplied. But it is settled that a bill in equity to compel the specific performance of a contract between individuals and a state cannot, against the objection of the state, be maintained in a court of the United States. Thus, in *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608, where, in suits brought in a court of the United States against officers and agents of the state of South Carolina, the holders of certain revenue scrip of the state endeavored to enforce the redemption thereof according to the terms of the statute in pursuance of which the scrip was issued, which statute was alleged *to constitute an[169 irrevocable contract, the court said (p. 67):

"Though not nominally a party to the record, it [the state] is the real and only party in interest, the nominal defendants being the officers and agents of the state, having no personal interest in the subject-matter of the suit, and defending only as representing the state. And the things required by the decrees to be done and performed by them are the very things which, when done and performed, constitute a performance of

the alleged contract by the state. The state is not only the real party to the controversy, but the real party against which relief is sought by the suit; and the suit is, therefore, substantially within the prohibition of the 11th Amendment to the Constitution of the United States, which declares that 'the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.'"

In the subsequent case of *Christian v. Atlantic & N. C. R. Co.* 133 U. S. 233, 33 L. ed. 589, 10 Sup. Ct. Rep. 260, by bill in equity, filed in a court of the United States, it was attempted to reach dividends on the stock of the defendant railroad company, and apply such dividends to the payment of the bonds issued by the state of North Carolina, and for the sale of stock owned and held by the state. It was contended for the complainants that the proceeding was *in rem* against the stock, to enforce a right in and to it resulting from an alleged contract by which the stock was pledged for the benefit of the complainants, although the stock was not actually delivered to the alleged pledgee. It was held that the mere declaration by the state in a statute, that stock held by it was pledged, did not technically operate to create a pledge. Upon the hypothesis that a mortgage of the stock might have been effected, it was said (p. 243):

"The proceeding is a suit against the party to obtain, by decree of court, the benefit of the mortgage right. But where the mortgagor in possession is a sovereign state, no 170]such proceeding *can be maintained. The mortgagee's right against the state may be just as good and valid, in a moral point of view, as if it were against an individual. But the state cannot be brought into court or sued by a private party without its consent. It was at first held by this court that, under the Constitution of the United States, a state might be sued in it by a citizen of another state, or of a foreign state; but it was declared by the 11th Amendment that the judicial power of the United States shall not be construed to extend to such suits. *New Hampshire v. Louisiana*, 108 U. S. 76, 37 L. ed. 656, 2 Sup. Ct. Rep. 176; *Louisiana v. Jumel*, 107 U. S. 711, 27 L. ed. 448, 2 Sup. Ct. Rep. 128; *Mayre v. Parsons*, 114 U. S. 325, 29 L. ed. 205, 5 Sup. Ct. Rep. 932, 962; *Hagood v. Southern*, 117 U. S. 52, 29 L. ed. 805, 6 Sup. Ct. Rep. 608; *Re Ayers*, 123 U. S. 443, 31 L. ed. 216, 8 Sup. Ct. Rep. 164."

The complainants below, however, insist that, if it be conceded that, under the state dispensary statutes, the relation of the 53 L. ed.

state and the sellers of liquor was that of debtor and creditor, the general assembly of South Carolina, in the winding-up act of 1907, intended to and did alter that relation, because the state, by that act, renouncing its control over the assets of the state dispensary, vested the commission with the title to such assets as trustees of an express trust, and constituted the creditors of the state who had furnished supplies for the use of the dispensary the beneficiaries of such trust. The argument being that hence the suits are not against the state, and therefore are not within the inhibition of the 11th Amendment. It cannot be and is not denied that the construction of the winding-up act, upon which the contention rests, is contrary to that entertained both by the general assembly of South Carolina and by the highest court of the state, but it is urged that the statutes of 1908, in respect to the dispensary fund, and the opinion of the supreme court, were, the former enacted and the latter announced, after this litigation was commenced. But if we assume that the legislation and decision referred to are not controlling, yet they are persuasive. Aside from this, however, considering the text of the winding up act, we are of opinion that there is no just ground for the conclusion that the state, in providing by that legislation for the liquidation of the affairs *of the [171 state dispensary, intended to divest itself of its right of property in the assets of that governmental agency, and to endow the commissioners with a right and title to the property which placed it so beyond the control of the state as to authorize a judicial tribunal to take the assets of the state out of the hands of those selected to manage the same, and, by means of a receiver, to administer such assets as property affected by a trust, irrecoverable in its nature, and thus to dispose of the same without the presence of the state.

An interpretation of the act in question, producing such an abnormal and extraordinary result as that just stated, cannot be adopted merely because it might be sustained by strained implications. On the contrary, such interpretation could only be warranted if exacted by the most express language, or by such overwhelming implication from the text as would leave no room for any other reasonable construction. Coming to consider the act, it is patent that neither by express language nor by necessary implication does it convey the meaning which the proposition seeks to give to it. In form the winding-up statute is but an ordinary act of legislation, providing, in the interest of the state, for an examination and liquidation of the claims against the dispensary, and their payment out of

the state assets when liquidated, so as to secure the state against unjust claims and preserve its interest in the fund. The act does not, in express terms, make any change, in the theretofore existing relation of debtor and creditor between the state and the vendors of liquor under the state dispensary act. The conception that an irrevocable trust was intended to be created is negated by the requirement in the 1st section, for the giving by each member of the commission of a bond for the sum of \$10,000, conditioned for the faithful performance of the duties imposed. So also the wide discretion vested in the commission by § 3, empowering it to arrive at a determination as to the legality of purchases of liquor previously supplied by a full investigation of the circumstances "surrounding all contracts for liquors," and subjecting to the approval of the attorney [172]*general of the state the employment of counsel to make such investigation, precludes the inference of an intention on the part of the general assembly to terminate its control over the fund. And the fact that the legislature deemed that the statute was but an ordinary act of legislation over a subject designed to be continued within legislative control is, we think, clearly manifested in the 8th section of the act, which reads as follows:

"Sec. 8. That said commission shall have full power and authority to investigate the past conduct of the affairs of the dispensary, and all the power and authority conferred upon the committee appointed to investigate the affairs of the dispensary, as prescribed by an act to provide for the investigation (27) of the dispensary, approved January 24th, A. D. 1906, be, and hereby is, conferred upon the commission provided for under this act; provided, that for purposes of the investigation of the affairs of the dispensary as herein provided, each and every member of said commission be, and hereby is, authorized and empowered, separately and individually, or collectively, to exercise the power and authority herein conferred upon the whole commission."

The absence in the winding-up act of a provision conferring authority to review in the ordinary courts of justice the action of the commission concerning claims, instead of supporting the contention that the state had abandoned all property right in the funds placed in the hands of the commission, tends to a contrary conclusion, since it at once suggests the evident purpose of the state to confine the determination of the amount of its liability to claimants, to the officers or agents chosen by the state for that purpose. And it is elementary that, even if a state has consented to be sued in

its own courts by one of its creditors, a right would not exist in such creditor to sue the state in a court of the United States. *Smith v. Reeves*, 178 U. S. 436, 44 L. ed. 1140, 20 Sup. Ct. Rep. 919, and cases cited; *Chandler v. Dix*, 194 U. S. 590, 48 L. ed. 1129, 24 Sup. Ct. Rep. 766. The situation, therefore, was not changed as a result of the subsequent act of February 24, 1908, giving the creditors of the state, "whose [173] claims might be adversely acted upon by the commission, the right to a review in the supreme court of the state.

The decision of the questions arising upon this record, relating, as they do, to rights and remedies of a mere contract creditor of the state of South Carolina, is not in anywise controlled by the ruling in *South Carolina v. United States*, 199 U. S. 437, 50 L. ed. 261, 26 Sup. Ct. Rep. 110, 4 A. & E. Ann. Cas. 737, where; although recognizing that official dispensers of liquors under the laws of South Carolina were agents of the state, it was held (p. 463), "that the license taxes charged by the Federal government upon persons selling liquor are not invalidated by the fact that they are the agents of the state, which has itself engaged in that business." That case was concerned with the power of a state, by virtue of its legislation in regard to the sale and consumption of liquor, to destroy a pre-existing right of taxation possessed by the government of the United States. The ruling in this case but enforces an exemption of the state from suit in the courts of the United States upon its contract debts,—an exemption which existed by virtue of the Constitution of the United States at the time when the legislation was enacted out of which the alleged contracts arose.

Deciding, as we do, that the suits in question were suits against the state of South Carolina, and within the inhibition of the 11th Amendment, the decree of the Circuit Court of Appeals is reversed; the decree of the Circuit Court is also reversed, and the cause remanded to that court with instructions to dismiss the bills of complaint.

And it is so ordered.

The CHIEF JUSTICE took no part in the consideration or disposition of this case.

*W. J. MURRAY, John McSween, and [174] Avery Patton, as the State Dispensary Commission, Plffs. in Err.,

v.

STATE OF SOUTH CAROLINA EX REL.
A. W. RAY, Trustee.

(See S. C. Reporter's ed. 174, 175.)

This case is governed by the decision in
213 U. S.

Murray v. Wilson Distilling Co. ante, 742.

[No. 605.]

Argued and submitted February 26 and March 1, 1909. Decided April 5, 1909.

IN ERROR to the Supreme Court of the State of South Carolina to review a judgment awarding mandamus to compel the state dispensary commission of that state to pay a certain judgment out of the funds in its hands. Affirmed.

See same case below, 79 S. C. 316, 60 S. E. 928.

The facts are stated in the opinion.

Mr. W. F. Stevenson argued the cause, and, with Mr. D. S. Matheson, filed a brief for plaintiffs in error.

Mr. D. C. Ray submitted the cause for defendant in error.

Mr Justice White delivered the opinion of the court:

This is a proceeding in mandamus, commenced in the supreme court of the state of South Carolina, to compel the commission appointed under the authority of the act of the general assembly of that state, approved February 16, 1907, providing for the winding up of the affairs of the state dispensary, to comply with an act of the general assembly, approved February 24, 1908, requiring the payment of a certain judgment out of the funds in the hands of the commission. It was set up in justification of the refusal to obey the command of the statute that the commission was restrained and enjoined from paying out the fund by orders of the circuit court of the United States, made in the suits of the Wilson Distilling Company and the Fleischmann Company, the validity of which orders was the subject of consideration in the case of Murray v. Wilson Distilling Co. No. 625, this term, just decided. [213 U. S. 151, ante, 742, 29 Sup. Ct. Rep. 458.] Upon the 175] authority of the decision in 79 *S. C. 316, 60 S. E. 928, the supreme court of South Carolina held that the return of the commission was insufficient, and ordered a peremptory mandamus to issue. A writ of error was thereupon prosecuted from this court, upon the theory that the court below had declined to give full faith and credit to the orders and decrees of the circuit court of the United States in the cases mentioned.

The determination of the questions of a Federal nature arising in this case is controlled by the decision made in Murray v. Wilson Distilling Co. No. 625, this term, heretofore referred to, and, upon the au-

thority of that decision, the judgment of the Supreme Court of South Carolina is affirmed.

The CHIEF JUSTICE took no part in the consideration or disposition of this case.

ADAM T. SILER, McDougal Ferguson, and
Lew P. Tarlton, Constituting the Rail-
road Commission of Kentucky, Appts.,
v.

LOUISVILLE & NASHVILLE RAILROAD
COMPANY.

(See S. C. Reporter's ed. 175-198.)

Federal courts — jurisdiction — questions not all Federal.

1. A Federal circuit court, having properly obtained jurisdiction of a suit by reason of the Federal questions set up by the bill, has the right to decide all the questions in the case, even though it decides the Federal questions adversely to the party raising them, or even if it omits to decide them at all, but decides the case on local or state questions only.

[For other cases, see Courts, 509, in Digest Sup. Ct. 1908.]

Appeal — from circuit court — extending review beyond Federal questions.

2. The Federal Supreme Court, on appeal from the decision of a circuit court, may decide local questions only, and omit to decide the Federal questions which gave the lower court jurisdiction, or may decide such questions adversely to the party claiming their benefit.

[For other cases, see Appeal and Error, 4297-4300, in Digest Sup. Ct. 1908.]

Federal courts — jurisdiction — Federal question.

3. Allegations in a bill to enjoin the enforcement, as in violation of U. S. Const., 14th Amend., of an order of a state railroad commission, that such commission was not vested with power to make that order, do not defeat the jurisdiction of a Federal circuit court because, in such case, the action of the commission is not that of the state, where the bill sets up several entirely separate Federal questions, some of

NOTE.—On direct review in Federal Supreme Court of judgments of district or circuit courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

As to Federal question as conferring jurisdiction on United States courts—see notes to Bailey v. Mosher, 11 C. C. A. 308, and Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co. 35 C. C. A. 7.

As to powers of state railroad commission—see notes to Cleveland, C. C. & I. R. Co. v. Closser, 9 L.R.A. 754; Pensacola & A. R. Co. v. State, 3 L.R.A. 661; and Railroad Comrs. v. Oregon R. & Nav. Co. 2 L.R.A. 195.

which are directed to the invalidity, on various constitutional grounds, of the state statute under the supposed authority of which the order was made, and some of which are founded upon the terms of the order.

[For other cases, see Courts, V. c. 2; Pleading, 337-349, in Digest Sup. Ct. 1908.]

Railroad commission — power to make general tariff.

4. Power to make a general schedule of maximum rates for the transportation of all commodities, upon all railroads, to and from all points within the state, upon a general and comprehensive complaint that rates are too high, or upon like information of the commission itself, is not conferred upon the Kentucky railroad commission by Ky. act of March 10, 1900, authorizing such commission, upon complaint that the rates of any railway company are extortionate, or upon its own information to that effect, to fix a reasonable rate if, after hearing, it finds the rates to be extortionate.

Railroad commission — making general tariff — validity of specific rate.

5. A particular rate on a specific commodity, fixed by the Kentucky railroad commission, will not, for the purpose of sustaining its validity, be separated from the general order fixing a general schedule of maximum rates for all commodities, upon all railroads, to and from all points within the state, where the specific order was made after a general complaint was filed, and is itself a general order, and was made in the exercise of the totally unfounded assumption of the power under Ky. act of March 10, 1900, to make a general tariff of rates.

[No. 521.]

Argued February 24, 25, 26, 1909. Decided April 5, 1909.

APPPEAL from the Circuit Court of the United States for the Eastern District of Kentucky to review a decree enjoining the enforcement of an order of the Kentucky railroad commission, fixing maximum railroad rates. Affirmed.

Statement by Mr. Justice Peckham:

The Louisville & Nashville Railroad Company, hereinafter called the company, filed its bill July 25, 1906, in the circuit court of the United States for the eastern district of Kentucky, to enjoin the enforcement of a certain order made by the railroad commission of Kentucky (hereafter called the commission), providing what are 177] termed maximum rates on *the transportation of all commodities upon the railroad of the company to and from all points within the state. In its bill the company contended that the order as to rates of transportation was void, because it was, upon several stated grounds, in violation of certain named provisions of the Constitution

of the United States, among them being the claim that the rates were so low as to be confiscatory. It was also contended that the statute was an interference, in its results, with interstate commerce. The company also contended (among other objections not of a Federal nature) that the commission had no power to make the order in question under a correct and proper construction of the state statute of March 10, 1900, under which the commission assumed to exercise the power to fix the rates provided for in its order.

The circuit court decided that such act, hereinafter fully set forth, and called the "McChord act," and also the order of the railroad commission of Kentucky, complained of, irrespective of any claim that such order was confiscatory, violated the provisions of § 1 of the 14th Amendment to the Constitution of the United States, prohibiting any state from depriving any person of property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, and that the order of the commission, so far as it was applicable to the company, was, therefore, null and void, and the special commissioner who had been appointed to take evidence in the case as to the character of the rates, and other matters, was directed to so report. (The court decided the case upon the authority of *Louisville & N. R. Co. v. McChord*, 103 Fed. 216, reversed on other grounds in 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. Rep. 165.)

A final decree having been made pursuant to the decision of the court, the commission appealed directly to this court from such decree. The proceedings which led up to the decree from which the commission has appealed, without the court passing upon the allegation of the confiscatory nature of the rates, were by means of a stipulation made in order to facilitate matters, *by [178 reason of which the court decided, as matter of law, the order and act were both invalid, and it perpetually enjoined the enforcement of the order as to rates as well as the procuring of indictments against the officers of the company or the company itself.

The appellants disputed the jurisdiction of the circuit court upon grounds which are particularly stated in the opinion herein, and they took issue on many of the material allegations contained in the bill of complaint.

The facts upon which the questions in this case arise are as follows: The company was duly incorporated under an act of the general assembly of the state of Kentucky, approved March 5, 1850. It has a large mileage, amounting to over 1,200

miles within the state, and it operates its road within the state in connection with other portions of its road in other states, having altogether, in Kentucky and such other states, a mileage of over 4,000 miles. It claims to have a contract right to fix rates as provided in its charter, and it contends that the order of the commission violates that right as well as other rights protected by the Federal Constitution.

The state adopted a new constitution on the 28th day of September, 1891, by § 209 of which the present railroad commission of the state was established.

It is asserted by the company, though such assertion is denied, that up to March 10, 1900, the commission or its predecessors had not been empowered by constitutional or statutory provision to regulate or fix the rate of compensation which a railroad company might charge for the service of transporting freight or passengers over its lines in the state. On the above-mentioned date the general assembly enacted what is generally called the "McChord act," which is set forth in full in the margin.†

179] *The act has not been construed by the court of appeals, the highest court of the state of Kentucky, upon the question 180] *hereinafter discussed, nor has it been held valid as to all of its provisions, with regard to the constitution of the state or of the United States, by any court, state or Federal.

After its passage, and in December, 1904, and January and February, 1905, one Guenther, a citizen of Owensboro, Kentucky, made complaints to the commission, in which he complained generally (but without specifying any in particular) that the rates charged by the company, and also by the Illinois Central Railway, and the Louis-

ville, Henderson, & St. Louis Railway Company, on interstate freight to and from Owensboro, as compared with the rates on like freight to and from Evansville, Indiana, and on *intrastate freight* to and from points in Kentucky to and from Owensboro, were unjust and unreasonable. A petition in regard to interstate rates was subsequently filed with the Interstate Commerce Commission, where it is still pending and undetermined. As to regulating the local rates complained of, the commission then made no finding.

Afterwards, Guenther prepared an amended complaint, which was filed with the commission some time early in September, 1905, in which this company and all the other railroad companies operating lines in the state of Kentucky were made *defend-ants, and wherein it was alleged, in substance (and again without any details), that all local freights from and to all local points in the state of Kentucky, as fixed and charged by the defendant railroad companies on all classes of freight, were excessive, discriminatory, and extortionate, and he prayed the commission to revise and adjust the rates, not only in and out of Owensboro, but to revise and adjust the rates between all local points from and to every local point throughout the state of Kentucky.

Subsequently, on the 14th of September, 1905, three lumber companies of Louisville, Kentucky, tendered their petition to be made parties to the Guenther proceedings then pending, and they adopted the general language of his complaint with respect to all local rates in the state, and they added complaints in regard to the rates on logs, lumber, and cross ties.

On the 3d of October, 1905, the state of

†An Act to Prevent Railroad Companies or Corporations Owning and Operating a Line or Lines of Railroad, and Its Officers, Agents, and Employees, from Charging, Collecting, or Receiving Extortionate Freight or Passenger Rates in This Commonwealth, and to Further Increase and Define the Duties and Powers of the Railroad Commission in Reference Thereto, and Prescribing the Manner of Enforcing the Provisions of This Act, and Penalties for the Violation of its Provisions.

Sec. 1. When complaint shall be made to the railroad commission, accusing any railroad company or corporation of charging, collecting, or receiving extortionate freight or passenger rates, over its line or lines of railroad in this commonwealth, or when said commission shall receive information, or have reason to believe, that such rate or rates are being charged, collected, or received, it shall be the duty of said commission to hear and determine the matter as

speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employee of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument, or evidence offered by the parties as the commission may deem relevant; and, should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll, or compensation, which said railroad company or corporation may charge, collect, or receive for like services thereafter rendered. The rate, toll, or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent, or employee of the railroad company or corporation affected thereby, and shall be in full force and effect at

Kentucky, through certain attorneys, filed a petition to intervene on the part of the state in the Guenther proceedings, and sought to make the state a party complainant against all the railroad companies as defendants operating lines in the state. The petition was opposed by the company on the ground that the state had no standing in the proceedings, and certainly none by the attorneys named, but it was granted, and the state intervened as prayed for, and was made a party complainant so that it might prosecute the proceedings against the company and all the other carriers made defendants therein. The proceedings against the various railroad companies within the state were subsequently consolidated before the commission.

Before answering the complaints of Guenther, the lumber companies, and the state of Kentucky against the defendant company and the other railroad companies in that state, the company, in this case, duly objected to the proceedings before the commission on various grounds, among them, that the complaint did not state facts sufficient to constitute a cause of action against the company, and on the ground that the complaints were not sufficiently definite and specific, and that the complaints **182]***should show specifically what rates are claimed to be exorbitant, excessive, or extortionate, or what commodity or which communities the rates of the company discriminate against.

An objection was also duly and in season made, that the commission had no power to fix a general maximum rate or rates for all commodities from and to all points within the state, but that specific complaint should be made as to the particular rates complained of. The commission ruled that the entire subject of railroad rates was before

it, and decided to proceed with its investigation of such rates on all railroads and between all places and on all classes of commodities within the state of Kentucky.

By virtue of the complaints above adverted to, the proceedings against substantially all the railroad companies of the state were then continued, and the commission heard and decided the question of rates relating to this company, and some, but not all, of the other roads in the state.

The commission subsequently, and on July 20, 1906, promulgated its order making schedules for "Maximum Rates on Freight," and it applied one schedule, called "Kentucky Railroad Commission's Standard Tariff, No. 1," to this company and four other companies within the state, although, in the case of one of the four (the Chesapeake & Ohio Railroad Company), no notice of such tariff was ever served upon it. Another schedule, called "Kentucky Railroad Commission's Standard Tariff, No. 2," applied to the Illinois Central Railroad Company alone, and the commission left several railroad companies untouched by either of such schedules, or by any schedule, although they were defendants in this proceeding. In its opinion the commission stated as follows: "The several complaints, which, for convenience, have been consolidated and heard together in this investigation, raise for the first time in Kentucky the question of the reasonableness of all rates, for the transportation of all commodities, upon all railroads, to and from all points within the state."

Messrs. C. C. McCord and Robert H. Winn argued the cause, and, with Mr. James Breathitt, filed a brief for appellants:

The bills of both companies expressly

the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent, or employee thereof, charge, collect, or receive a greater or higher rate, toll, or compensation for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent, or employee, shall each be deemed guilty of extortion, and, upon conviction, shall be fined for the first offense in any sum not less than \$500, nor more than \$1,000, and, upon a second conviction, in any sum not less than \$1,000 nor more than \$2,000, and, for a third and succeeding conviction, in any sum not less than \$2,000 nor more than \$5,000.

Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight owned or operated by said railroad, and the

Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent, or employee shall have jurisdiction in all prosecutions against said officer, agent, or employee.

Sec. 3. Prosecutions under this act shall be by indictment.

Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

Sec. 5. In making said investigation, said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the state, and, upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasury for its payment.

Approved March 10, 1900.

aver that there was no state authority behind the action of the commission, thereby depriving the Federal court of all jurisdiction of these bills as a suit arising under the Constitution or the laws of the United States.

Louisville v. Cumberland Teleph. & Teleg. Co. 84 C. C. A. 151, 155 Fed. 729, 12 A. & E. Ann. Cas. 500; *Barney v. New York*, 193 U. S. 437, 48 L. ed. 739, 24 Sup. Ct. Rep. 502.

If the commission's order be regarded as a judicial order, then, under the rule of this and every other court, only so much of it as the commission was unauthorized to make would be void; if it be regarded as a legislative act, then, under the uninterrupted decisions of this court, only so much as is *ultra vires* would be void, and the remainder would stand as a valid act.

Berea College v. Kentucky, 211 U. S. 45, ante, 81, 29 Sup. Ct. Rep. 33; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

If the law itself under which the commission acted was uncertain or ambiguous as to the power and duty of the commission in the premises, which we deny, the fact that the commission has adopted a wise and comprehensive plan for the adjustment of these rates should commend itself to the court.

Knoulton v. Moore, 178 U. S. 76, 44 L. ed. 983, 20 Sup. Ct. Rep. 747.

Mr. Henry L. Stone argued the cause and filed a brief for appellee:

Neither the Interstate Commerce Commission nor the Kentucky Railroad Commission has been granted the power to make and fix schedules of maximum rates.

Corn Belt Meat Producers' Asso. v. Chicago, B. & Q. R. Co. 14 Inters. Com. Rep. 376.

The allegations of the complaints on which the order complained of herein was made and promulgated by the Commission were insufficient to give jurisdiction to or authorize the commission to make such order, or to prescribe and establish the maximum rates or standard tariff for all of appellee's lines, between all stations, for all distances, on all classes of freight in Kentucky, even if the commission was empowered to establish and prescribe such maximum rates or tariffs upon complaints of any character or under any circumstances.

State v. Chicago, M. & St. P. R. Co. 86 Iowa, 641, 53 N. W. 323.

53 L. ed.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The appellants deny the jurisdiction of the circuit court in this case. There is no diverse citizenship in the case of this particular company, and the jurisdiction must depend upon the presence of a Federal question. The bill filed by the company herein attacked the validity of the act of the legislature of Kentucky of March 10, 1900 (above set forth in full), on several grounds, as in violation of § 1 of the 14th Amendment. It was also averred that the act was a violation of § 4, article 4, of the Federal Constitution, in that it constituted an abandonment by the state of Kentucky of a republican *form of government, [191 in so far as it vested legislative, executive, and judicial powers of an absolute and arbitrary nature over railroad carriers in one body or tribunal, styled the railroad commission. The company also contended that the act was in violation of the Federal Constitution, on account of the enormous fines and penalties provided in the act as a punishment for a violation of any of its provisions; also that the enforcement of the act would operate to deprive the company of its property without due process of law, and would deny to it the equal protection of the laws, in violation of § 1 of article 14 of the Amendments to the Constitution of the United States. Other grounds of alleged invalidity of the act in question, as in violation of the Federal Constitution, are set up in the bill. The bill also contained the averment that the order of the railroad commission of Kentucky, in making a general schedule of maximum rates for the railroads mentioned in its order, was invalid, as unauthorized by the statute. This is, of course, a local or state question.

The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the circuit court jurisdiction, and, having properly obtained it, that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all, but decided the case on local or state questions only.

This court has the same right, and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit. *Horner v. United States*, 143 U. S. 570, 576, 36 L. ed. 266, 268, 12 Sup. Ct. Rep. 522; *Fallbrook Irrig. Dist. v. Bradley*, 164 U. S. 112, 154, 41 L. ed. 369, 387, 17 Sup. Ct. Rep. 56; *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S.

685, 694, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; *Burton v. United States*, 196 U. S. 283, 295, 49 L. ed. 482, 485, 25 Sup. Ct. Rep. 243; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163; *People's Sav. Bank v. Layman*, 134 Fed. 635; *Michigan R. Tax Cases*, 138 Fed. 223. Of course, the Federal question must 192] not be merely colorable or *fraudulently set up for the mere purpose of endeavoring to give the court jurisdiction. *Penn Mut. L. Ins. Co. v. Austin*, 168 U. S. 695, 42 L. ed. 630, 18 Sup. Ct. Rep. 223; *Michigan R. Tax Cases*, supra.

The character of some of the Federal question raised is such as to show that they are not merely colorable, and have not been fraudulently raised for the purpose of attempting to give jurisdiction to a Federal court.

The appellants, however, contend that the jurisdiction of the circuit court did not attach under the 14th Amendment, because of the allegations contained in the bill of the company, in which was contained an averment that the defendants below (the appellants here) had not been vested with the power, by either the Constitution of the state of Kentucky or by any act of its legislature, or by any law, to make and enter the order of July 20, 1906, complained of in the company's bill. The argument of the appellants is that, in order to violate the 14th Amendment, the action complained of must be under the authority of the state; and where the allegation of the bill was that "no power or authority had been vested in or conferred upon the appellants by the act of March 10, 1900, or by any law, to make or fix the rates complained of," such allegation swept away the foundation for the claim of Federal jurisdiction, inasmuch as, in such case, the action of the railroad commission was not the action of the state, and the principle decided in *Barney v. New York*, 193 U. S. 430, 437, 48 L. ed. 737, 739, 24 Sup. Ct. Rep. 502, was applicable.

If the averment as to the invalidity of the order of the commission were the only ground upon which a Federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the state, either by statute or in any other way, the objection might be good; but the bill sets up several Federal questions. Some of them are directed to the invalidity of the statute itself, on the ground that it violates various named provisions of the Federal Constitution in addition to and other than the 14th Amendment, while some of the other Federal ques- 193] tions are founded upon the *terms of the order made by the commission, under what is claimed by the commission to be the authority of the statute. The bill also sets

up several local questions arising from the terms of the order, and which the company claims are unauthorized by the statute. The various questions are entirely separate from each other. Under these circumstances there can be no doubt that the circuit court obtained jurisdiction over the case by virtue of the Federal questions set up in the bill, without reference to the particular violation set up in regard to the 14th Amendment.

Where a case in this court can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons. In this case we think it much better to decide it with regard to the question of a local nature, involving the construction of the state statute and the authority therein given to the commission to make the order in question, rather than to unnecessarily decide the various constitutional questions appearing in the record.

The commission has assumed the power under this statute of making what are termed general maximum rates for the transportation of all commodities, upon all railroads, to and from all points within the state, and this company is included in the general order made by the commission. This is an enormous power. Jurisdiction so extensive and comprehensive as must exist in a commission in the making of rates by one general tariff upon all classes of commodities upon all the railroads throughout the state is not to be implied. The proper establishment of reasonable rates upon all commodities carried by railroads, and relating to each and all of them within the state, depends upon so many facts, which may be very different in regard to each road, that it is plain the work ought not to be attempted without a profound and painstaking investigation, which could not be intelligently or with discrimination accomplished by wholesale. It may be matter of surprise to find such power granted to any commission, although it would seem *that it has in some[194 cases been attempted. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 495, 42 L. ed. 243, 251, 17 Sup. Ct. Rep. 896. In any event, the jurisdiction of the commission to establish all rates at one time, and in regard to all commodities, on all railroads in the state, on a general and comprehensive complaint to the commission that all rates are too high, or upon like information of the commission itself, must be conferred in plain language. The commission, as an extraordinary tribunal of the state, must have the power herein exercised conferred by a stat-

ute in language free from doubt. The power is not to be taken by implication; it must be given by language which admits of no other reasonable construction.

In this case we are without the benefit of a construction of the statute by the highest state court of Kentucky, and we must proceed in the absence of state adjudication upon the subject. Nevertheless, we are compelled to the belief that the statute does not grant to the commission any such great and extensive power as it has assumed to exercise in making the order in question.

The first section of the statute provides for a complaint being made to the commission, accusing the railroad company of charging or receiving extortionate freight or passenger rates over its lines of railroad in that state; or, if the commission receive information or have reason to believe that such rate or rates are being charged, it is its duty in either case to hear and determine the matter as speedily as possible. The commission is to give the company complained of not less than ten days' notice, and the notice must contain a statement of the nature of the complaint or matter to be investigated; and if the commission, after investigation of the complaint, or on its own information, determines that the company has been guilty of extortion, the commission is, in that case, authorized to make and fix "a just and reasonable rate, toll, or compensation, which said railroad company or corporation shall charge, collect, or receive for like service thereafter rendered." The whole section, it seems to us, proceeds upon the assumption that complaint *shall be made of some particular rate or rates being charged, or if, without formal complaint, the commission receives information or has reason to believe that such rate or rates are being charged, then the investigation is to go on in relation to those particular rates. We cannot for one moment believe that, under such language as is contained in the section, the commission is clothed with jurisdiction, either upon complaint or upon its own information, to enter upon a general investigation of every rate upon every class of commodities carried by all the roads of the state from or to all points therein, and make a general tariff of rates throughout the state, such as has been made in this case. No such power was given to the Interstate Commerce Commission. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.* 167 U. S. 479, 42 L. ed. 243, 17 Sup. Ct. Rep. 896, supra. As the express power was not given in so many words to the commission, this court held that it could not be implied.

53 L. ed.

The so-called complaints, in this case above mentioned, are, as we construe the statute, entirely too general to raise any objection to a specific rate. Guenther, in his petition, in substance, alleged "that all local freight rates to and from all local points in the state of Kentucky, as fixed and charged by all railroads, on all classes of freight, are excessive, discriminatory, and extortionate." The lumber companies, which were permitted to intervene, made substantially the same complaint (with an addition as to lumber, ties, and logs), and the attorneys appearing in behalf of the state of Kentucky joined in the general complaint of Guenther. If complaint were necessary to enable the commission to make rates, the allegations in the complaint of Guenther were mere sweeping generalities, and were in no sense whatever a fair or honest compliance with the statute. The commission itself, in order to act, must have had some information or had some reasons to believe that certain rates were extortionate, and it could not, under this statute, enter upon a general attack upon all the rates of all the companies throughout the state, and make an order such as this in question. Such action is, in our judgment, founded upon a total *mis-[196 construction of the statute, and an assumption on the part of the commission of a right and power to do that which the statute itself gives it no authority whatever to do.

And again, the section provides that if the commission should determine that the company had been guilty of extortion, it must, instead of the extortionate rate, make and fix a reasonable and just rate, which the company may charge for its service thereafter rendered. This language is not apt by which to confer power to establish a schedule of rates applicable in all cases, to all commodities, and on all roads, and, on the contrary, it strengthens the view that no such general jurisdiction to establish rates in all cases for all roads throughout the state by a general tariff was in the contemplation of the framers of the statute.

It may also be stated that, if the statute was really intended to give the commission power to make a general schedule of rates, we should expect to find, almost necessarily, a right to increase as well as to reduce those rates in some instances, in order to produce an equality, where, otherwise, great inequalities might exist as a result of the putting the general schedule of reductions in force. Here is a case where the schedule of rates was reduced from 20 to 25 per cent upon an average. Some of the rates not touched might require in-

crease in order to make the whole schedule fair and reasonable, and yet the commission could not make the increase over the amount theretofore collected by the company. This seems to us to be a very strong argument in favor of the view that the legislature never intended to, and did not in fact, give such a power to establish general maximum rates, but confined it to one or two or a few specified rates, which might be reduced upon complaint, and where there might be a real investigation of all the problems involved in the propriety of the reduction in a few distinct and separate cases. A sufficient investigation of the whole series of rates on all the roads in the state by one commission is almost an impossibility, and an attempt to do so would prove a failure, and would, in all 197]probability, result in gross injustice *to the roads. The statute, it will be remembered, gives no power to the commission to fix rates unless it has already determined that the rates complained of, or which it has investigated upon its own information, are extortionate after hearing the parties, and then it fixes the rates at a just and reasonable amount. If no extortion is found in any particular rate, there can be no fixing of rates in that particular. And yet that particular rate might require increase in order to make the whole schedule just, fair, and reasonable. A general power to fix rates under such limitations cannot be supposed to have been within the intent of the legislature. The difference between the fixing of one rate or a few, upon specific complaint or information, and the adoption of a general scheme of rates, applicable in all cases to all the roads, is vast and important. In the one case it can be fairly accomplished, while, in the other, the chances of injustice and great inequalities are infinite and almost certain to occur.

We do not say that, under this statute, as we construe it, there must be a separate proceeding or complaint for each separate rate. A complaint, or a proceeding on information by the commission itself, in regard to any road, may include more than the rate on one commodity or more than one rate, but there must be some specific complaint or information in regard to each rate to be investigated, and there can be, under this statute, no such wholesale complaint, which, by its looseness and its generalities, can be made applicable to every rate in operation on a railroad, or upon several or all of the railroads of the state. If the legislature intended to give such a universal and all-prevailing power, it is not too much to say that the language used in giving it should be so plain as not to permit of doubt as to the legislative intent.

The appellants contend that, in any

event, the order made by the commission December 7, 1905, regarding rates on lumber, logs, and cross ties, to and from all points in the state, ought to stand as reasonable and proper. The complaint made by the lumber dealers in their petition to intervene in the Guenther *proceed-[198 ing adopted the language of that petition as to all rates, upon all commodities, upon all roads throughout the state, and then added a specific complaint as to the logs, etc. While the whole proceeding as to all rates was pending before the commission, it took up, as part of it, the question of the reasonableness of all the rates on lumber to and from all points in the state. This proceeding is, therefore, but a part of the whole proceeding, involving an investigation as to every rate on all commodities on every road throughout the state, and we do not think it a case where a particular rate on a specific commodity, applicable all through the state, upon all roads, should be separated from the general order, when the specific order was made after the general complaint was filed, and is itself a general order, and was made by the commission in the exercise of an assumed power claimed to be given by the statute, which claim we hold was totally unfounded. We therefore think that, in this particular case, the order as to lumber rates must fall with the rest of the assumed jurisdiction of the commission.

There is nothing in our decision in *McChord v. Louisville & N. R. Co.* 183 U. S. 483, 46 L. ed. 289, 22 Sup. Ct. Rep. 165, which affects the question discussed in this opinion.

We are of opinion that, under the statute, the commission had no authority to make a general tariff of rates, and the final decree of the Circuit Court is, for that reason, affirmed.

*SILER et al., as Railroad Commis-[199 sion, Appts.,

v.

ILLINOIS CENTRAL RAILROAD COMPANY. (No. 522.)

SILER et al., as Railroad Commission, Appts.,

v.

SOUTHERN RAILWAY COMPANY IN KENTUCKY. (No. 523.)

SILER et al., as Railroad Commission, Appts.,

v.

CINCINNATI, NEW ORLEANS, & TEXAS PACIFIC RAILWAY COMPANY. (No. 524.)

(See S. C. Reporter's ed. 199, 200.)

These cases are governed by the decision 213 U. S.

in *Siler v. Louisville & N. R. Co.*, ante, 753.

[Nos. 522, 523, 524.]

Argued February 24, 25, 26, 1909. Decided April 5, 1909.

APPEAL from the Circuit Court of the United States for the Eastern District of Kentucky to review decrees enjoining the enforcement of an order of the Kentucky railroad commission, fixing railroad rates. Affirmed.

Messrs. **C. C. McChord** and **Robert H. Winn** argued the cause, and, with Mr. **James Breathitt**, filed a brief for appellants. For their contentions, see their brief as reported in *Siler v. Louisville & N. R. Co.* ante, 753.

Messrs. **Edmund F. Trabue** argued the cause, and, with Messrs. **John C. Doolan**, **Attila Cox, Jr.**, and **J. M. Dickinson**, filed a brief for appellee the Illinois Central Railroad Company:

The order of the commission is void because unauthorized by the statute.

Missouri, K. & T. R. Co. v. Interstate Commerce Commission, 164 Fed. 649; *Northern Securities Co. v. United States*, 193 U. S. 343, 48 L. ed. 702, 24 Sup. Ct. Rep. 436; *McChord v. Louisville & N. R. Co.* 183 U. S. 483, 499, 46 L. ed. 289, 296, 22 Sup. Ct. Rep. 165; *Louisville & N. R. Co. v. Kentucky*, 183 U. S. 503-505, 46 L. ed. 298, 301, 22 Sup. Ct. Rep. 95.

The power to make a schedule is not inferable from the power to make a rate in substitution for another rate, found extortionate, the power of the commission being strictly construed.

Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co. 167 U. S. 479, 494, 505, 509, 42 L. ed. 243, 251, 255, 256, 17 Sup. Ct. Rep. 896; *Railroad Comrs. v. Oregon R. & Nav. Co.* 17 Or. 65, 2 L.R.A. 199, 19 Pac. 702; *Brymer v. Butler Water Co.* 179 Pa. 231, 36 L.R.A. 260, 36 Atl. 249.

Mr. **John Galvin** argued the cause, and, with Messrs. **Edward Colston** and **Maurice L. Galvin**, filed a brief for appellee the Cincinnati, New Orleans, & Texas Pacific Railway company.

Mr. **Alexander Pope Humphrey** filed a brief for appellee the Southern Railway Company.

200] *By Mr. Justice Peckham:

The above-entitled cases raise the same question that is decided in *Siler v. Louisville & N. R. Co.* 213 U. S. 151, ante, 753, 29 Sup. Ct. Rep. 451, and, upon its authority, the decrees in the above cases are affirmed.

53 L. ed.

MAX SELLIGER, Plff. in Err.,

v.

COMMONWEALTH OF KENTUCKY, by George H. Alexander, Revenue Agent.

(See S. C. Reporter's ed. 200-207.)

Taxes — situs — foreign warehouse receipts — tax on exports.

A state cannot tax German warehouse receipts, valuing them at the value of the whisky they represent, where it cannot tax the whisky itself, either because it was exported from the United States or because of its situs.

[For other cases, see *Taxes*, I. c. 6, Commerce, 484-504, in Digest Sup. Ct. 1908.]

[No. 115.]

Argued March 16, 17, 1909. Decided April 5, 1909.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which, reversing judgments of the Jefferson Circuit Court in that state, and the Jefferson County Court, sustained a tax on German warehouse receipts representing whisky which had been shipped to that country from the United States. Reversed.

See same case below, 30 Ky. L. Rep. 451, 98 S. W. 1040; dissenting opinion, 31 Ky. L. Rep. 535, 102 S. W. 810.

The facts are stated in the opinion.

Messrs. **John L. Dodd** and **Alexander Pope Humphrey** argued the cause, and, with Messrs. **Joseph C. Dodd** and **Humphrey, Davie, & Humphrey**, filed a brief for plaintiff in error:

The tax in question violates § 10 of article 1 of the Constitution of the United States, prohibiting a state from laying any tax upon exports.

Brown v. Maryland, 12 Wheat. 419, 6 L. ed. 678; *License Cases*, 5 How. 505, 12 L. ed. 256; *Almy v. California*, 24 How. 169, 16 L. ed. 644; *Low v. Austin*, 13 Wall. 29, 20 L. ed. 517.

Personal property having an actual situs beyond the territorial boundary of a state cannot be taxed by that state.

Louisville & J. Ferry Co. v. Kentucky, 188 U. S. 385, 47 L. ed. 513, 23 Sup. Ct. Rep. 463; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205.

A warehouse receipt is nothing more nor less than a document of title, and has always been so treated.

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2 Benjamin, Sales, 1043; 10 Am. & Eng. Enc. Law, p. 1; Gibson v. Stevens, 8 How. 399, 400, 12 L. ed. 1129, 1130; Leonard v. Davis, 1 Black, 482, 483, 17 L. ed. 225; Halliday v. Hamilton, 11 Wall. 564, 565, 20 L. ed. 215, 216; The Thames (The Thames v. Seaman) 14 Wall. 106, 20 L. ed. 806; Crapo v. Kelly, 16 Wall. 640, 21 L. ed. 441; Mechanics' & T. Ins. Co. v. Kiger, 103 U. S. 356, 26 L. ed. 434; Union Trust Co. v. Wilson, 198 U. S. 538, 539, 49 L. ed. 1156, 1157, 25 Sup. Ct. Rep. 766.

The law looks to the substance and not to the shadow; a receipt, apart from the property described therein, is not taxable as property, and the effort to give this whisky a double situs,—one actually in Germany and the other constructively in Kentucky,—and to tax it in both jurisdictions, is unwarranted, and cannot be upheld either by reason or authority. It is violative of the fundamental law of the country.

Almy v. California, 24 How. 169, 16 L. ed. 644; Pollock v. Farmers' Loan & T. Co. 157 U. S. 581, 39 L. ed. 819, 15 Sup. Ct. Rep. 673; Postal Teleg. Cable Co. v. Adams, 155 U. S. 698, 39 L. ed. 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; Dobbins v. Erie County, 16 Pet. 435, 10 L. ed. 1022; Northern C. R. Co. v. Jackson, 7 Wall. 262, 19 L. ed. 88; Cook v. Pennsylvania, 97 U. S. 566, 24 L. ed. 1015; Philadelphia & S. Mail S. S. Co. v. Pennsylvania, 122 U. S. 326, 30 L. ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118; Leloup v. Mobile, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380.

Mr. Matthew J. Holt argued the cause, and, with Mr. B. F. Washer, filed a brief for defendant in error:

The motive for exportation can be inquired into to fix the taxable situs.

Turpin v. Burgess, 117 U. S. 507, 29 L. ed. 989, 6 Sup. Ct. Rep. 835.

This whisky is not an export.

Swan & F. Co. v. United States, 190 U. S. 145, 47 L. ed. 986, 23 Sup. Ct. Rep. 702.

The tax sought to be imposed is not a tax imposed by Kentucky upon the whisky as a foreign product, nor a tax imposed by reason of the whisky being exported, nor a tax while it is in a state of transit to some other place of destination. It is sought to be imposed upon the whisky after its exportation, and after it has reached its storage destination, and has become property in the market at its place of destination. It therefore enjoys no discriminating favors other than all tangible property of persons in this state, situated beyond the limits of this state.

Coe v. Errol, 116 U. S. 527, 29 L. ed. 718, 6 Sup. Ct. Rep. 475; Turpin v. Burgess, supra; May v. New Orleans, 178 U. S. 509, 44 L. ed. 1170, 20 Sup. Ct. Rep. 976; American Steel & Wire Co. v. Speed, 192 U. S. 509, 510, 48 L. ed. 542, 24 Sup. Ct. Rep. 365.

The extent to which, the subjects upon which, and the mode in which, the taxing power shall be exercised, are with the state except so far as it has been surrendered to the Federal government, either expressly or by necessary implication.

New York ex rel. Burke v. Wells, 208 U. S. 22-25, 52 L. ed. 373, 374, 28 Sup. Ct. Rep. 193; Union P. R. Co. v. Peniston, 18 Wall. 5, 21 L. ed. 787; Lewis v. Monson, 151 U. S. 549, 38 L. ed. 266, 14 Sup. Ct. Rep. 424; Home Ins. Co. v. New York, 134 U. S. 600, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593.

If the seven thousand barrels of whisky were exported temporarily, that is, to await a better market, and to be reimported when the price justified, or to evade, for the time being, the revenue tax of 90 cents per gallon, the taxable situs is in Kentucky,—the place of residence of the owner.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493; Frankfort v. Fidelity Trust & S. V. Co. 111 Ky. 667, 64 S. W. 470; May v. New Orleans, 178 U. S. 507, 44 L. ed. 1169, 20 Sup. Ct. Rep. 976.

If the owner of personal property within a state resides in another state, which taxes him for that property as part of his general estate attached to his person, this action of the former state does not in the least affect the right of the state of his domicile to tax it also (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 31, 35 L. ed. 619, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Buck v. Beach, 206 U. S. 402, 51 L. ed. 1112, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732); to constitute double taxation the property must be twice taxed in the same jurisdiction.

Com. v. Sellinger, 30 Ky. L. Rep. 453, 98 S. W. 1040; Farmer v. Etheridge, 24 Ky. L. Rep. 653, 69 S. W. 761; Cochran v. Ripy, 13 Bush, 505; Greenbaum Bros. v. Megibben, 10 Bush, 420; Purdy's Beach, Priv. Corp. §§ 271, 272; Frankfort v. Fidelity Trust & S. V. Co. 111 Ky. 677, 64 S. W. 470; 30 Am. & Eng. Enc. Law, pp. 69-77; Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250; Wilkes Barre Deposit & Sav. Bank v. Wilkes Barre, 148 Pa. 601, 24 Atl. 111; Whitaker v. Brooks, 90 Ky. 76, 13 S. W. 355; Knox v. Eden Musee American Co. 148 N. Y. 441, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E.

988; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 38 L. ed. 238, 14 Sup. Ct. Rep. 396.

A warehouse receipt is property.

Farmer v. Etheridge, supra; *Union Trust Co. v. Wilson*, 198 U. S. 536, 49 L. ed. 1155, 25 Sup. Ct. Rep. 766. See also *New Orleans v. Stempel*, 175 U. S. 320, 44 L. ed. 180, 20 Sup. Ct. Rep. 110.

No Federal question is involved, no provision of the Federal Constitution is violated by this decision, which merely declares that warehouse receipts, wherever issued, and whatever they may represent, are intangible personal property, whose situs, for purposes of taxation, is the domicile of their owner.

United States Bank v. Huth, 4 B. Mon. 443; *Savings & L. Soc. v. Multnomah County*, 169 U. S. 426-431, 42 L. ed. 804-806, 18 Sup. Ct. Rep. 392; *Kelley v. Rhods*, 188 U. S. 1, 47 L. ed. 359, 23 Sup. Ct. Rep. 259; *Kirtland v. Hotchkiss*, 100 U. S. 498, 25 L. ed. 562; *M'Culloch v. Maryland*, 4 Wheat. 316-418, 428, 429, 4 L. ed. 579-604, 606, 607; *New York ex rel. Burke v. Wells*, 208 U. S. 22-25, 52 L. ed. 373, 374, 28 Sup. Ct. Rep. 193; *Union P. R. Co. v. Peniston*, 18 Wall. 5, 21 L. ed. 787; *Lewis v. Monson*, 151 U. S. 549, 38 L. ed. 266, 14 Sup. Ct. Rep. 424; *Home Ins. Co. v. New York*, 134 U. S. 600, 33 L. ed. 1029, 10 Sup. Ct. Rep. 593; *Delaware Railroad Tax*, 18 Wall. 206-231, 21 L. ed. 888-896; *Coe v. Errol*, 116 U. S. 524, 29 L. ed. 717, 6 Sup. Ct. Rep. 475; *New Orleans v. Stempel*, supra.

Mr. Justice Holmes delivered the opinion of the court:

This is a proceeding to recover back-taxes on personal property of the plaintiff in error, hereafter called the defendant. He pleaded that he did own certain barrels of whisky which he did not list for the years in question, but that he had exported them to Bremen and Hamburg, in Germany, for sale abroad, and that the state was forbidden to tax them, both because they were exports (U. S. Const. art. 1, § 10), and because their permanent situs was outside the state. 14th Amend.; *Delaware, L. & W. R. Co. v. Pennsylvania*, 198 U. S. 341, 49 L. ed. 1077, 25 Sup. Ct. Rep. 669; *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 A. & E. Ann. Cas. 493. The plaintiff replied, denying that the export was for sale and that the situs of the whisky was abroad. It alleged that the defendant was a citizen and resident of Kentucky, engaged there in the wholesale whisky business, and that he shipped the whisky to Germany merely to evade rev-
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enue and ad valorem taxes on the same. It alleged further that the defendant remained the owner and in possession of the whisky, except such portion as he reshipped to himself or to purchasers in the United States; that while the whisky remained in the German warehouses he held the warehouse receipts, used them as collaterals and traded in them, and that the barrels of whisky sold by him were mostly returned to the state of Kentucky, and all to the United States. The court of first instance held that the whisky was exempt on both the grounds taken by the defendant. On appeal to the state circuit court for the county, the judgment was affirmed *on[204 the ground that the situs of the whisky was outside the state. A further appeal was taken to the court of appeals, and that court, accepting the fact that the whisky was beyond the taxing power of Kentucky, nevertheless sustained the tax as a tax on the warehouse receipts. 30 Ky. L. Rep. 451, 98 S. W. 1040, dissenting opinion, 31 Ky. L. Rep. 535, 102 S. W. 810. The case then was brought by writ of error to this court.

We think that we have stated the effect of the pleadings fairly, and it will be observed that the plaintiff's claim was of a right to tax the whisky, the warehouse receipts being mentioned only to corroborate the plaintiff's contention as to the true domicile of the goods. After the decision, the amount of whisky for which the defendant held German warehouse receipts at the material times and the value of the whisky were agreed, and thereupon the court, reciting the agreement, directed a judgment for taxes due upon the warehouse receipts, valuing them at the agreed value "per barrel of whisky embraced in them." So that it will be seen that the effect is the same as if the whisky itself had been taxed, and the question is whether, by such a dislocation of the documents from the things they represent, a second property of equal value is created for taxing purposes, which can be reached although the first could not. Possibilities similar in economic principle sometimes have to be, or at least have been, recognized, but, of course, economically speaking, they are absurd.

We are dealing with German receipts, and therefore we are not called upon to consider the effect of statutes purporting to make such instruments negotiable. Bonds can be taxed where they are permanently kept, because, by a notion going back to very early law, the obligation is, or originally was, inseparable from the paper or parchment which expressed it. *Buck v. Beach*, 206 U. S. 392, 403, 413, 51 L. ed. 1106, 1112, 1116, 27 Sup. Ct. Rep. 712, 11 A. & E. Ann. Cas. 732. That case and the

authorities cited by it show how far a similar notion has been applied to negotiable bills and notes. But a warehouse receipt does not depend upon any peculiar doctrine for its effect. A simple receipt merely imports that goods are in the hands of a certain kind of bailee. But if a bailee as-
205]sents to becoming *bailee for another to whom the owner has sold or pledged the goods, the change satisfies the requirement of a change of possession so far as to validate the sale or pledge. Therefore it is common for certain classes of bailees to give receipts to the order of the bailor, and so to assent in advance to becoming bailee for anyone which is brought within the terms of the receipt by an indorsement of the same. But this does not give the instrument the character of a symbol, it simply makes it the means of bringing about what is somewhat inaccurately termed a change of possession, upon ordinary legal principles, just as if the goods had been transported to another warehouse. *Union Trust Co. v. Wilson*, 198 U. S. 530, 536, 49 L. ed. 1154, 1155, 25 Sup. Ct. Rep. 766. If the receipt contains no clause of assent to a transfer, it has been held that an indorsement goes no further than a transfer and unaccepted order on any other piece of paper. *Hallgarten v. Oldham*, 135 Mass. 1, 46 Am. Rep. 433.

The form of the receipts given in Germany does not appear. It does not appear that they contained any assent to transfer, unless by conjecture from the defendant's testimony that he pledged them for loans. Even that conjecture is made more doubtful, if not excluded, by the findings of the lower courts. It does not appear that the court of appeals made a different finding, if it had the power to do so. This court can make none. There is no presumption that we know of, that the transactions took one form or had one effect rather than another.

We can think of but two ways in which the receipts could amount to more than a mere convenience for getting quasi possession of the goods. In the first place, they might express or imply a promise to be answerable, or carry a statutory liability, for a corresponding amount in case the property referred to was delivered to another without a surrender of the receipts. See *Mechanics' & T. Ins. Co. v. Kiger*, 103 U. S. 352, 26 L. ed. 433. Such a promise might have a distinct value if the promisor had credit. But it cannot be assumed on this record that the receipts contained it, and, if they did, even then the value of the instrument would be due rather to the as-
206]sumption that the *bailee would not give up the goods without a return of it

than to the promise. The value of the promise would vary with the promisor. As a key to the goods, a receipt no more can be called a second property of equal value than could a key to an adamant safe that could not be opened without it be called a second property of a value distinct from but equal to that of the money that the safe contained. The receipt, like the key, would be property of some small value distinct from that to which it gave access. But it would not be a counterpart, doubling the riches of the owner of the goods.

In the second place, the receipt might be made the representative of the goods in a practical sense. A statute might ordain that a sale and delivery of the goods to a purchaser without notice should be invalid as against a subsequent bona fide purchaser of the receipt. We need not speculate as to how the law would deal with it in that event, as we have no warrant for assuming that the German law gives it such effect. On the facts before us, and on any facts that the court of appeals can have had before it, the receipts cannot be taken to have been more than one of several keys to the goods. It cannot be assumed that a good title to the whisky could not have been given while the receipts were outstanding. We assume that they made it very unlikely that it would be, but the practical probability does not make the instrument the legal equivalent of the goods. We take it to be almost undisputed that, if the warehouses were in Kentucky, the state would not and could not tax both the whisky and the receipts, even when issued in Kentucky form, and that it would recognize that the only taxable object was the whisky. The relation of the paper to the goods is not changed by their being abroad, and the only question in the case is whether the paper can be treated as property equivalent in value to the goods, because in some way it represents them.

We state the question as we have stated it because that is the one that is raised by the decision under review. It would be a mere quibble to say that the receipts, as paper, had an infinitesimal *value,
[207] that they acquired a substantial one, although much less than that of the whisky because of their practical use, and that this court is not concerned with a mere overvaluation. The tax is imposed on the theory that the receipts are the equivalents of the goods, and are taxable on that footing, although the goods cannot be taxed. Assuming, as the court of appeals assumed, that the whisky is exempt under the Constitution of the United States, we are of opinion that the protection of the Constitution extends to warehouse receipts locally present

within the state. What was said by Chief Justice Taney about bills of lading applies to them, *mutatis mutandis*: "A duty upon that is, in substance and effect, a duty on the article exported." *Almy v. California*, 24 How. 169, 16 L. ed. 644; *Fairbank v. United States*, 181 U. S. 283, 294, 45 L. ed. 862, 867, 21 Sup. Ct. Rep. 648. We discuss the case on the facts assumed by the court of appeals. Whether a finding would have been warranted that the whisky still was domiciled in Kentucky, or, for any other reason, was not exempt, is a matter upon which we do not pass. See *New York ex rel. New York C. & H. R. R. Co. v. Miller*, 202 U. S. 584, 597, 50 L. ed. 1155, 1160, 26 Sup. Ct. Rep. 714.

Judgment reversed.

CHESAPEAKE & OHIO RAILWAY COMPANY and Maysville & Big Sandy Railroad Company, Plffs. in Err.,
v.

EMMA R. McCABE, Administratrix of
Peter McCabe, Deceased.

(See S. C. Reporter's ed. 207-222.)

Error to state court — final judgment.

1. The judgment of the highest court of a state, affirming, on a third appeal, a judgment of the trial court, entered on a verdict in favor of plaintiff, is the first final judgment in the action which is the subject of review in the Federal Supreme Court, where the highest state court, on the first appeal, reversed the order of the lower court, granting a petition for the removal of the action to a Federal circuit court, and remanded the case for trial, and, on the second appeal, reversed a judgment entered on a directed verdict in favor of defendant, although the court, on such third appeal, regarded itself as bound by its prior decision as the law of the case, and declined again to consider the Federal question.

[For other cases, see *Appeal and Error*, I. d. 24, in Digest Sup. Ct. 1908.]

NOTE.—As to what judgments of state courts are final for the purpose of a review in the Supreme Court of the United States—see note to *Schlosser v. Hemphill*, 49 L. ed. U. S. 1001.

On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Re Buchanan*, 39 L. ed. U. S. 884; and *Kipley v. Illinois*, 42 L. ed. U. S. 998.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be
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Removal of causes — power of Federal court to determine right of removal.

2. A Federal circuit court must be deemed to possess the right to determine the question of the right to remove a case from a state court independently of the jurisdiction and determination of the state courts, in view of the provisions of the removal act of March 3, 1875 (18 Stat. at L. 471, chap. 137, U. S. Comp. Stat. 1901, p. 510), §§ 3, 5, 7, that a petition and bond being entered in the circuit court, the cause shall proceed in the same manner as if originally commenced there; that such court may remand and dismiss the case if it does not really and substantially involve a dispute or controversy properly within its jurisdiction, or if there is improper and collusive joinder of parties; and may issue certiorari to compel the state court to make return of the record and enforce such writ.

[For other cases, see *Removal of Causes*, 287-293, in Digest Sup. Ct. 1908.]

Judgment — in action improperly removed to Federal court — conclusiveness.

3. The final judgment of a Federal circuit court dismissing a suit after refusing to remand the case to the state court, whence it had been removed, must, while unreversed, be given full effect by the state court when set up as a bar to the action after the order of the state court, granting the petition for removal, has been reversed by the highest state court, and the case remanded for trial, although the Federal court may have been in error in holding the case to be a removable one.

[For other cases, see *Judgment*, 178-192, 1072-1078, in Digest Sup. Ct. 1908.]

[No. 89.]

Argued January 25, 1909. Decided April 5, 1909.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which affirmed, on a third appeal, a judgment of the Mason County Circuit Court, in that state, in favor of plaintiff in an action to recover damages for the negligent killing of plaintiff's intestate. Re-

raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On fraudulent joinder to prevent removal of case to Federal court—see note to *Offner v. Chicago & E. R. Co.* 78 C. C. A. 362.

On removal of causes in cases of separable controversy—see note to *Miller v. Clifford*, 5 L.R.A. (N.S.) 49.

As to conclusiveness and effect of judgments as between Federal and state courts—see notes to *Kansas City, Ft. S. & M. R. Co. v. Morgan*, 21 C. C. A. 478, and *Union & Planters' Bank v. Memphis*, 49 C. C. A. 468.

versed and remanded for further proceedings.

See same case below, 30 Ky. L. Rep. 1009 100 S. W. 219; on first appeal, 112 Ky. 861, 66 S. W. 1054; on second appeal, 28 Ky. L. Rep. 536, 89 S. W. 683.

Statement by Mr. Justice Day:

This action was brought September 27, 1901, by the defendant in error in the Mason county circuit court of Kentucky against the Chesapeake & Ohio Railway Company, a Virginia corporation, and the Maysville & Big Sandy Railroad Company of Kentucky, to recover damages for the death of her intestate, by the negligence, as it is alleged, of the Chesapeake & Ohio Railroad Company, in operating one of its trains over a railroad track which had been leased to it by the other company.

The allegations of the petition in substance are that the intestate of defendant in error received injuries which caused his death by being negligently run into by a train operated by the Chesapeake & Ohio Railway Company. And negligence is charged against the Maysville & Big Sandy Railroad Company, in permitting its tracks to be used by the other company. It alleges that, more than twelve months before the injuries to her intestate, the Maysville & Big Sandy Railroad Company *leased and transferred its entire line to the Chesapeake & Ohio Railway Company, and that the latter has had since that time the exclusive possession and control of it; that, by the laws of Kentucky, the lease and transfer were *ultra vires* and void; that in December, 1893, under § 211 of the Constitution of Kentucky, and under § 841 of the statute of the state, the Chesapeake & Ohio Railway Company became a corporation, citizen, and resident of the state, by filing in the office of the secretary of state, and in the office of the railroad commissioner, copies of its articles of incorporation, and that thereupon a certificate of incorporation was issued to it by the secretary of state. The petition further alleges that the railroad track was laid in Third street, in Maysville, under an ordinance from the city authorities; that the railroad occupied the whole street, so as to render, it unfit for travel by wagons or vehicles; that the city authorities were without power to authorize such use of the street, and that the ordinance was void, and the operation of the trains on the street was illegal.

On December 11, 1901, the Chesapeake & Ohio Railroad Company filed a petition to remove the action to the circuit court of the United States for the eastern district of Kentucky. The petition set up that the Chesapeake & Ohio Railroad Company was

a Virginia corporation; that the suit was of a civil nature; that the amount involved exceeded \$2,000; that in the suit there was a controversy which was wholly between citizens of different states, to wit, between the Chesapeake & Ohio Railroad Company, a citizen of Virginia, and the plaintiff in the suit, who was a citizen of the state of Kentucky. It was further alleged that the Maysville & Big Sandy Railroad Company was not a necessary party to the suit, but was made a defendant therein "for the sole and simple purpose" of preventing the Chesapeake & Ohio Railroad Company from removing the suit to the circuit court of the United States, and thereby unlawfully, wrongfully, and fraudulently depriving it of a right conferred by the Constitution and laws of the United States.

*Petitioner quotes all the allegations [210 of the plaintiff connecting the Maysville & Big Sandy Company with liability, and avers that "each and all of them" were "untrue and palpably so, and were known to the plaintiff to be untrue" when made in the original and amended petition. Petitioner alleges that, by reason of its charter and amendments thereto, and partly of the act of February 17, 1866, entitled, "An Act Authorizing the Sale of the Maysville & Big Sandy Railroad, and Providing for the Organization of a New Company under Its Charter to Construct Said Road" (Session Acts 1866, page 644), and of the General Laws of the state of Kentucky, the Maysville & Big Sandy Railroad Company, which petitioner states was recognized under said act and laws, before the making of said contract and lease, had full authority to make the same, and that petitioner was operating the railway under the same at the time of the injury complained of. And the petitioner finally "charges and avers that the allegations of the plaintiff's petition and amended petition, hereinbefore recited and controverted, were made, and its codefendant was made defendant to this action, and was sued for the injury complained of herein, for the sole and fraudulent purpose of depriving this defendant of the right to remove this action to the Federal court for the eastern district of Kentucky, and of depriving that court of its jurisdiction."

The petition was granted, and the clerk of the court, on the 14th of December, 1901, was directed to make up the record of said cause for transmission to the circuit court of the United States for the eastern district of Kentucky. The plaintiff in the case excepted to the order and subsequently made a motion to set it aside, which was denied. An appeal from the order to the court of appeals was immediately granted,

which court, on the 5th of March, 1902, reversed the order and remanded the case for trial. 112 Ky. 861, 66 S. W. 1054. The trial was had and the jury instructed by the court to find in favor of the defendant. This judgment was reversed by the court of appeals. 28 Ky. L. Rep. 536, 89 S. W. 683. 211] Another trial was had, resulting *in a verdict and judgment for plaintiff in the sum of \$2,500. The judgment was sustained by the court of appeals. 30 Ky. L. Rep. 1009, 100 S. W. 219. To this judgment the writ of error in the present case was taken.

The record further shows that, after the appeal from the order of removal, plaintiff in error filed a transcript of the record in the circuit court of the United States for the eastern district of Kentucky, and the case was duly docketed. After the decision of the court of appeals of Kentucky, reversing the order of the Mason county circuit court, removing the case to the circuit court of the United States, plaintiff filed in the latter court a motion to remand the case to the state court. On October 19, 1903, that motion was overruled.

On April 4, 1904, the Chesapeake & Ohio Railroad Company filed in the circuit court of the United States its answer to the petition of the plaintiff, and on motion of the latter the cause was set down for trial April 12. On the latter date the Chesapeake & Ohio Railroad Company moved for judgment of dismissal of the suit on the face of the pleadings. This motion was granted, and also a demurrer of the Maysville & Big Sandy Railroad Company was sustained to the petition, and judgment rendered.

On November 17, 1903, plaintiff in error offered for filing an answer in the Mason county circuit court, which set up the petition for removal, and the order thereon, removing the cause to the circuit court of the United States, the filing in the latter court of the transcript of the record and the docketing of the cause the 13th of January, 1902. The answer alleged also that, on motion of the defendants, a rule was issued against the plaintiff to show cause why she should not be required to give bond for costs or make a deposit of money in lieu thereof, that the plaintiff filed a response thereto, and, after the decision of the court of appeals of Kentucky, reversing the order removing the cause to the circuit court of the United States, appeared by her counsel in the latter court, filed a petition to remand the case to the state court, a brief in support thereof, the opinion 212] of the court of appeals, and that, on the 19th of October, 1903, the motion was denied.

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The motion to file the answer was denied by the state court, but, by order of the court, it was made part of the record.

Notwithstanding the judgment of April 12, 1904, of the circuit court of the United States, dismissing the action, the case remained on the docket of the state court, and, before it was called for trial again, the defendants therein (plaintiffs in error here) tendered an amended answer, setting out all the proceedings in the circuit court of the United States, attaching thereto copies of the judgments of that court, and alleging that they were in "force and effect unreversed," and pleaded "the same to plaintiff's recovery against them and each of them in said action." The court refused to let the answer be filed, but ordered that it be made part of the record.

Mr. E. L. Worthington argued the cause, and with Messrs. W. H. Wadsworth and W. D. Cochran, filed a brief for plaintiffs in error:

The judgment of the circuit court of the United States for the eastern district of Kentucky, dismissing this suit, is a bar to further proceedings on the same cause of action in the Mason circuit court.

Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611; Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217.

The removal statute does not confer any jurisdiction on a state court to determine whether a cause pending therein is a removable one. Hence, its determination of it, if erroneous, is absolutely void.

Kern v. Huidekoper, 103 U. S. 485, 26 L. ed. 354.

But the removal statute does confer jurisdiction on the Federal courts to determine whether a cause should be remanded to the state court. Hence, the determination of it by the Federal court to which it has been, in fact, removed is not *coram non judice*, but is valid and binding on the parties thereto, even though erroneous.

Dowell v. Applegate and Des Moines Nav. & R. Co. v. Iowa Homestead Co. supra; See also Northern P. R. Co. v. McMullen, 86 Wis. 501, 56 N. W. 629.

Messrs. E. L. Worthington and W. D. Cochran also filed a brief in reply for plaintiff in error:

The judgment of the highest court of a state, reversing a judgment of a lower court, and remanding the action for further proceedings, is not a final judgment within the meaning of U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575.

Bostwick v. Brinkerhoff, 106 U. S. 3, 27 L. ed. 73, 1 Sup. Ct. Rep. 15.

The circumstance that, on the last appeal, the court of appeals might consider itself bound by its judgment on the former appeal, does not make its former judgment the "final judgment" in the suit, within the meaning of U. S. Rev. Stat. § 709.

Great Western Teleg. Co. v. Burnham, 162 U. S. 339, 40 L. ed. 991, 16 Sup. Ct. Rep. 850.

If a state court proceeds to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable here, after final judgment, under U. S. Rev. Stat. § 709.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 582, 40 L. ed. 542, 16 Sup. Ct. Rep. 389. See also *Cincinnati Street R. Co. v. Snell*, 179 U. S. 398, 45 L. ed. 248, 21 Sup. Ct. Rep. 205.

Mr. Allan D. Cole argued the cause, and, with Mr. W. T. Cole, filed a brief for defendant in error:

The judgment of the United States circuit court for the eastern district of Kentucky, pleaded in bar herein, is a nullity.

Dexter, H. & Co. v. Sayward, 84 Fed. 299.

Mr. Justice Day delivered the opinion of the court:

From the foregoing statement it is apparent that the principal question in this case, and it is the one which we regard as decisive of it, concerns the effect of the judgment rendered in the circuit court of the United States after it had taken jurisdiction, which was undertaken to be set up in the state court as a bar to further proceedings therein. It is contended by the defendant in error that when the court of appeals of Kentucky rendered its judgment holding that the case was not a removable one (March 5, 1902), that was a final judgment upon the question of jurisdiction, and the case should have been brought here for review and determination. But we are of opinion that this contention is not tenable. The case was three times in the court of appeals of Kentucky, and only the last judgment in that court was a final one. As we have seen, the state circuit court, in which the action was originally begun, held the case was a removable one, and from that order an appeal was prosecuted to the court of appeals of Kentucky, that court, concluding that both railroads could be properly joined in the action, held that the case was not removable, and remanded the same to the state court for further proceedings.

Upon the second appeal the judgment for the defendant below was reversed, and the cause remanded for a new trial. Upon the

third trial a judgment was rendered in favor of the plaintiff below for damages, which was affirmed in the court of appeals of Kentucky, to which judgment this writ of error is prosecuted. Nor is it material that the state supreme court regarded itself as bound by the decision in the former appeal as the law of the case and declined, in the judgment now under review, to again consider the question. The judgment under review was the only final judgment in the appellate court of the state from which plaintiff in error could prosecute a writ of error, and, until such final judgment, the case could not have been brought here for review. *Schlosser v. Hemphill*, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654, and cases therein cited.

The circuit court of the United States having taken jurisdiction of the case upon the removal, and having refused to remand it, and proceeded to final judgment, should the state court, when that judgment[215] was offered to be pleaded before it, have given effect to the judgment? That is the Federal question presented in this case. It is insisted for the defendant in error that the right of removal depends upon the presentation to the state court of a proper petition for removal, which petition should contain the essential allegations necessary to make out a case under the statute for that purpose, and that unless this is done the jurisdiction of the state court is not divested. And in aid of that contention cases are cited which hold that a plaintiff has the right to make a cause of action joint when acting in good faith, and when he has so made it, the action is deemed to be joint for the purpose of determining the right of removal. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 50 L. ed. 441, 26 Sup. Ct. Rep. 161, 4 A. & E. Ann. Cas. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 50 L. ed. 448, 26 Sup. Ct. Rep. 166, 4 A. & E. Ann. Cas. 1152. And inasmuch as the state court has held that the Maysville & Big Sandy Railroad Company, under the law of Kentucky, could be properly joined as defendant with the Chesapeake & Ohio Railway Company in this case, it is insisted that the plaintiff had a right to sue both companies, and that the averment in the petition for removal, that the joinder was fraudulent, goes for nothing in the absence of a showing of facts which makes such joinder fraudulent in fact. *Wecker v. National Enameling & Stamping Co.* 204 U. S. 176, 51 L. ed. 430, 27 Sup. Ct. Rep. 184, 9 A. & E. Ann. Cas. 757.

It is insisted that this contention is supported by a line of cases in this court which have held that a state court is not bound to surrender its jurisdiction until a

petition for removal has been filed which, upon its face, shows that the petitioner has a right to the transfer of the cause. And it is contended that the petition in this case, in view of the decision of the court of appeals of Kentucky as to the right to prosecute a joint cause of action, did not make a case for removal, and, therefore, the state court did not lose its jurisdiction. To maintain the general proposition that a petition making a case for removal upon its face is essential to confer jurisdiction upon the United States circuit court, attention is called to a number of cases decided in this court: *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 216[799]; *Carson v. *Hyatt*, 118 U. S. 279, 30 L. ed. 167, 6 Sup. Ct. Rep. 1050; *Stevens v. Nichols*, 130 U. S. 230, 32 L. ed. 914, 9 Sup. Ct. Rep. 518; *Crehore v. Ohio & M. R. Co.* 131 U. S. 240, 33 L. ed. 144, 9 Sup. Ct. Rep. 692; *Jackson v. Allen*, 132 U. S. 27, 33 L. ed. 249, 10 Sup. Ct. Rep. 9; *Graves v. Corbin*, 132 U. S. 571, 33 L. ed. 462, 10 Sup. Ct. Rep. 196.

In these cases the jurisdiction of the state courts was maintained for the want of an adequate petition showing facts which required an order of removal. In none of them was involved the effect of the judgment of a United States circuit court taking jurisdiction upon removal, unreversed and in full force and effect. That the circuit court of the United States may determine the question of the right of removal is conclusively shown by the terms of the statute governing the subject. In § 3 of the removal act ([18 Stat. at L. 471, chap. 137] U. S. Comp. Stat. 1901, p. 510) it is provided that, a petition and bond being entered in the circuit court of the United States, the cause shall proceed in the same manner as if it had originally been commenced in the circuit court. And in § 5 of the act it is provided that the circuit court of the United States may at any time that it appears that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the circuit court, or that the parties to the suit have been improperly and collusively joined for the purpose of creating a case removable under the act, remand and dismiss the same as justice may require. Section 7 of the act of 1875 ([18 Stat. at L. 472, chap. 137] U. S. Comp. Stat. 1901, p. 512) provides that a circuit court, in any case removable under the act, shall have power to issue a writ of certiorari to the state court, commanding that court to make return of the record in any cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of the act for the removal

of the same, and enforce such writ according to law.

It is apparent that these provisions are intended to confer jurisdiction upon the United States circuit court to determine for itself the removability of a given cause, and it has been accordingly held in this court that, notwithstanding the refusal of the state court to remove the case, the party desiring the removal may file a transcript of the record in the circuit court of the United States, and, if the case was a removable one, it is *immaterial that the state[217 court has denied the petition for removal. *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354, and cases therein cited. And it was held in *Madisonville Traction Co. v. St. Bernard Min. Co.* 196 U. S. 239, 49 L. ed. 462, 25 Sup. Ct. Rep. 251, that notwithstanding the refusal of the state court to make an order of removal, the controversy being removable to the United States circuit court, that court might protect its jurisdiction by injunction against further proceedings in the state court.

In view of these provisions of the statute, and the decisions of this court construing the same, we think it was the intention of Congress to confer upon the circuit court of the United States a right to determine the removability of a cause, independently of the jurisdiction and determination of the state courts. And while it is true that, when the judgment of a state court is under consideration, it may properly be held that the courts of the state are not obliged to surrender their jurisdiction until a petition is filed making a proper ground for removal, it does not follow that, when the jurisdiction of the circuit court of the United States is invoked, its judgment holding a case removable and rendering a final judgment therein can be disregarded by the state court where it is properly set up before judgment, as was done in the present case. If this be not so, the state court may ignore an unreversed judgment of the United States circuit court deciding a question of Federal jurisdiction within the power conferred upon it by Congress, and wherein it was intended to give to the state court no right to review such action, and wherein the judgment is binding until properly reversed in this court, in which the question of jurisdiction can alone be finally settled, whether brought here from a state or Federal court.

The circuit court of the United States having an independent jurisdiction to determine the removability of the cause, what is the proper procedure when, as has sometimes happened, the Federal court differs from the state court upon this question? This question was dealt with in *Baltimore & O.*

R. Co. v. Koontz, 104 U. S. 5, 15, 26 L. ed. 643, 646, wherein Mr. Chief Justice Waite, speaking for the court, said:

218] **"The right to remove is derived from a law of the United States, and whether a case is made for removal is a Federal question. If, after a case has been made, the state court forces the petitioning party to trial and judgment, and the highest court of the state sustains the judgment, he is entitled to his writ of error to this court if he saves the question on the record. If a reversal is had here on account of that error, the case is sent back to the state court with instructions to recognize the removal, and proceed no further. Such was, in effect, the order in Gordon v. Longest, 16 Pet. 97, 10 L. ed. 900. The petitioning party has the right to remain in the state court under protest, and rely on this form of remedy if he chooses, or he may enter the record in the circuit court and require the adverse party to litigate with him there, even while the state court is going on. This was actually done in Removal Cases, 100 U. S. 457, 25 L. ed. 593. When the suit is docketed in the circuit court, the adverse party may move to remand. If his motion is decided against him, he may save his point on the record, and, after final judgment, bring the case here for review, if the amount involved is sufficient for our jurisdiction. If, in such a case, we think his motion should have been granted, we reverse the judgment of the circuit court, and direct that the suit be sent back to the state court, to be proceeded with there as if no removal had been had. If the motion to remand is decided by the circuit court against the petitioning party, he can at once bring the case here by writ of error or appeal for a review of that decision, without regard to the amount in controversy. Babbitt v. Clark, 103 U. S. 606, 26 L. ed. 507. If, in such a case, we reverse the order of the circuit court to remand, our instructions to that court are, as in Relfe v. Rundle (Life Asso. of America v. Rundle) 103 U. S. 222, 26 L. ed. 337, to proceed according to law, as with a pending suit within its jurisdiction by removal."*

So far as the case now before us is concerned it is immaterial that, under the act of March 3, 1887 [24 Stat at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508], the decision of a circuit court of the United States remanding a case to the state court is final. *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389.

219] *Again, speaking for the court on the same subject, in *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513-516, 30 L. ed.

1159, 1160, 7 Sup. Ct. Rep. 1262, Mr. Chief Justice Waite said:

"But even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition in the circuit court, and have the suit docketed there. If the circuit court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount."

From these decisions it is apparent that, while the petitioner, in the event of an adverse decision in the state court, may remain in that court, and, after a final judgment therein, bring the case here for review, he is not obliged to do so. He may file the record in the circuit court of the United States, as was said by Mr. Chief Justice Waite, while the case is going on in the state court. The Federal statute then gives to the United States circuit court jurisdiction to determine the question of removability, and it has the power, not given to the state court, to protect its jurisdiction, notwithstanding § 720 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 581), by an injunction against further proceedings in the state courts. *Madisonville Traction Co. v. St. Bernard Min. Co. supra*.

In order to prevent unseemly conflict of jurisdiction it would seem that the state court in such cases should withhold its further exercise of jurisdiction until the decision of the circuit court of the United States is reviewed in this court. If the Federal jurisdiction is not sustained, the case will be remanded with instructions that it be sent back to the state court as if no removal had been had. *Baltimore & O. R. Co. v. Koontz, supra*.

Conceding that, except for the principle of comity, the state court may decide the question of jurisdiction for itself, in the absence of an injunction from the Federal court in aid of its own jurisdiction, or a writ of certiorari requiring the state court to surrender the record under the act of 1875, is the state court obliged to give effect to the judgment of the United States circuit court, from which no writ of error is taken, and rendered in the Federal court after it has sustained its own jurisdiction and refused to remand the action?

In view of the fact that the question is a Federal one, and that the state court is given no right to review or control the exercise of the jurisdiction of the Federal court, we think that such Federal judgment cannot be ignored in the state court as one absolutely void for want of jurisdiction, and that such judgment, until reversed by

a proper proceeding in this court, is binding upon the parties, and must be given force when set up in the action. This view is sustained in the former decisions of this court upon the subject. In *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217, this court considered the effect of a judgment rendered in the Federal court upon removal from the state court. In that case it appeared that the Federal court ought not in fact to have taken jurisdiction, for it appeared upon the face of the record that some of the defendants who did not join in the petition for removal were citizens of the same state as the plaintiff. The state court of Iowa refused to give effect to the judgment of the Federal court, and its judgment was reversed. Mr. Chief Justice Waite, speaking for the court, said (p. 559):

"Whether in such a case the suit could be removed was a question for the circuit court to decide when it was called on to take jurisdiction. If it kept the case when it ought to have been remanded, or if it proceeded to adjudicate on matters in dispute between two citizens of Iowa when it ought to have confined itself to those between the citizens of Iowa and the citizens of New York, its final decree in the suit could have been reversed, on appeal, as erroneous, but the decree would not have been a nullity. To determine whether the suit was removable in whole or in part or not was certainly within the power of the circuit court. The decision of that question was the exercise, and the rightful exercise, of jurisdiction, no matter whether in favor of or against taking the cause. Whether its ²²¹*decision was right, in this or any other respect, was to be finally determined by this court on appeal."

In *Dowell v. Applegate*, 152 U. S. 327, 38 L. ed. 463, 14 Sup. Ct. Rep. 611, the benefit of a judgment in the circuit court of the United States was claimed. That judgment was the basis of a conveyance to the plaintiff in error, and it was contended that the conveyance was void, inasmuch as the Federal court had no jurisdiction of the suit in which the sale was ordered. It was held in this court that even if the Federal court erred in assuming or retaining jurisdiction of the suit, its decree, being unmodified and unreversed, could not be treated as a nullity. After citing previous decisions of this court, the court, speaking through Mr. Justice Harlan, said (p. 340):

"These cases establish the doctrine that, although the presumption in every stage of a cause in a circuit court of the United States is that the court is without jurisdiction

unless the contrary affirmatively appears from the record (*Börs v. Preston*, 111 U. S. 252, 255, 28 L. ed. 419, 4 Sup. Ct. Rep. 407, and the authorities there cited), yet, if such jurisdiction does not so appear, the judgment or final decree cannot, for that reason, be collaterally attacked, or treated as a nullity.

"These authorities, above cited, it is said, do not meet the present case, because the ground on which, it is claimed, the Federal court assumed jurisdiction, was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the circuit court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them, or either of them, collaterally, or otherwise than on writ of error or appeal to this court."

Applying these principles to the case at bar, we think the state court erred in refusing to give effect to the judgment set up in the answer offered in the state court. When the application for removal was made in the state circuit court, that court *held the case removable, and the record²²² was filed in the Federal court. Afterwards that court, upon the application of the plaintiff, refused to remand the suit, and proceeded to a final determination thereof, and rendered judgment accordingly.

It is not necessary to determine whether the case was removable or not. The Federal court was given jurisdiction to determine that question, it did determine it, and its judgment was conclusive upon the parties before it until reversed by a proper proceeding in this court. Instead of bringing the case here, the plaintiff proceeded in the state court, and that court denied effect to the Federal judgment. The plaintiff in error lost no right when thus compelled to remain in the state court, notwithstanding the Federal judgment in its favor, and brought the suit here by writ of error to the final judgment of the state court, denying its right secured by the Federal judgment. It was open to the plaintiff to bring the adverse decision of the Federal court on the question of jurisdiction to this court for review. This course was not pursued, but the action proceeded in the state court, evidently upon the theory that the judgment of the Federal court was a nullity if it had erred in taking jurisdiction. For the reasons stated we think this hypothesis is not maintainable.

The judgment of the Court of Appeals of

Kentucky is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Dissenting: Mr. Justice McKenna.

223]*JOSIAH CODER, Trustee of the Estate of Alexander Armstrong, Bankrupt, Appt.,

v.
WILLIAM ARTS.

(See S. C. Reporter's ed. 223-245.)

Appeal — to circuit court of appeals — in bankruptcy case.

1. A proceeding in bankruptcy within the meaning of the bankrupt act of July 1, 1898 (30 Stat. at L. 544, chap. 541, U. S. Comp. Stat. 1901, p. 3418), § 25, providing for appeals in bankruptcy proceedings from courts of bankruptcy to the circuit courts of appeals to review judgments allowing or rejecting a debt or claim of \$500 or more, is instituted by presenting to the trustee in bankruptcy a claim upon notes of the bankrupt in excess of that amount, joined with the statement that the claimant had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets, although the trustee makes no objection to the amount found due upon the notes, and only seeks by his appeal to contest further the right to security.

[For other cases, see Appeal and Error, III. c, in Digest Sup. Ct. 1908.]

Appeal — in bankruptcy cases — time — findings.

2. A sufficient compliance with general orders in bankruptcy No. 36, providing that appeals under the bankrupt act from the circuit court of appeals to the Federal Supreme Court shall be taken within thirty days after judgment, and that the court below shall, at or before the time of entering the judgment, make and file findings of fact and conclusions of law, which, together with the pleadings and judgment, shall constitute the record, is shown where the appeal was taken within the thirty days, and the circuit court of appeals made its findings of fact and conclusions of law part of the record by an order made within thirty

NOTE. — On appeal and review in bankruptcy cases—see note to *Re Eggert*, 43 C. C. A. 9.

On appellate jurisdiction of the Federal Supreme Court over circuit courts of appeals—see note to *Bagley v. General Fire Extinguisher Co.* ante, 605.

As to validity of transfer to secure pre-existing debt within four months of bankruptcy, in absence of any intent of debtor to hinder, delay, or defraud creditors, or of reasonable cause on the part of the creditor to believe that it was intended as a preference—see note to *Coder v. Arts*, 15 L.R.A. (N.S.) 372.

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days, directing the same to be filed *nunc pro tunc* as of the date of the judgment.

[For other cases, see Appeal and Error, IV. d, 1; V. o, in Digest Sup. Ct. 1908.]

Appeal — in bankruptcy cases — Federal question.

3. The question involved in a proceeding in bankruptcy is one which, within the meaning of the bankrupt act of July 1, 1898, § 25b, giving appeals to the Federal Supreme Court, would have sustained a writ of error from that court had the case been decided by the highest court of the state, where, in determining the validity of a lien asserted to secure a claim against the bankrupt's estate, a construction of the bankrupt act is directly involved, one party asserting a construction which would defeat the lien, and the other party one which would give it validity.

[For other cases, see Appeal and Error, 804, 805, in Digest Sup. Ct. 1908.]

Bankruptcy — fraudulent conveyance — intent.

4. The necessary effect upon other creditors of a mortgage executed by an insolvent within four months of the filing of a petition in bankruptcy, to secure a pre-existing debt, does not dispense with the necessity of showing an actual intent on his part to hinder, delay, or defraud creditors, which is essential under the bankrupt act of July 1, 1898, § 67e, in order to avoid such mortgage, where the mortgagee was ignorant of the insolvency of the mortgagor, and had no reason to believe that a preference was intended.

[For other cases, see Bankruptcy, 163-182, in Digest Sup. Ct. 1908.]

Interest — on mortgage debt of bankrupt.

5. A creditor of a bankrupt who has taken a mortgage to secure his debt, which is not voidable under the bankrupt act, is entitled to interest on the mortgage debt, where the estate is ample for that purpose.

[For other cases, see Interest, 32, 33, in Digest Sup. Ct. 1908.]

[No. 93.]

Argued January 26, 1909. Decided April 5, 1909.

APPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which, on an appeal from the District Court for the Southern District of Iowa, allowed certain claims against a bankrupt estate, and upheld the validity of a mortgage executed to secure their payment. Affirmed.

See same case below, 15 L.R.A. (N.S.) 372, 82 C. C. A. 91, 152 Fed. 943.

The facts are stated in the opinion.

Mr. Myron L. Learned argued the cause and filed a brief for appellant:

Is not the intent and purpose to hinder, delay, or defraud creditors to be presumed from the giving of the mortgage of May 2d,

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1904, when its necessary effect was so to hinder, delay, or defraud?

Crow v. Beardsley, 68 Mo. 439; *Wager v. Hall*, 16 Wall. 584, 21 L. ed. 504; *Re Gilbert*, 112 Fed. 953; *Johnson v. Wald*, 35 C. C. A. 522, 93 Fed. 640; *Re McGee*, 105 Fed. 895; *Toof v. Martin*, 13 Wall. 40, 20 L. ed. 481; *Wilson v. City Bank*, 17 Wall. 473, 21 L. ed. 723; *Western Tie & Timber Co. v. Brown*, 196 U. S. 502, 49 L. ed. 571, 25 Sup. Ct. Rep. 339.

The bankrupt must be held to have intended the necessary effect of his act.

Re Ed. W. Wright Lumber Co., 114 Fed. 1011; *Re Platts*, 110 Fed. 126; *Re McLam*, 97 Fed. 922; *Pollock v. Jones*, 61 C. C. A. 555, 124 Fed. 163; *Re Gutwillig*, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337, 90 Fed. 475.

The provisions of the 1898 act differ in important respects from those of the earlier acts. The act of 1898 makes the result obtained by the creditor, and not the specific intent of the debtor, the essential fact.

Wilson Bros. v. Nelson, 183 U. S. 191, 46 L. ed. 147, 22 Sup. Ct. Rep. 74.

The dominant purposes of the bankrupt act are (1) the protection and discharge of the bankrupt, and (2) the distribution of the unexempt property which the bankrupt owned four months before the filing of the petition, share and share alike among his creditors.

Keppel v. Tiffin Sav. Bank, 197 U. S. 356, 49 L. ed. 790, 25 Sup. Ct. Rep. 443; *Morgan v. First Nat. Bank*, 76 C. C. A. 236, 145 Fed. 466; *Pollock v. Jones*, *supra*; *Re Gutwillig*, 34 C. C. A. 377, 63 U. S. App. 191, 92 Fed. 337.

The validity of a mortgage given within four months preceding bankruptcy, to secure a pre-existing, unsecured indebtedness, has been passed on and denied in many cases.

City Nat. Bank v. Bruce, 48 C. C. A. 236, 109 Fed. 69; *Re Sanderlin*, 109 Fed. 857; *Re Jones*, 118 Fed. 673; *Re Sawyer*, 130 Fed. 384; *Re Cobb*, 96 Fed. 821; *Re Belding*, 116 Fed. 1016; *Re Wolf*, 98 Fed. 84; *Re Gutwillig*, 90 Fed. 475; *Re Durham*, 114 Fed. 750; *Davis v. Turner*, 56 C. C. A. 669, 120 Fed. 605; *Re Pease*, 129 Fed. 447.

The controversy was one of those "controversies arising in bankruptcy proceedings" rather than in "proceedings in bankruptcy."

Re Friend, 67 C. C. A. 500, 134 Fed. 778; *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

If this controversy was a "controversy arising in bankruptcy proceedings," it clearly was appealable under § 24a.

Dodge v. Norlin, 66 C. C. A. 425, 133 Fed. 363; *Re McKenzie*, 73 C. C. A. 483, 142 Fed.

53 L. ed.

383; *Re Holmes*, 73 C. C. A. 491, 142 Fed. 391; *Hendricks v. Webster*, 87 C. C. A. 107, 159 Fed. 927; *Burleigh v. Foreman*, 60 C. C. A. 109, 125 Fed. 217; *Smith v. Means*, 78 C. C. A. 10, 148 Fed. 89; *Mason v. Walkowich*, 10 L.R.A. (N.S.) 765, 80 C. C. A. 435, 150 Fed. 699; *Security Warehousing Co. v. Hand*, 74 C. C. A. 186, 143 Fed. 32; *Hinds v. Moore*, 67 C. C. A. 149, 134 Fed. 221; *McCarty v. Coffin*, 80 C. C. A. 195, 150 Fed. 307; *Re McMahon*, 77 C. C. A. 668, 147 Fed. 684; *Re Mueller*, 68 C. C. A. 349, 135 Fed. 711.

The case having been properly reviewed on appeal in the circuit court of appeals, the appeal to this court then followed under § 6 of the act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, pp. 549, 550).

Hewit v. Berlin Mach. Works, *supra*.

Mr. George S. Wright argued the cause, and, with Mr. Robert E. O'Hanly, filed a brief for appellee:

The trustee's remedy, if he felt aggrieved by the district's court's decision, was by application to the court of appeals "to superintend and revise, in matter of law," the decree of the district court, under § 24b of the bankrupt act.

Re Worcester County, 42 C. C. A. 637, 102 Fed. 808; *Morgan v. First Nat. Bank*, 76 C. C. A. 236, 145 Fed. 466; *Re Whitener*, 44 C. C. A. 434, 105 Fed. 180; *Re Abraham*, 35 C. C. A. 592, 93 Fed. 767; *Re Mueller*, 68 C. C. A. 349, 135 Fed. 711; *Re First Nat. Bank*, 84 C. C. A. 16, 155 Fed. 100; *Re McMahon*, 77 C. C. A. 668, 147 Fed. 684; *Re Rouse, H. & Co.* 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; *Re Cosmopolitan Power Co.* 70 C. C. A. 388, 137 Fed. 858; *Gaudette v. Graham*, 164 Fed. 311; *Hutchinson v. Otis*, 190 U. S. 552, 555, 47 L. ed. 1179, 1181, 23 Sup. Ct. Rep. 778; *First Nat. Bank v. Chicago Title & T. Co.* 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693.

No appeal lies from the decision of the court of appeals, under § 25b of the bankrupt act or otherwise, because the question involved is not one that might have been taken on appeal or writ of error from the highest court of a state to this court.

Chapman v. Bowen, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32.

No findings of fact were requested by the appellant or made or filed by the court of appeals at or before the rendition of its final decree.

Chapman v. Bowen, *supra*; *Knapp v. Milwaukee Trust Co.* 89 C. C. A. 467, 162 Fed. 675.

The intent to hinder or delay must be actual, not presumed as a consequence of acts.

Jones, Chat. Mortg. § 334; *Re Eggert*, 43 C. C. A. 1, 102 Fed. 735; *Jacobs v. Van Sick*, 61 C. C. A. 598, 127 Fed. 62; *Lansing Boiler & Engine Works v. Ryerson*, 63 C. C. A. 253, 128 Fed. 701; *Githens v. Shiffler*, 112 Fed. 505; *Hark v. C. M. Allen Co.* 77 C. C. A. 91, 146 Fed. 665; *Congleton v. Schreihof* (N. J. Ch.) 54 Atl. 144; *Re Virginia Hardwood Mfg. Co.* 139 Fed. 209; *Bump, Fraud. Conv.* pp. 45, 184, 189; *Rison v. Knapp*, 1 Dill. 186, Fed. Cas. No. 11,861; *Summerville v. Stockton Mill Co.* 142 Cal. 529, 76 Pac. 243; *Drury v. Cross* (*Drury v. Milwaukee & S. R. Co.*) 7 Wall. 299, 303, 19 L. ed. 40, 41; *Davis v. Schwartz*, 155 U. S. 631, 639, 39 L. ed. 289, 293, 15 Sup. Ct. Rep. 237.

To make a preference voidable, the creditor must have had reasonable cause to believe such preference was intended.

Brandenburg, Bankr. 3d ed. § 962; *Love-land, Bankr.* 2d ed. §§ 159, 160; *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 446, 45 L. ed. 1171, 1176, 21 Sup. Ct. Rep. 906; *Kep- pel v. Tiffin Sav. Bank*, 197 U. S. 358, 49 L. ed. 790, 25 Sup. Ct. Rep. 443; *Eau Claire Nat. Bank v. Jackman*, 204 U. S. 522, 532, 51 L. ed. 596, 603, 27 Sup. Ct. Rep. 391; *First Nat. Bank v. Connett*, 5 L.R.A.(N.S.) 148, 73 C. C. A. 219, 142 Fed. 33; *J. W. Butler Paper Co. v. Goembel*, 74 C. C. A. 433, 143 Fed. 295; *Re Eggert, supra*; *Re First Nat. Bank*, 67 C. C. A. 536, 135 Fed. 62; *Re Vir- ginia Hardwood Mfg. Co. supra*; *Re Gra- ham*, 110 Fed. 133; *Des Moines Sav. Bank v. Morgan Jewelry Co.* 123 Iowa, 432, 99 N. W. 121; *Deland v. Miller & C. Bank*, 119 Iowa, 368, 93 N. W. 304; *Cullinane v. State Bank*, 123 Iowa, 340, 98 N. W. 887; *Murphy v. Murphy*, 126 Iowa, 57, 101 N. W. 486; *Bardes v. First Nat. Bank*, 122 Iowa, 443, 98 N. W. 284; *Hackney v. Raymond Bros. Clarke Co.* 68 Neb. 624, 94 N. W. 822; *Farmers' & M. Bank v. Wilson*, 4 Neb. (Unof.) 606, 95 N. W. 609; *Johnson v. An- derson*, 70 Neb. 233, 97 N. W. 339; *Re Nas- sau*, 140 Fed. 912; *Summerville v. Stock- ton Mill Co. supra*; *Whitson v. Farber Bank*, 105 Mo. App. 605, 80 S. W. 327; *Gamble v. Elkin*, 205 Pa. 226, 54 Atl. 782; *Crawford v. Rumpf*, 205 Pa. 154, 54 Atl. 709; *Empire State Trust Co. v. William F. Fisher Co.* 67 N. J. Eq. 88, 57 Atl. 502; *Laundy v. First Nat. Bank*, 66 Kan. 759, 71 Pac. 259; *Bunnell v. Bronson*, 78 Conn. 679, 63 Atl. 396; *Strobel & W. Co. v. Knost*, 99 Fed. 409; *Re Goodhile*, 130 Fed. 474; *Crandall v. Coats*, 133 Fed. 965; *Re Tindal*, 155 Fed. 456; *Re McLoon*, 162 Fed. 575; *Lansing Boiler & Engine Works v. Ryerson, supra*; *Cummings v. Kansas City Wholesale Grocery Co.* 123 Mo. App. 9, 99 S. W. 470; *Andrews v. Kellogg*, 41 Colo. 35, 92 Pac. 222; *Re First Nat. Bank*, 84 C. C. A. 16, 155

Fed. 100; *Re Pfaffinger*, 154 Fed. 523; *Ar- kansas Nat. Bank v. Sparks*, 83 Ark. 324, 103 S. W. 626; *Webb v. Lynchburg Shoe Co.* 106 Va. 726, 56 S. E. 581; *Bacon v. Merchants' Bank*, 146 Ala. 521, 40 So. 413; *Off v. Hakes*, 73 C. C. A. 464, 142 Fed. 364; *J. W. Butler Paper Co. v. Goembel, supra*; *Re Maher*, 144 Fed. 503; *Parker v. Black*, 143 Fed. 560; *Re Hines*, 144 Fed. 543; *Summer- ville v. Stockton Mill Co. supra*; *Stratton v. Lawson*, 27 Wash. 310, 67 Pac. 562; *Galveston Dry Goods Co. v. Frenkel*, 39 Tex. Civ. App. 19, 86 S. W. 949; *Dunlop v. Thomas*, 28 Wash. 521, 68 Pac. 909; *Suffel v. McCartney Nat. Bank*, 127 Wis. 208, 115 Am. St. Rep. 1004, 106 N. W. 837; *Harmon v. Walker*, 131 Mich. 540, 91 N. W. 1025; *Hawes v. Bank of Elberton*, 124 Ga. 567, 52 S. E. 922; *Capital Nat. Bank v. Wilker- son* (Ind. App.) 72 N. E. 247; *Harmon v. Feldheim*, 131 Mich. 470, 91 N. W. 744; *Thompson v. First Nat. Bank*, 84 Miss. 54, 36 So. 65; *Lampkin v. Peoples' Nat. Bank*, 98 Mo. App. 239, 71 S. W. 715; *Sirrine v. Stover-Marshall Co.* 64 S. C. 457, 42 S. E. 432; *Townes v. Alexander*, 69 S. C. 23, 48 S. E. 214; *Harris v. Second Nat. Bank*, 110 Tenn. 239, 75 S. W. 1053; *Grant v. First Nat. Bank*, 97 U. S. 80, 24 L. ed. 971; *Bar- bour v. Priest*, 103 U. S. 293, 26 L. ed. 478; *Stucky v. Masonic Sav. Bank*, 108 U. S. 74, 27 L. ed. 640, 2 Sup. Ct. Rep. 219.

Mr. Justice Day delivered the opinion of the court:

Alexander Armstrong, upon a petition in voluntary bankruptcy, was adjudicated a bankrupt by the United States district court for the southern district of Iowa on August 6, 1904. Josiah Coder, appellant, was duly elected and qualified as trustee. On August 26, 1904, William Arts, ap- pellee, filed a claim for \$104,880.46 against the bankrupt estate on certain promissory notes, to wit, one in the sum of \$2,700, dated May 19, 1900, due May 19, 1901; one in the sum of \$18,453, dated December 26, 1903, due March 26, 1904; one in the sum of \$20,000, dated January 29, 1904, due on demand; one in the sum of \$58,826.50, dat- ed January 29, 1904, due January 30, 1905; and one in the sum of \$5,512.40, dated June 17, 1904, due on demand.

It was alleged in the claim filed that the first four notes were secured by a real- estate mortgage, dated May 2, 1904, cover- ing 2,280 acres of land in Carroll county, Iowa, and the last note by a real-estate mortgage of June 17, 1904, covering 615½ acres of land in Monona county, Iowa. The claimant asked for the allowance of his notes against the estate, reserving all rights to his securities in every portion thereof. The trustee filed an answer and

objections to the claim of Arts, attacking both the notes and the mortgage, alleging, in substance, that the bankrupt was not indebted to the claimant in the amount named; that two of the notes were really obligations of the sons of Armstrong, signed by Arts as surety; that the mortgage **228** was given to secure a pre-existing indebtedness within four months of the adjudication in bankruptcy; that, at the time of the giving of the mortgage, the property of the bankrupt was not, at a fair valuation, sufficient to pay his debts, and that he was insolvent; that the claimant or his agents knew the bankrupt's condition, or had knowledge of such facts as would put them on inquiry; that the mortgage was given with the intent and purpose to prefer claimant; that claimant or his agents had reason to believe a preference was intended; and that the mortgage was made and given within four months of the adjudication in bankruptcy with the intent and purpose to hinder, delay, or defraud creditors.

Testimony was taken before the referee, and upon exceptions to his findings the case went before the district judge, who set aside the findings of the referee, made findings of fact, and entered the following order:

"It is therefore hereby ordered, adjudged, and decreed that the said claim of William Arts, on account of the four notes referred to in the fourth finding of facts herein, and secured by the said mortgage of May 2, 1904, be and the same are established against the trustee and estate of Alexander Armstrong, bankrupt, and the said notes and the mortgage securing the same are hereby declared to have been a good, valid, and [enforceable] lien on the property described in said mortgage from the time of the giving and recording of said mortgage down to the time when said property was sold by the trustee in bankruptcy herein, under order of this court, discharged and free and clear of all liens, and are now a good, valid, and [enforceable] lien on the proceeds of the sale of said land in the hands of the trustee. To which said order, adjudication, and decree, and each part thereof, the trustee excepts.

"It is further ordered, adjudged, and decreed that the said claims of the said William Arts on account of said four notes, aggregating, principal and interest, the sum of \$97,497.40, as found in the fifth finding of fact, herein to be paid in full to the said William Arts, claimant, by the trustee out **229** of the funds and moneys in his hands by him received on account of the sale of the lands covered by said mortgage, and hereinbefore described, after the payments of all prior liens and claims thereon as deter-

mined by this court. To which said order, adjudication, and decree, and each part thereof, the trustee excepts.

"It is further ordered, adjudged, and decreed that the note and claim of \$5,512.40, referred to in the fourteenth finding of fact herein, be, and the same is hereby, established as against the trustee and the estate, and that, as to said claim, the said William Arts will participate in said estate as a general creditor. To which said order, adjudication, and decree, and each part thereof, the trustee excepts.

"It is further ordered, adjudged, and decreed that the said mortgage of June 17, 1904, given to secure said claim of \$5,512.40, be not enforced, but is hereby set aside, canceled, and held for naught, and treated as though never given, and the claimant Arts take nothing under the mortgage."

The case is reported in the district court in 145 Fed. 202.

The trustee took the case to the circuit court of appeals for the eighth circuit upon petition for a review and by appeal. That court dismissed the petition for review, and, after considering the appeal, sustained the findings of the district court and affirmed its judgment, except upon the matter of interest on the notes secured by the mortgage, wherein it differed from the district court, and held that Arts was entitled to interest on the notes, to be paid out of the fund. 15 L.R.A.(N.S.) 372, 82 C. C. A. 91, 152 Fed. 943. This correction of interest was made upon the petition of Arts for review. An appeal was then taken to this court upon a petition for allowance of appeal, stating the allowance of the claim and the establishment of the lien thereof. The ground of appeal alleged was that the amount in controversy exceeded the sum of \$2,000, and that it was a proper case to appeal from the court of appeals to the Supreme Court of the United States. The appeal was allowed within thirty days of the entry of the decree, and afterwards, within thirty days, an order was made which recited that the court had made **230** certain findings of fact and conclusions of law, and the same was entered *nunc pro tunc* as of the date of the judgment, as follows:

"1. Alexander Armstrong filed a voluntary petition in bankruptcy on July 27, 1904, in the district court of the United States for the southern district of Iowa, and was adjudged a bankrupt thereon on August 6, 1904.

"2. For many years prior to May 2, 1904, he had been engaged principally in farming in Carroll county, Iowa, and on that day he owned a tract of 80 acres of land and a tract of 2,360 acres of land in that county,

616½ acres of land in Monona county, a residence and business lot in Glidden, Iowa, 200 or 300 head of cattle, 30 horses, a large number of hogs, and some farm machinery. Mortgages which amounted to about \$18,000 had been recorded against a part of the land in Carroll county, and the land in Monona county had been traded for in April, 1904, and taken subject to one half of a mortgage for \$40,000. All of the other property was free from encumbrance. But the residence in Glidden was his homestead and exempt from execution.

"3. William Arts was the sole owner of a state bank in Carroll, Iowa, which he opened in 1898, and his son, W. A. Arts, was the cashier. In June, 1898, the bank commenced loaning money to Armstrong, and continued to loan moneys to him in amounts varying from \$20,000 to a few hundred dollars at a time, and to renew old loans, until, on May 2, 1904, Armstrong owed Arts \$98,503.32, evidenced by notes, and \$2,000, evidenced by an overdrawn account in the bank. This indebtedness had been increasing steadily from June, 1898, by reason of the new loans and the accrual of interest. Armstrong first opened an account in Arts's bank in April, 1900. Prior to that time he had kept an account in another bank in Carroll, in which Arts had owned a large interest up to the time he opened his own bank, in 1898.

"4. Armstrong had the reputation of being one of the wealthiest men in Carroll county and no security had been required 231]*of or given by him to Arts until May 2, 1904, when he gave a mortgage on 2,360 acres of his land in Carroll county to secure the payment of \$98,503.32, evidenced by his notes, and this mortgage was recorded on May 3, 1904. It was executed at the request of the cashier of the bank, or at the request of his brother, who had been called home by reason of the serious illness of their father, William Arts.

"5. Armstrong was insolvent on May 2, 1904, when he gave the mortgage to Arts, and he then knew that he was insolvent.

"6. Neither Arts nor any of his agents acting therein knew or had reasonable cause to believe that Armstrong was insolvent when he gave the mortgage of May 2, 1904, nor did Arts or any of his agents acting therein then have reasonable cause to believe that it was intended thereby to give him a preference over other creditors by the execution of that mortgage.

"7. Armstrong did not make the mortgage of May 2, 1904, with any intent or purpose on his part to hinder, delay, or defraud his creditors or any of them.

"8. There is due to the appellee on the notes secured by the mortgage of May 2,

1904, with interest to March 1, 1906, the sum of \$109,107.56, and this amount should be paid to appellee by the appellant out of the funds and moneys in his hands which he received on account of the sale of the lands covered by that mortgage.

Conclusions of Law.

"1. The mortgage of May 2, 1904, is not voidable by the trustee under sections 60a and 60b of the bankruptcy law, because neither Arts nor his agents acting therein had reasonable cause to believe that it was intended thereby to give a preference.

"2. The mortgage of May 2, 1904, is not null or void as against the creditors of the mortgagor, Armstrong, under § 67e, because it was not made with the intent or purpose on his part to hinder, delay, or defraud his creditors or any of them.

"3. The giving of the mortgage of May 2, 1904, to Arts, did *not, as a matter [232 of law, constitute any evidence of any intent on the part of the bankrupt to hinder, delay, or defraud other creditors within the meaning of § 67e, notwithstanding the fact that its necessary effect was to hinder and delay other creditors, and to deprive them of an opportunity they might otherwise have had to collect larger portions of their claims.

"4. The mortgage of May 2, 1904, though given within four months of the adjudication in bankruptcy, to secure a pre-existing unsecured indebtedness, was valid, and the appellee should be paid \$109,107.56 out of the proceeds of the sale of the mortgaged property."

It is contended by the appellee that the case should be dismissed for want of jurisdiction of the circuit court of appeals and of this court. Questions of the jurisdiction in bankruptcy, particularly of the appellate courts, have given rise to numerous and not altogether reconcilable decisions. The bankruptcy act, as originally passed, did not give the bankruptcy courts jurisdiction over plenary suits to recover the property alleged to belong to the trustee in bankruptcy, except with the consent of the defendant. This was the subject of full consideration and determination in *Bardes v. First Nat. Bank*, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000. Subsequent decisions of this court construed the act to give the bankruptcy courts jurisdiction over controversies concerning the property in possession of the bankruptcy courts. *Whitney v. Wenman*, 198 U. S. 539, 49 L. ed. 1157, 25 Sup. Ct. Rep. 778; *Murphy v. John Hofman Co.* 211 U. S. 562, ante, 327, 29 Sup. Ct. Rep. 154.

Section 24 of the bankruptcy act provides:

"a. The Supreme Court of the United States, the circuit courts of appeals of the

United States, and the supreme courts of the territories, in vacation in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. The Supreme Court of the United States shall exercise a like jurisdiction from courts of bankruptcy not within any *organized circuit of the United States and from the supreme court of the District of Columbia.

"b. The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." [30 Stat. at L. 553, chap. 541, U. S. Comp. Stat. 1901, p. 3431.]

By paragraph b of § 24, the circuit courts of appeals have jurisdiction to superintend and revise in matters of law, proceedings of the several inferior courts of bankruptcy within their jurisdiction. The proceeding under this section is designed to enable the circuit court of appeals to review questions of law arising in bankruptcy proceedings, and is not intended as a substitute for the right of appeal upon controverted questions of fact under the right of appeal given in controversies arising in bankruptcy proceedings (§ 24), or the special appeal given in certain cases under § 25.

Section 25 of the act provides for appeals in bankruptcy proceedings, and in such proceedings appeals may be taken from the courts of bankruptcy to the circuit courts of appeals in three classes of cases.

We are concerned in this case with the third class, "from a judgment allowing or rejecting a debt or claim of five hundred dollars or over." The appeal must be taken within ten days after the judgment.

It is therefore apparent that the mode of appeal in a given case depends upon the character of the proceeding. And the question to be solved in such cases is, Does the case present a proceeding in bankruptcy, or is it a controversy arising in bankruptcy proceedings?

A reference to the adjudications in this court may assist in clearing the matter. *Hewit v. Berlin Mach. Works*, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690, is an illustration of a controversy arising in bankruptcy proceedings (§ 24a) wherein the appeal is under § 6 of the act of March 3, 1891. [26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549.] In that case [234] the Berlin Machine Works *asserted

title to the property in the possession of the trustee, and intervened in the bankruptcy proceedings, raising a distinct and separable issue as to the title to property in the possession of the trustee. This court, speaking through the chief justice, held that the case presented a controversy arising in bankruptcy proceedings, appealable to the courts of appeal as other cases under § 6 of the act of March 3, 1891. Nor is the decision in the *Berlin Mach. Works Case* inconsistent with *First Nat. Bank v. Chicago Title & T. Co.* 198 U. S. 280, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693. In that case there was an attempt on the part of the trustee to invoke an adjudication as to the title to property which the district court found not to be in the possession of the trustee, notwithstanding the petition of the trustee had averred possession, and it was held that, when this fact appeared, the district court had no longer jurisdiction of the case, under the doctrine laid down in *Bardes v. First Nat. Bank*, *supra*, and ought to have dismissed the case.

We are thus brought to the determination of the question, Was the proceeding instituted by Arts a controversy arising in bankruptcy proceedings, or did he institute a bankruptcy proceeding, properly speaking? The answer to this question depends upon an examination of the manner in which the jurisdiction of the bankruptcy court was invoked for the determination of the rights involved. The record discloses that Arts filed in due form a claim upon the promissory notes, setting them forth in detail, asking that they be allowed as a proper claim against the assets in the hands of the trustees to be administered, described the mortgage as being the only security held by him for the payment of the debt, and concluded his claims with this statement: "The deponent, in filing his claim herein against the bankrupt, does so with the express understanding that he makes no waiver of any portion of his security, and expressly reserves said security and every portion thereof to the amount of said claim, including the costs, if any, of collecting payment thereof out of said property held as security."

He thus in effect presented to the trustee in bankruptcy a *claim upon his notes, [235 joined with the statement that he had security upon the estate which it was his purpose to maintain, and upon which he was entitled to priority in the distribution of the assets. He did not, as was the case in *Hewit v. Berlin Mach. Works*, *supra*; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; *Security Warehousing Co. v. Hand*, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A.

& E. Ann. Cas. 789, intervene in the bankruptcy proceedings for the purpose of asserting an independent and superior title to the property held by the trustees, claiming the right to recover the property and to remove it from the jurisdiction of the bankruptcy court as a part of the estate to be administered. Arts appeared in the bankruptcy court, recognizing the title and possession of the trustee in bankruptcy, asserted his claim upon the notes, and his right to have the assets so administered and paid as to recognize the validity of the lien for the security for his claim. We are of opinion that he thus instituted a proceeding in bankruptcy as distinguished from a controversy arising in the course of bankruptcy proceedings. This being the character of the proceeding, its subsequent disposition and the appropriate appellate jurisdiction are to be determined by the provisions of the bankruptcy act governing bankruptcy proceedings.

It is true that Arts asserted both a debt and a lien to secure the same. In such cases the procedure as to the debt or claim governs, with incidental right to consider and determine the validity and priority of the lien asserted upon the property in the hands of the bankrupt's trustee. This method of procedure was recognized in *Hutchinson v. Otis*, 190 U. S. 552, 47 L. ed. 1179, 23 Sup. Ct. Rep. 778. In that case *Otis, Wilcox, & Company*, having a claim for \$4,421.64, had sued and attached the bankrupt's property within four months of filing the petition in bankruptcy. *Otis, Wilcox, & Company*, supposing their attachment good, took judgment by default, and collected their debts from the attached parties, the trustee agreeing to save them harmless from liability; satisfaction was entered in each suit. Subsequently the trustee demanded payment of these debtors of the bankrupt, and, as they had no defense, *Otis, Wilcox, & Company* paid to the trustee the amount of the debts. *Otis, Wilcox, & Company* then filed a claim in bankruptcy, which was allowed in the lower court; and they asserted a lien upon the bankrupt estate. After disposing of the question of the effect of the satisfaction, and deciding that the claim was provable, speaking of the asserted lien, this court said:

"Under the circumstances of this case it seems to us that the petition [asserting the lien] was incident to the claim (*Cunningham v. German Ins. Bank*, 41 C. C. A. 609, 101 Fed. 977, s. c. 43 C. C. A. 377, 103 Fed. 932, 4 Am. Bankr. Rep. 192), and was a bankruptcy proceeding under § 2, cl. 7, within the meaning of § 25, regulating appeals in bankruptcy proceedings, and that

the decree upon it was not 'a judgment allowing or rejecting a debt or claim of five hundred dollars or over,' within § 25a, 3, and was not an independent ground of appeal. See *Re Whitener*, 44 C. C. A. 434, 105 Fed. 180, 186; *Re Worcester County*, 42 C. C. A. 637, 102 Fed. 808, 813; *Re Rouse, H. & Co.* 33 C. C. A. 356, 63 U. S. App. 570, 91 Fed. 96; *Re York*, 4 Nat. Bankr. Reg. 479, 483. If the question should be held to come up as incident to the appeal on the proof (*Cunningham v. German Ins. Bank*, supra), we see no error in the decree of the district court."

The contest in the *Otis* Case, as in this, was over the claim presented, and, incidentally, to establish a lien upon the bankrupt's estate.

It is insisted, however, that inasmuch as the trustee in the case at bar made no objection to the amount found due upon the notes by the district court, and only sought by his appeal to further contest the right to the security asserted by Arts, that his sole remedy was under § 24b,—to have a revision in the circuit court of appeals by a petition filed for that purpose, and that the circuit court of appeals should have dismissed the attempted appeal. But we are of opinion that the character of the proceeding must be determined by the nature of the claim set up against the trustee in bankruptcy, and as § 25a, 3 gives an appeal to the court of appeals from a judgment allowing or rejecting a debt or claim of \$500 or over, that the appeal *was properly allowed in this case, and brought before the circuit court of appeals the validity of the claim and the lien asserted securing the debt.

The question remains, Has this court jurisdiction by appeal from the circuit court of appeals? This depends upon subdivision b of § 25, giving an appeal, under such rules as may be prescribed by this court, where the amount in controversy exceeds the sum of \$2,000, and the question involved is one which might have been taken on appeal or writ of error from the highest court of the state to this court; or where some justice of this court shall make a certificate, as required under paragraph 2 of subdivision b. As there is no such certificate, the question is, Was the appeal taken within the time prescribed by the rules of this court, and is the question involved one which might have been taken on appeal or writ of error from the highest court of the state to this court? The general order in bankruptcy No. 36 provides that appeals under the act from the circuit court of appeals to this court shall be taken within thirty days after the judgment or decree, and that in every such case "the court from

which the appeal lies shall, at or before the time of entering its judgment or decree, make and file a finding of the facts, and its conclusions of law thereon, stated separately; and the record transmitted to the Supreme Court of the United States in such an appeal shall consist only of the pleadings, the judgment or decree, the finding of facts, and the conclusions of law." The appeal was taken within the thirty days. The circuit court of appeals made the findings of fact and conclusions of law part of the record by an order, made within thirty days, directing the same to be filed *nunc pro tunc* as of the date the judgment entered. It is insisted that this is not a compliance with the rule that requires the findings to be made at or before the time of entering its judgment or decree. But we think that the court must be presumed to have acted within its authority to correct the record by this order, made within the time allowed for an appeal, to make it show the findings at or before the time of entering the judgment.

238] *Is the case one which might have been taken to this court upon appeal or writ of error from the highest court of the state? We are of opinion that it is. In determining the validity of the lien asserted to secure the claim, a construction of the bankruptcy act is directly involved. A construction of the act is insisted upon by the appellant which would defeat the lien. On the other hand, the construction contended for by the appellee would give the lien validity. In such a case, had the case been in the state court, it might have been brought here for review under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575). *Rector v. City Deposit Bank Co.* 200 U. S. 405, 50 L. ed. 527, 26 Sup. Ct. Rep. 289; *St. Louis, I. M. & S. R. Co. v. Taylor*, 210 U. S. 281, 293, 52 L. ed. 1061, 1067, 28 Sup. Ct. Rep. 616. It is contended that a contrary ruling was made in *Chapman v. Bowen*, 207 U. S. 89, 52 L. ed. 116, 28 Sup. Ct. Rep. 32. But, in concluding the opinion of the court in that case, Mr. Chief Justice Fuller said:

"The decision below proceeded on well-settled principles of general law, broad enough to sustain it without reference to provisions of the bankruptcy act. And, moreover, even if it could be held that by his claim Bowen asserted any right within the meaning of § 709, Rev. Stat., the decision was in his favor, and the trustee's bare denial of the claim could not be relied on under that statute. *Jersey City & B. R. Co. v. Morgan*, 160 U. S. 288, 40 L. ed. 430, 16 Sup. Ct. Rep. 276."

We, therefore, reach the conclusion that the claim presented instituted a proceeding

in bankruptcy, and, being for over \$500, it was appealable to the circuit court of appeals, bringing to that court the validity of the asserted lien, and that appeal lies to this court under § 25b, as the claim exceeded \$2,000, and, with the lien asserted thereon, presented a case for the construction of the bankruptcy act which might have been brought here under § 709 of the Revised Statutes had the case been decided by the highest court of the state. We, therefore, entertain the case upon its merits, and will proceed to examine the validity of the lien asserted under the mortgage to Arts upon the facts found by the circuit court of appeals.

In an appeal of this character we can look only at the facts *found by the circuit[239 court of appeals. General orders in bankruptcy 36, paragraph 3. The question before us is, Upon the findings of fact made by the circuit court of appeals, should the mortgage to Arts of May 2, 1904, securing the sum of \$98,503.32, have been invalidated? The mortgage was placed on a large tract of land in Carroll county, Iowa. The record discloses that this was not all the property of the bankrupt. Just what the other property was worth above encumbrances does not definitely appear. It does appear, however, that the bankrupt owned a residence and business lot in Glidden, Iowa, 200 or 300 head of cattle, 30 horses, a large number of hogs, and some farm machinery, unencumbered. And it is specifically found that although Armstrong was insolvent on May 2, 1904, and knew that he was insolvent, neither the mortgagee nor any of his agents knew or had reasonable cause to believe that Armstrong was then insolvent; nor did Arts or any of his agents then have reasonable cause to believe that it was intended thereby to give a preference over other creditors by the execution of the mortgage. It is further specifically found that Armstrong did not make the mortgage in question with any intent or purpose on his part to hinder, delay, or defraud his creditors, or any of them. The decision of the case requires consideration of certain sections of the bankruptcy act. Section 60, subdivision a [as amended by § 13, 32 Stat. at L. 799, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1031], provides:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition, and before the adjudication, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such

judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Such preferences may be set aside under the condition named in subdivision b of § 60 [as amended by § 13], which is as follows:

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting **240***therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person."

Manifestly this conveyance could not be set aside under the provisions of § 60b. For, while it is true that, under the facts found, the conveyance might be deemed a preference, as a transfer of property which would have the effect of enabling one creditor to obtain a larger percentage of his debt or claim than other creditors of the same class, yet, as it is distinctly found that neither the mortgagee nor his agent had any reasonable cause to believe that it was intended to give a preference, the same could not be avoided under § 60b.

The reliance in this case is upon § 67e of the act. This section, so far as it is necessary to consider it, reads as follows:

"d. Liens given or accepted in good faith, and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act.

"e. That all conveyances, transfers, assignments, or encumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act, and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay, or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt, and shall pass to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." [30 Stat. at L. 564, chap. 541, U. S. Comp. Stat. 1901, p. 3449.]

*It is the contention of the appellant[**241** that, as the necessary consequence of the giving of the mortgage under consideration was to hinder, delay, or defraud creditors of the bankrupt in the collection of their debts, Armstrong must be presumed to have intended such consequences, and the mortgage is therefore voidable.

A consideration of the provisions of the bankruptcy law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in § 60, enabling one creditor to obtain a greater portion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view to obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who, himself or by his agent, knew of the intention to create a preference. In construing the bankruptcy act this distinction must be kept constantly in mind. As was said in *Githens v. Shiffler*, 112 Fed. 505: "An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one." In *Re Maher*, 144 Fed. 503-505, it was well said by the district court of Massachusetts:

"In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual,—the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him."

Is the conveyance voidable under subdivision e, § 67? Under the terms of that subdivision a fraudulent conveyance is made void as to creditors, except as to grantees in good faith and for a present fair consideration. The provision saving conveyances to purchasers in good faith and for a present fair consideration prevents such conveyances from being declared void *by the act, although they have[**242** been made by the bankrupt with the intent on his part to hinder, delay, or defraud his creditors. But the act does not dispense with the necessity of showing, to avoid a conveyance or transfer under § 67e, that the bankrupt had the actual intent to hinder, delay, or defraud creditors. What is meant when it is required that such conveyances, in order to be set aside, shall be made with the intent on the bankrupt's

part to hinder, delay, or defraud creditors? This form of expression is familiar to the law of fraudulent conveyances, and was used at the common law, and in the statute of Elizabeth, and has always been held to require, in order to invalidate a conveyance, that there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying, or defrauding creditors. The question of fraud depends upon the motive. Kerr, *Fraud & Mistake*, 196, 201. The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance; but it was uniformly recognized that, acting in good faith, a debtor might thus prefer one or more creditors. *Stewart v. Dunham*, 115 U. S. 61, 29 L. ed 329, 5 Sup. Ct. Rep. 1163; *Huntley v. Kingman & Co.* 152 U. S. 527, 38 L. ed. 540, 14 Sup. Ct. Rep. 688.

We are of opinion that Congress, in enacting 67e, and using the terms "to hinder, delay, or defraud creditors," intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In § 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in 67e, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in § 3, subdivision 1, in which it is made an act of bankruptcy to transfer property with intent to hinder, delay, or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in *Lansing Boiler & Engine Works v. Ryerson*, 63 C. C. A. 253, 128 Fed. 701. Considering the language, 243]* which is identical with that in § 67e, the circuit court of appeals, speaking through Judge Severns, said:

"The language of subsection 1 of § 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. *Githens v. Shiffer* (D. C.) 112 Fed. 505. And, so construed, the test of the conveyances intended by subsection 1 of § 3 is that of the bona fides of the transfer. *Loveland*, Bankr. 2d ed. § 51. For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or present consideration, is not forbidden by such

statutes, notwithstanding the effect may be that it hinders or delays creditors by removing from their reach assets of the debtor."

And to the same effect is the decision of the circuit court of appeals of the second circuit in *Re Bloch*, 74 C. C. A. 250, 142 Fed. 676, in which that court had occasion to consider the meaning of § 67e as applicable to 57g of the act as amended 1903, requiring the surrender of preferences voidable under § 60, subdivision b, or of fraudulent conveyances voidable under § 67e, in order to make proof of a claim, and, in considering § 67e, Judge Townsend, speaking for the court, said:

"We think Congress must be presumed to have intended by the introduction of § 67e to require a surrender only of such transfers as would have been fraudulent at common law, or would constitute an act of bankruptcy under § 3 of the act. In *Githens v. Shiffer*, supra, the bankrupt used the proceeds of a sale of property to prefer certain creditors. The court, upon a review of the authorities, held that § 3 applied only to those transfers which, according to the established course of authority, constituted a fraudulent transfer at the time of the passage of the bankruptcy act, and held that a mere preferential transfer, as distinguished from a fraudulent one, was not an act in bankruptcy under said § 3.

*"The question as to whether a trans-[244 fer is made with intent to hinder, delay, or defraud depends upon whether the act done is a bona fide transaction. *Loveland*, Bankr. 391; *Cadogan v. Kennett*, 2 Cowp. 435; *Lansing Boiler & Engine Works v. Ryerson*, supra. An intent to defraud is the test of the right to avoid a transfer under § 67e."

In dealing with this question this court said, in *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306:

"There is no finding that, in parting with the possession of the property, the mortgagor had any purpose of hindering, delaying, or defrauding his creditors or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property within the provisions of § 67e of the bankruptcy law."

That it is essential to show actual fraud in order to invalidate conveyances under § 67e is the view of the text writers upon this subject. *Loveland*, Bankr. 3d ed. 476; *Collier*, Bankr. 6th ed. 562; 1 *Remington*, Bankr. § 1498.

We do not agree, if such is to be held the effect of the third conclusion of law in the finding of the court of appeals, that the

giving of the mortgage and its effect upon other creditors could not be considered as an item of evidence in determining the question of fraud. What we hold is that, to constitute a conveyance voidable under § 67e, actual fraud must be shown.

How, then, stands the case at bar? As we have already said, we must decide this case upon the facts found in the circuit court of appeals, and it is therein found that, in making the mortgage in question, Armstrong had no intention to hinder, delay, or defraud his creditors. In view of the finding of the circuit court of appeals, it may be that Armstrong, though including in the conveyance a large amount of his property, acted in good faith, with a view to preserving his estate, and enabling him to meet his indebtedness. Such conveyances were valid at the common law and under the statute from which this feature of the law was taken, and while Congress, 245] in the *bankruptcy act, strikes down preferential conveyances which come within its terms where the party preferred has good reasons to believe that a preference is intended, it has not declared voidable merely preferential conveyances made in good faith, and in which the grantee, as is found in this case, was ignorant of the insolvency of the grantor, and had no reason to believe that a preference was intended. Nor do we think the circuit court of appeals erred in holding that, inasmuch as the estate was ample for that purpose, Arts was entitled to interest on his mortgage debt. Finding no error in the judgment of the Court of Appeals, the same is affirmed.

COMMERCIAL MUTUAL ACCIDENT
COMPANY, Plff. in Err.,

v.

MARY B. DAVIS.

(See S. C. Reporter's ed. 245-257.)

Appearance — effect to give jurisdiction — special or general.

1. An appearance for the sole purpose

NOTE. — On service of process on foreign corporations—see notes to *Foster v. Charles Betcher Lumber Co.* 23 L.R.A. 490; *Eldred v. American Palace-Car Co.* 45 C. C. A. 3, and *Cella Commission Co. v. Bohlinger*, 78 C. C. A. 473.

On due process of law in service of process on foreign corporation—see notes to *Pinney v. Providence Loan & Invest. Co.* 50 L.R.A. 589, and *Cella Commission Co. v. Bohlinger*, 8 L.R.A. (N.S.) 537.

On direct review in Federal Supreme Court of judgments of district or circuit courts—see note to *Gwin v. United States*, 46 L. ed. U. S. 741.

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of raising the question of jurisdiction and removing the case from a state court to a Federal circuit court does not amount to a general appearance in the suit.

[For other cases, see *Appearance*, I. b, in *Digest Sup. Ct. 1908.*]

Writ and process — service on foreign insurance company — person adjusting loss.

2. The medical representative of a foreign insurance company who comes into the state clothed with full authority to adjust a claim is one "who adjusts or settles a loss" within the meaning of 2 Mo. Rev. Stat. 1899, § 7992, providing for the service of process on local agents, although in fact such loss is not actually settled.

[For other cases, see *Writ and Process*, 67-77, in *Digest Sup. Ct. 1908.*]

Writ and process — service on foreign insurance company — person adjusting loss.

3. A state may provide, as has Missouri by 2 Rev. Stat. 1899, § 7992, for the service of process in an action against a foreign insurance company upon any person within the state who adjusts or settles a loss.

[For other cases, see *Writ and Process*, 67-77, in *Digest Sup. Ct. 1908.*]

Writ and process — service on foreign insurance company — what is doing business.

4. A foreign accident insurance company which has policies outstanding in the state, and has and exercises the right to investigate losses thereunder, to examine the body of the deceased insured in proper cases, and to adjust and settle losses within the state, is doing business therein so as to support service of process upon a local agent within the state, conformably to 2 Mo. Rev. Stat. 1899, § 7992, providing for the service of process in actions against foreign insurance companies.

[For other cases, see *Writ and Process*, 67-77, in *Digest Sup. Ct. 1908.*]

Appeal — review of facts.

5. The decision below, even on a question of fact, may, if clearly erroneous, be set aside by the Federal Supreme Court on a direct writ of error sued out to a circuit court under the act of March 3, 1891 (26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 5, to review a case in which the question of jurisdiction alone is involved, and which is duly certified for decision.

[For other cases, see *Appeal and Error*, VIII. i, in *Digest Sup. Ct. 1908.*]

Appeal — review of facts.

6. A finding of a Federal circuit court that a foreign insurance company was not induced by fraud or artifice to send its medical representative into the state, clothed with authority to settle a loss, so as to permit service of process on him in an action against the company, will not be set aside by the Federal Supreme Court as clearly erroneous, where the lower court might have found on the testimony that there was a bona fide attempt to settle the controversy between the parties, and that it was only upon failure to reach a settle-

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ment that service of summons was made upon such medical representative as the agent of the company.

[For other cases, see Appeal and Error, VIII. 1, in Digest Sup. Ct. 1908.]

[No. 114.]

Argued March 15, 16, 1909. Decided April 5, 1909.

IN ERROR to the Circuit Court of the United States for the Western District of Missouri to review a judgment overruling a motion to set aside service of process in an action against a foreign insurance company, and to dismiss the action for want of jurisdiction. Affirmed.

The facts are stated in the opinion.

Mr. Jules C. Rosenberger argued the cause, and, with Messrs. James C. Jones and Kersey Coates Reed, filed a brief for plaintiff in error:

In order to support the jurisdiction of the court to render a personal judgment against a foreign corporation, these facts are essential: (1) That, at the time of service of the summons, the corporation was engaged in business in the state. (2) That the person upon whom service was had stood in a representative character to the company; that his employment was general, not special, and that his duties were not limited to those of a subordinate employee nor to a particular transaction; and (3) that such person was not lured or enticed into the state, or authority conferred upon him through any trick or device employed by the plaintiff.

St. Clair v. Cox, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Gold-ey v. Morning News, 156 U. S. 522, 39 L. ed. 518, 15 Sup. Ct. Rep. 559; Connecticut Mut. L. Ins. Co. v. Spratley, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; Barrow S. S. Co. v. Kane, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; Conley v. Mathieson Alkali Works, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; Geer v. Mathieson Alkali Works, 190 U. S. 428, 47 L. ed. 1122, 23 Sup. Ct. Rep. 807; Remington v. Central P. R. Co. 198 U. S. 95, 49 L. ed. 959, 25 Sup. Ct. Rep. 577.

The defendant was and is not doing business in this state. Isolated or sporadic transactions, taking place between a foreign corporation and citizens of a state, are not a doing or carrying on of business within that state, even where the transaction is of such a character as to constitute a part of the ordinary business of the corporation.

Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739; Frawley v. Pennsylvania Casualty Co. 124

Fed. 264; Loudon Machinery Co. v. American Malleable Iron Co. 127 Fed. 1008; Romaine v. Union Ins. Co. 55 Fed. 751; Hazeltine v. Mississippi Valley F. Ins. Co. 55 Fed. 743; St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co. 32 Fed. 802; United States v. American Bell Teleph. Co. 29 Fed. 41; Carpenter v. Westinghouse Air-Brake Co. 32 Fed. 434; 19 Cyc. Law & Proc. p. 1268, title, Foreign Corporations.

Much more so is this true where, as in this case, the business transacted was wholly by mail, where policies of insurance are negotiated by correspondence with the company, and not through the medium of agents located in the state, or going into it for that purpose, and the business, whatever it was, was done at the home office in a foreign state, where the applications were received and passed upon, the payment of premiums made, and the policies written and forwarded; this does not constitute a doing of business in the state.

Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 832, 17 Sup. Ct. Rep. 427; Marine Ins. Co. v. St. Louis, I. M. & S. R. Co. 41 Fed. 643; Hazeltine v. Mississippi Valley F. Ins. Co. and Romaine v. Union Ins. Co. supra; Caesar v. Capell, 83 Fed. 403; Eastern Bldg. & L. Asso. v. Bedford, 88 Fed. 7; Neal v. New Orleans Loan, Bldg. & Sav. Asso. 100 Tenn. 607, 46 S. W. 755; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259.

Where the agency of the person served is casual or temporary or confined to a particular purpose, he cannot be held, in law, an agent to receive service of process on behalf of the corporation.

St. Clair v. Cox; Connecticut Mut. L. Ins. Co. v. Spratley; and Loudon Machinery Co. v. American Malleable Iron Co.,—supra; Houston v. Filer & S. Co. 85 Fed. 757; Mexican C. R. Co. v. Pinkney, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859; Maxwell v. Atchison, T. & S. F. R. Co. 34 Fed. 286; Frawley v. Pennsylvania Casualty Co. 124 Fed. 265; Wall v. Chesapeake & O. R. Co. 37 C. C. A. 129, 95 Fed. 398.

If a person is induced by artifice to come within the jurisdiction of a court for the purpose of having process served upon him, and process is there served, it is such an abuse that the court will, on motion, set the process aside.

Fitzgerald & M. Constr. Co. v. Fitzgerald, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Loudon Machinery Co. v. American Malleable Iron Co. supra; Cavanagh v. Manhattan Transit Co. 133 Fed. 818.

The Federal courts, in determining their jurisdiction, are not bound by any local statute or decision, but will determine, on

principles of general jurisprudence, whether the company is doing business in the state, and whether the person served is such an agent as is truly representative of the corporation.

St. Clair v. Cox; *Barrow S. S. Co. v. Kane*; *Connecticut Mut. L. Ins. Co. v. Spratley*; and *Frawley v. Pennsylvania Casualty Co.*,—*supra*.

The return of service by an officer of a local court is not conclusive upon a court of the United States, and its recitals may be contradicted, any state decision or statute to the contrary notwithstanding. *Ibid*.

The defendant did not waive its objections to the service nor its right to contest the jurisdiction by taking depositions in support of its motion to quash the service.

Stonega Coal & Coke Co. v. Louisville & N. R. Co. 139 Fed. 271; *Pacific Mut. L. Ins. Co. v. Tompkins*, 41 C. C. A. 488, 101 Fed. 539.

This court can review the decision of the court below on the motion to set aside the service.

Goldey v. Morning News, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; and *Mexican C. R. Co. v. Pinkney*, *supra*.

Where, as here, the evidence as to service is embodied in a bill of exceptions, the evidence therein presented will govern and control the jurisdictional recitals of due service of process, contained in a sheriff's return or in a judgment.

17 Am. & Eng. Enc. Law, 2d ed. pp. 1077, 1082; *Settlemier v. Sullivan*, 97 U. S. 444, 24 L. ed. 1110; *Galpin v. Page*, 18 Wall. 366, 21 L. ed. 962; *Laney v. Garbee*, 105 Mo. 360, 24 Am. St. Rep. 391, 16 S. W. 831; *Johnson v. Hunter*, 77 C. C. A. 359, 147 Fed. 138.

The presumption in support of the judgments of courts of general jurisdiction only arises with respect to jurisdictional facts as to which the record is silent. When the record sets out the evidence as to service, it will be presumed that it contains all the evidence; not that there was other or different evidence to support the judgment.

Settlemier v. Sullivan and *Galpin v. Page*, *supra*.

A finding by the court on the question of jurisdiction is not conclusive where the record itself shows that the finding is not true, because it is also a rule in regard to the effect of records as evidence that one part of a record may be impeached by another part.

17 Am. & Eng. Enc. Law, 2d ed. p. 1082; *Laney v. Garbee*, *supra*.

Mr. William C. Scarritt argued the cause, and, with Messrs. Elliott H. Jones and Edward L. Scarritt, filed a brief for defendant in error:

The finding of the lower court that the plaintiff in error was doing business in the state of Missouri, and that there was no fraudulent enticement of defendant below into this state, and that due service of process upon the defendant had been made, is, upon this record, conclusive upon this court.

Jeffries v. Mutual L. Ins. Co. 110 U. S. 305, 28 L. ed. 156, 4 Sup. Ct. Rep. 8; *Mercantile Mut. Ins. Co. v. Folsom*, 18 Wall. 237, 253, 21 L. ed. 827, 834; *Cooper v. Omohundro*, 19 Wall. 65, 69, 22 L. ed. 47, 48; *Mann v. Rock Island Bank*, 11 Wall. 650, 652, 20 L. ed. 188, 189.

The return of the officer as to the service of the summons, and the finding of the court in its judgment as to the facts of that service, are at least *prima facie* evidence of the facts so recited.

Alderson, *Judicial Writs & Process*, p. 530; *Murfree*, *Sheriffs*, § 866a; 18 Enc. Pl. & Pr. pp. 963, 978; *Wall v. Chesapeake & O. R. Co.* 37 C. C. A. 129, 95 Fed. 404; *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Newcomb v. New York C. & H. R. R. Co.* 182 Mo. 687, 81 S. W. 1069; *Phillips v. Evans*, 64 Mo. 17; *Regent Realty Co. v. Armour Packing Co.* 112 Mo. App. 271, 86 S. W. 880.

The service of the writ on Mr. Mason for and on behalf of the company was good service.

Pennsylvania Lumberman's Mut. F. Ins. Co. v. Meyer, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; *Houston v. Filer & S. Co.* 85 Fed. 757; *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308; *Chattanooga Nat. Bldg. & L. Asso. v. Denson*, 189 U. S. 408, 47 L. ed. 870, 23 Sup. Ct. Rep. 630; *Funk v. Anglo-American Ins. Co.* 27 Fed. 336; *St. Clair v. Cox*, *supra*.

The taking and filing of depositions in a case is a general appearance.

Bates v. Scott, 26 Mo. App. 430.

Mr. Justice Day delivered the opinion of the court:

This case presents a question of the jurisdiction of the circuit court of the United States to entertain a suit brought by Mary B. Davis, defendant in error, plaintiff below, against the *Commercial Mutual[250 Accident Company, plaintiff in error, defendant below. The case comes here upon a certificate involving the question whether the defendant company was duly served with process. The circuit court found that the service of summons was valid and sufficient to give it jurisdiction, and overruled a

motion to set aside the service and dismiss the action for want of jurisdiction.

The suit was commenced by Mary B. Davis in the circuit court of Howard county, Missouri, and was removed to the circuit court of the United States for the central division of western Missouri by the defendant, a Pennsylvania corporation. The company made no appearance in the court below or in the state court, except for the purpose of raising the question of jurisdiction, and removing the case to the Federal court. Such proceedings did not amount to a general appearance in the suit. *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Wabash Western R. Co. v. Brow*, 164 U. S. 271, 41 L. ed. 431, 17 Sup. Ct. Rep. 126.

The record contains a bill of exceptions, setting forth the testimony upon the question of jurisdiction. It appears that A. F. Davis, husband of the plaintiff, held a policy in the defendant company, issued August 6, 1896, in the sum of \$5,000, insuring against accidental death. On December 31, 1906, he received a gunshot wound, from which he died on the 4th of January, 1907. On January 7th, 1907, the insurance company was notified of the death. On January 14 and 15 one Dr. Mason, of Chicago, went to the city of Fayette, Missouri, the home of the plaintiff, and there made an investigation of the cause of death in defendant's behalf, and demanded an inspection of the body of the deceased, which demand was refused. Some correspondence ensued between the plaintiff and the defendant company, and, on February 20, a letter was written, signed by the plaintiff, which letter contained, among other things, the following:

"However, if you think it is right, you may send someone here to examine the body for you. Can't you also send someone authorized who could settle the claim here if your doctor found everything as reported, 251]as most all of the claims have *been paid, and I am very anxious to have the balance settled as soon as possible.

"Then, too, if I should want to compromise the claim in lieu of an examination, your agent would have power to settle it without any delay. Please let me know just when you will send someone, as I am thinking of going to St. Louis for a few days, and would like to be here when he comes, so let me know several days in advance."

To this letter the company replied by a letter written by its secretary at the Philadelphia office, that it would have its medical representative in Fayette with authority to make an adjustment. Afterwards, on February 27, Dr. Mason went to Fayette, having received a written letter of author-

ity from the company, authorizing him to act on behalf of the company in the examination of the body of the deceased, which letter also authorized him to adjust the claim.

The testimony is not altogether in harmony as to what occurred at the meeting of February 27. It does appear that the representative of the plaintiff and Dr. Mason met and conferred upon the matter of compromising the claim, and that afterwards an offer was made by the plaintiff's representatives to proceed with an examination of the body of the deceased. Dr. Mason declined this offer until he could have another physician present; and, after some negotiation, a deputy sheriff appeared and served process upon Dr. Mason as agent of the company, upon a petition which had been prepared before his arrival, and which was filed in the case subsequently removed to the Federal court. There is also testimony tending to show that a physician was present, who was ready to assist in the examination of the body as a representative of the plaintiff.

The grounds of objection to the service in the case may be summarized to be: First, that Mason was not a person authorized to receive service of process on defendant's behalf; second, that, at the time the service was attempted, the defendant company was not engaged in the transaction of business in the state of Missouri; third, that Dr. Mason was enticed into the state of *Missouri by the trick and device of [252 the plaintiff; fourth, that the return of service did not disclose a valid service under the laws of the United States nor of the state of Missouri.

As to the service of summons, the statutes of Missouri provide (Revised Statutes of Missouri, 1899, vol. 1, § 570) as follows:

"A summons shall be executed, except as otherwise provided by law, either . . . fourth, where defendant is a corporation or joint stock company, organized under the laws of any other state or country, and having an office or doing business in this state, by delivering a copy of the writ and petition to any officer or agent of such corporation or company in charge of any office or place of business, or, if it have no office or place of business, then to any officer, agent, or employee in any county where such service may be obtained, and, when had in conformity with this subdivision, shall be deemed personal service against such corporation, and authorize the rendition of a general judgment against it."

Section 7992, vol. 2, Revised Statutes of Missouri, 1899:

"Service of summons in any action against an insurance company not incor-

porated under and by virtue of the laws of this state, and not authorized to do business in this state by the superintendent of insurance, shall, in addition to the mode prescribed in § 7991, be valid and legal and of the same force and effect as personal service on a private individual, if made by delivering a copy of the summons and complaint to any person within this state who shall solicit insurance on behalf of any such insurance corporation, or make any contract of insurance, or collect or receives any premium for insurance, or who adjusts or settles a loss, or pays the same for such insurance corporation, or in any manner aids or assists in doing either."

The sheriff returned the summons as follows:

Executed the within writ in the county of Howard and state of Missouri, on the 27th day of February, A. D. 1907, by delivering a copy of the petition in this case hereto attached and a copy of this writ to Frank G. Mason, agent of the within-named 253]*defendant, the Commercial Mutual Accident Company, a corporation organized under the laws of the state of Pennsylvania, and doing business in the state, but having no office or place of business herein, and not incorporated under the laws of this state nor authorized to do business in this state, and while he, the said agent, was transacting business for the said defendant in our said county, and while he was adjusting or settling a loss on a policy of insurance for said defendant, or was aiding and assisting in so doing.

George D. Gibson,
Sheriff, Howard County, Missouri,
By H. L. Hughes, Deputy.

In view of the fact that much of the business of the country is done by corporations having foreign charters and principal offices remote from states wherein they transact business, it has been found necessary to make provision for the service of summons upon local agents, in order to give jurisdiction to try controversies which have originated in such states. With this purpose in view, many states have provided that foreign corporations, in order to do business within the state, must make provision for service upon some local agent, or by authority conferred upon some state officer to accept service of summons. And but for such statutes and the authority given by the states to obtain service upon local agents, there could be no recovery upon the contracts of such companies, unless redress be sought in a distant state, where the company may happen to have its home office. Connecticut Mut. L. Ins. Co. v. Spratley,

172 U. S. 602, 619, 43 L. ed. 569, 575, 19 Sup. Ct. Rep. 308; Baltimore & O. R. Co. v. Harris, 12 Wall. 65, 83, 20 L. ed. 354, 358.

In pursuance of this policy the state of Missouri has enacted the sections of its statutes providing for service upon the agents of insurance companies. In § 7992 it is provided, among other things, that service may be made by delivering a copy of the summons and complaint to any person within the state who shall solicit insurance on behalf of any insurance company, or make any contract of insurance, or who collects or receives any *premium for in-[254 surance, or who adjusts or settles a loss or pays the same for such insurance corporation, or in any manner aids or assists in doing either. Under this section, in part, at least, the sheriff undertook to make service upon Dr. Mason. The record clearly discloses that Mason had authority to adjust and settle the loss which was the subject of the plaintiff's claim. It is true that the statute says that service may be upon "any person within the state . . . who adjusts or settles the loss," etc. This language clearly has reference to the authority of the person whom the statute declares to be competent to receive service of summons, and the statute, in effect, provides that the person clothed with such power shall be capable of receiving service upon the corporation. The statute designing to reach one having the authority of the company for the purpose named, it is immaterial that the loss was not actually settled. This section (7992) is limited to the cases of companies not incorporated under the laws of the state, and not authorized to do such business within the state by the superintendent of insurance.

This law was in force when Dr. Mason came into the state, clothed with full authority to settle the loss. The company must be presumed to have acted with knowledge of this statute. The company could only be served with process through some agent. It was competent for the state, keeping within lawful bounds, to designate the agent upon whom process might be served. It chose to enact a statute providing that an agent competent by authority of the company to settle and adjust losses should be competent to represent the company for the service of process. When the company sent such an agent into Missouri, by force of the statute he is presumed to represent the company for the purpose of service, and to be vested with authority in respect to such service so far as to make it known to the foreign corporation thus coming within the state and subjecting itself to its laws. Lafayette Ins. Co. v. French, 18 How. 404, 408, 15 L. ed. 451, 453.

It is not necessary that express authority 255]to receive service *of process be shown. The law of the state may designate an agent upon whom service may be made, if he be one sustaining such relation to the company that the state may designate him for that purpose, exercising legislative power within the lawful bounds of due process of law. This was held in effect in *Connecticut Mut. L. Ins. Co. v. Spratley*, 172 U. S. 602, 43 L. ed. 569, 19 Sup. Ct. Rep. 308.

We think the state did not exceed its power and did no injustice to the corporation by requiring that, when it clothed an agent with authority to adjust or settle the loss, such agent should be competent to receive notice, for the company, of an action concerning the same.

It is further contended that the defendant company was not doing business within the state of Missouri. That it is essential, in order to obtain jurisdiction over a foreign corporation having, as in the case at bar, neither property nor agent in the state, that it be doing business in the state, is settled by numerous decisions of this court. *St. Clair v. Cox*, 106 U. S. 350, 27 L. ed. 222, 1 Sup. Ct. Rep. 354; *Goldey v. Morning News*, 156 U. S. 518, 39 L. ed. 517, 15 Sup. Ct. Rep. 559; *Barrow S. S. Co. v. Kane*, 170 U. S. 100, 42 L. ed. 964, 18 Sup. Ct. Rep. 526; *Connecticut Mut. L. Ins. Co. v. Spratley*, supra; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Pennsylvania Lumbermen's Mut. F. Ins. Co. v. Meyer*, 197 U. S. 407, 49 L. ed. 810, 25 Sup. Ct. Rep. 483; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513.

Was the defendant doing business in the state of Missouri? The record discloses, and the court has found, that it had other insurance policies outstanding in the state of Missouri. Upon these policies undoubtedly premiums were paid, and it was the right of the company to investigate losses thereunder, to have an examination of the body of the deceased in proper cases, and to do whatever might be necessary to an adjustment or payment of any loss. The record shows that the company sent Dr. Mason to Fayette to investigate the loss sued for in this case, and later, and at the time of the service of the process, Mason was in Missouri with full authority to settle the loss in controversy.

256] *Previous cases in this court have not defined the extent of the business necessary to the presence of a foreign corporation in the state for the purpose of a valid service; it is sufficient if it is doing business therein. We are of opinion that the finding of the court in this case is supported by 53 L. ed.

testimony, and that the corporation was doing business in Missouri.

It is urged that it clearly appears from the testimony in this case that Dr. Mason was sent into the state of Missouri because of the fraud and artifice of the plaintiff, and that in such case the law will not permit a service of summons to stand. It is undoubtedly true that if a person is induced by artifice or fraud to come within the jurisdiction of the court for the purpose of procuring service of process, such fraudulent abuse of the writ will be set aside upon proper showing. *Fitzgerald & M. Constr. Co. v. Fitzgerald*, 137 U. S. 98, 34 L. ed. 608, 11 Sup. Ct. Rep. 36. "The fraud of the plaintiff," says the counsel for the plaintiff in error, "consisted in inducing the company, by artifice, to confer upon Dr. Mason authority to compromise the suit."

Upon the testimony before the court, the circuit court reached the conclusion that the company was not induced by fraud or artifice to send Dr. Mason to the state of Missouri. This court has jurisdiction to review, under § 5 of the act of March 3, 1891 [26 Stat. at L. 827, chap. 517, U. S. Comp. Stat. 1901, p. 549], cases in which the question of jurisdiction alone is involved, and which are duly certified here for decision. And where the decision of the court below is clearly wrong, even upon a question of fact, it may be set aside under the power conferred by the statute upon this court. We think this is the effect of the reasoning in *Goldey v. Morning News*, supra; and *Mexican C. R. Co. v. Pinkney*, 149 U. S. 194, 37 L. ed. 699, 13 Sup. Ct. Rep. 859.

It is contended by counsel for the plaintiff in error that the evidence is undisputed, and clearly demonstrates the fraudulent conduct of the plaintiff in obtaining service in this case. But we are not prepared, on this question of fact, to say that the court below committed plain error. The court might have found upon the testimony that there was a bona fide attempt *to[257 settle the controversy between the parties, and that it was only when they failed to settle that service of summons was made upon Mason, as the agent of the company. There is testimony tending to show that both parties expected an adjustment of the claim to be made at this meeting, which was held for that purpose. There is testimony from which it might be inferred that there was a bona fide offer to permit an examination at that time of the remains of the deceased. We do not feel authorized to find, as against the testimony set forth in the bill of exceptions, and the finding of the court below, that the purpose in writ-

ing the letter of February 20, and procuring authority to be conferred upon Dr. Mason to settle the case, and to come into the state of Missouri for that purpose, was a mere fraudulent scheme to obtain service upon the insurance company.

As the sole question before us pertains to the sufficiency of the service under the facts disclosed, we reach the conclusion that the judgment of the Circuit Court must be affirmed.

Affirmed.

MOLYNEAUX L. TURNER, Appt. and
Plff. in Err.,
v.

AMERICAN SECURITY & TRUST COMPANY, the Children's Hospital, and the Garfield Memorial Hospital.

(See S. C. Reporter's ed. 257-267.)

Evidence — nonexpert opinion as to sanity.

1. A lay witness who has had an adequate opportunity to observe the speech and other conduct of a person whose soundness or unsoundness of mind is in issue may, in addition to relating the significant instances of speech and conduct, testify to his opinion as to mental capacity, formed at the time from such observation.

[For other cases, see Evidence VII. e, in Digest Sup. Ct. 1908.]

Appeal — review of discretionary matters — qualification of nonexpert witness.

2. The discretion of the trial judge in determining whether a given nonexpert witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of mental capacity, should not be reviewed on appeal unless the decision is clearly erroneous.

[For other cases, see Appeal and Error, 4445-4448, in Digest Sup. Ct. 1908.]

Evidence — record of divorce suit — relevancy on issue of mental capacity.

3. The record in a suit for divorce brought by the testator, in which he alleged as a cause for divorce that his wife was incapable of a valid marriage on account of a physical malformation, which the physicians appointed by the court reported, after examination, did not exist, is not admis-

sible on the issue of the testamentary capacity of the testator some thirty years afterwards, being too remote in point of time, and leading to the collateral inquiry whether the statement was actually false, and, if so, whether the result of a delusion, or of malice or falsehood.

[For other cases, see Evidence IV. k, in Digest Sup. Ct. 1908.]

Evidence — documentary — explanation or rebuttal.

4. A written agreement between testator and his wife, in which the latter relinquished all claim to her husband's property and all right to dower or alimony, and which concluded by stating that it was intended to restore to the parties the same contractual and property rights as they possessed before marriage, is admissible in evidence to explain the testator's untrue statements that he was a widower and had been divorced, which had been admitted in evidence as proof of his mental unsoundness.

[For other cases, see Evidence, XI. 1, in Digest Sup. Ct. 1908.]

Evidence — motive.

5. The motive of a wife in signing an agreement with her husband, and in joining with him in a deed, is immaterial, where such agreement and deed were only admitted in evidence on the issue of the husband's testamentary capacity, to explain his untrue statements in evidence that he was a widower and had been divorced from his wife.

[For other cases, see Evidence, XI. c, in Digest Sup. Ct. 1908.]

Appeal — errors cured below — admitting evidence.

6. Error in permitting an improper use of a letter on the cross-examination of the addressee is cured by instructing the jury that such letter is not to be taken as evidence of the truth of any of its statements, or even allowed to be used for the purpose of cross-examination.

[For other cases, see Appeal and Error, VIII. k, 3, in Digest Sup. Ct. 1908.]

[No. 101.]

Argued March 9, 10, 1909. Decided April 5, 1909.

APPEAL from and **IN ERROR** to the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, admitting a will and certain codicils to probate. Affirmed.

See same case below, 29 App. D. C. 460. The facts are stated in the opinion.

Messrs. Charles F. Carusi and J. J. Darlington argued the cause and filed a brief for appellant and plaintiff in error.

Messrs. Stanton C. Peelle and William F. Mattingly argued the cause and filed a brief for appellees and defendants in error.

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NOTE. — On nonexpert opinion as to sanity or insanity—see note to *Ryder v. State*, 38 L.R.A. 721.

On opinions as to sanity generally—see notes to *Dexter v. Hall*, 21 L. ed. U. S. 73, and *Hoffman v. Overby*, 34 L. ed. U. S. 755.

On appellate review of discretionary matters—see note to *Barrow v. Hill*, 14 L. ed. U. S. 48.

Mr. Justice Moody delivered the opinion of the court:

In this case we are asked to review, on appeal and writ of error, a judgment of the court of appeals of the District of Columbia, affirming a decree of the supreme court of the District, sitting as a probate court, which admitted to probate certain paper writings purporting to be the will and codicils thereto *of Henry E. Woodbury. The decree was based upon the findings of a jury upon two issues submitted to it, namely:

"(1.) At the time of the execution of he said several paper writings propounded or probate as the last will and testament of Henry E. Woodbury, deceased, was the said Henry E. Woodbury of sound and disposing mind and capable of making a valid deed or contract?"

"(2.) Was execution of said paper writings procured by the fraud or undue influence of Sallie Woodbury, Mena Stevens, or either of them, or any other person or persons?"

The jury found that the testator was of sound mind and that he was not unduly influenced. The questions brought here arose upon the trial of those issues and are stated in the bill of exceptions duly allowed. There are nineteen assignments of error, relating to the admission or exclusion of evidence, and to the instructions or refusal of instructions to the jury. There was conflicting evidence upon the issues. As no question of the sufficiency of the evidence of either party is properly here, a brief preliminary statement of facts is sufficient, and any other facts which may be needed to explain the questions of law will be stated in connection with the disposition of those questions.

According to the practice in the District in a contest of this kind, those propounding the instrument for probate are called caveaters and those opposing its probate caveators.

The testator, Henry E. Woodbury, died January 15, 1905, seventy-nine years of age. The will was executed April 11, 1902, and five codicils were executed at different times from January 5, 1903, to December 20, 1904. With slight exceptions, the will and codicils devise and bequeath the real and personal property to charities. The testator had been a physician until 1881, when an injury compelled him to cease the practice of his profession. He was childless. He had married in 1870, and in less than two years had parted from his wife, and thereafter they lived separately, though without being divorced. A sister, Sallie Woodbury, lived with him until her death, in December, 1902. After the death of the

sister, Mena M. Stevens became *his[260 housekeeper and nurse. A nephew, Molyneaux L. Turner, was his heir and next of kin. His wife survived the testator, and, with the nephew, filed a caveat against the probate of the paper writings purporting to be a will and codicils.

1. The first eleven assignments of error relate to the admission or exclusion by the trial court of the testimony of lay witnesses as to their opinion for or against the mental capacity of the testator. In the view we take of these assignments of error they may be considered together, and without any statement as to the testimony of the several witnesses.

The rule governing the admission of testimony of this character which has been prescribed by this court for the courts of the United States is easy of statement and administration. Where the issue is whether a person is of sound or unsound mind, a lay witness who has had an adequate opportunity to observe the speech and other conduct of that person may, in addition to relating the significant instances of speech and conduct, testify to the opinion on the mental capacity formed at the time from such observation. *Charter Oak L. Ins. Co. v. Rodel*, 95 U. S. 232, 24 L. ed. 433; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S. 612, 28 L. ed. 536, 4 Sup. Ct. Rep. 533; *Queenan v. Oklahoma*, 190 U. S. 548, 47 L. ed. 1175, 23 Sup. Ct. Rep. 762. In no other way than this can the full knowledge of an unprofessional witness with regard to the issue be placed before the jury, because ordinarily it is impossible for such a witness to give an adequate description of all the appearances which to him have indicated sanity or insanity. Such testimony has been well described as a compendious mode of ascertaining the result of the actual observations of witnesses. Ordinarily, and perhaps necessarily, the witness, in testifying to his opportunities for observation and his actual observation, relates more or less fully the instances of his conversation or dealings with the person whose mental capacity is under consideration, and it is, of course, competent, either upon direct or cross-examination, to elicit those instances in detail.

The order of the evidence must be left to the discretion of the trial judge; but, when sufficient appears to convince the *trial[261 judge that the witness has had an opportunity for adequate observation of the person's mental capacity, and has actually observed it, then the judge may permit him to testify to his opinion. This was the course pursued by the trial judge in this case. With respect to each witness whose testimony as to opinion was admitted or excluded

ed, the judge exercised his discretion upon the qualifying testimony.

We are asked to review that discretion, and to say that, in the case of the eleven witnesses before us, it was improperly exercised. We have no hesitation in declining to do this. No general rule can well be framed which will govern all cases, and an attempt to do that would multiply exceptions and new trials. The responsibility for the exercise of the judicial power of determining whether a given witness has the qualifications which will permit him, to the profit of the jury, to state his opinion upon an issue of this kind, may best be left with the judge presiding at the trial, who has a comprehensive view of the issue and of all of the evidence, and the witness himself before his face.

This is not to say that, in a very clear case, an appellate court ought not to review the discretion of the trial judge. For instance, if it should appear that the witness had never spoken to the testator or seen any significant act, but merely observed him driving from day to day through the streets, and the opinion of such a witness as to sanity had been received, it would be the duty of the appellate court to correct the error. On the other hand, if the witness for years had been in constant communication with the testator, had frequently conversed with him and observed his conduct from day to day, the exclusion of the opinion of the witness ought to be corrected by the appellate court. These are instances of a plain abuse of judicial discretion.

The true rule of action for an appellate court is stated in *Wheeler v. United States*, 159 U. S. 523, 40 L. ed. 244, 16 Sup. Ct. Rep. 93. In that case this court was considering the admissibility, upon the trial of an indictment for murder, of the testimony of a boy five and a half years old at the time of the trial. The court, speaking by Mr. Justice Brewer, said (p. 524):

"The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence as well as his understanding of the obligations of an oath. As many of these matters cannot be photographed into the record, the decision of the trial judge will not be disturbed on review unless, from that which is preserved, it is clear that it was erroneous."

Though the question of competency in that case differed materially from the questions of competency in this case, the spirit

which underlies the statement of the court there ought to govern here.

We have examined these eleven assignments of error and brought them to the test of the foregoing principles. We find that no admissions or exclusions of testimony were clearly erroneous, and accordingly all the assignments are overruled.

2. The caveators, on the issue of unsoundness of mind of the testator in 1902 and the following years, offered in evidence the record in a suit for divorce brought by the testator in 1872, and more especially that part of the record wherein he alleged, as a cause for divorce, that his wife was incapable of a valid marriage on account of a physical malformation. The physicians appointed by the court reported, after an examination of the wife, that the condition alleged did not exist. The offer of this evidence was accompanied by the contention that it showed a delusion on the part of the testator. The evidence was excluded, and we think rightly, either upon the ground that it was too remote in point of time, or that it would lead to a collateral inquiry whether the statement was actually false, and, if so, whether it was the result of a delusion, or of malice or falsehood.

3. The caveators had introduced evidence that the testator had spoken of himself as a widower and as having been divorced from his wife, both of which statements were untrue. Obviously, the testimony that these statements had been made by the testator could only have been admitted as proof of mental unsoundness. To meet this testimony and the inference which might be drawn from it, the judge admitted in evidence a written agreement made in 1887 by the testator with his wife. The material parts of the agreement follow:

"Witneseth: That, whereas the said Anna L. Woodbury is seised and possessed of certain lands and real estate in her own right in the city of Washington, District of Columbia, and Cambridge, Massachusetts; and whereas the said Anna L. Woodbury desires to be able to sell, dispose of, and convey the same as she could were she a *femme sole*; and whereas she is unable to do so unless by and with the consent and agreement of her said husband aforesaid, Henry E. Woodbury:

"Now, therefore, it is agreed by these presents that the said Henry E. Woodbury will permit the said Anna L. Woodbury to sell, dispose of, and convey any and all of her real estate as at any time she may desire to do; and, in consideration of this relinquishment of all right, title, interest, and claim of him, the said Henry E. Woodbury, in and to the property and lands of the said Anna L. Woodbury, the said

Anna L. Woodbury hereby covenants and agrees for herself, her heirs and assigns, to relinquish all and every right, title, interest, and claim that she (or they through her) may have to any and to all of the property, personal or real, that the said Henry E. Woodbury possesses now or may hereafter acquire, together with her right of dower in any estate the said Henry E. Woodbury may leave in case of his demise. And she, the said Anna L. Woodbury, further covenants and agrees with the said Henry E. Woodbury, that under no circumstances will the said Anna L. Woodbury ask for, demand, or claim from him alimony or a support for any time past, present, or to come.

"In short, this covenant and agreement is intended to restore to each of the aforesaid parties—Anna L. Woodbury and Henry E. Woodbury—the same right to contract, to use or to dispose of their respective properties, lands and estates,—personal and real,—as they possessed before they were married."

Counsel for the caveatees offered this to explain the statements of the testator, and urged its admission in connection with the fact of separation. The caveators' counsel objected to it, because it showed neither a divorce nor that the testator was a widower. The judge then said: "I think it may be competent to explain the situation here, and I will admit it." The judge further said: "Inasmuch as you have two contradictory statements from him, I think this may come in in response to that." Counsel for the caveatees, in the course of the discussion, said: "We have a right to show the relations existing between Dr. Woodbury and members of his family;" but the court did not assent to this proposition, and made no response to it.

We think it is clear that this agreement was admitted solely for the purpose of explaining the testator's statement about his divorce and widowerhood. If the caveators wished to limit its use any further than it was limited by the judge in the ruling admitting it, an instruction to the jury should have been asked. We think it is competent for the purpose for which it was offered and admitted, and that its weight was for the jury. In it the wife relinquished all claim to her husband's property, real or personal, and all right to dower or of alimony, or of other support, and concluded by saying: "This covenant and agreement is intended to restore to each of the aforesaid parties—Anna L. Woodbury and Henry E. Woodbury—the same right to contract, to use or to dispose of their respective properties, lands and estates,—personal and real,—as they pos-

sessed before they were married." Though the weight of this evidence might have been slight, we think the evidence was competent.

4. The caveators, for the purpose of explaining the signature by the wife to the agreement of 1887, then offered to prove by her deposition that she had been advised by physicians, now dead, to sign any paper that the testator wished her to sign, and that it was the mania of the testator to be rid of her and * her property, and that [265] the testator had said to them that he would die if he could not get rid of both. This testimony was excluded, and we think rightly. The motive of the wife in signing the agreement of 1887 was entirely immaterial. She did sign it, and it was admitted solely for the purpose of explaining the testator's statement that he was a widower and had been divorced.

5. The facts upon which the next assignment of error is based are very obscure. Mena M. Stevens, the nurse, was called as a witness by the caveatees. Upon cross-examination, she testified that in 1903 and 1904 she had received from the testator gifts of certain stock and a deed to certain lands, whose rental value was \$21.90 per month. The deed was delivered to a person to keep for the nurse until the testator's death. This deed was offered in evidence by the caveators. It was dated September 12, 1904. The testator described himself in this deed as a widower. Thereupon caveatees put in evidence, without objection, a deed from Henry E. Woodbury and Anna L. Woodbury, his wife, to the American Security & Trust Company, dated November 18, 1903. Whether this deed included the same land conveyed to Stevens we are unable to tell from the descriptions, but we assume it did not. The purpose for which the deed was offered does not appear. As it was admitted just prior to the admission of the agreement of 1887, and subsequent to the admission of the deed to Stevens, in which the testator called himself a widower, we may fairly assume that, like the agreement of 1887, it was offered to explain the use of the word "widower." There is nothing in the bill of exceptions to show that it was used for any other purpose, and we treat it as limited to that purpose.

The caveators offered, by the deposition of the wife, to prove the same explanation of this deed as was offered for the agreement of 1887, but the evidence was excluded. We think that the caveators have not shown that the excluded evidence was competent, and we therefore overrule this assignment of error.

It should be said generally of this and the

266]preeding assignment *of error that there is nothing to show that the instruments were received or used as evidence that the wife regarded the testator as of sound mind and capable of transacting business. There was, therefore, no occasion to offer evidence to explain the act and destroy the effect of the admission. The whole argument for the admissibility of the explanatory evidence is based upon the theory that the instruments were offered to show the wife's belief as to his mental condition,—a theory which finds no support in the bill of exceptions. If the instruments had been admitted and used for that purpose a different question would be presented.

6. Turner was called as a witness in his own behalf. On cross-examination he was asked if he had made certain insulting remarks to his aunt, Sallie Woodbury. He replied that he had not. He was then shown a paper and asked if it was in his aunt's handwriting, and replied that it was, and was a letter addressed to William H. Turner. He was then asked, over the objection and under the exception of the caveators, whether the letter did not assert that the witness had made the insulting statements. The cross-examining counsel was then permitted to read the letter for the purpose of examining the witness upon the statements contained in it. This was done over objection and under exception. The letter stated that the witness had made the insulting remarks which he had denied making. The cross-examining counsel proceeded: "Now, do you mean that that statement by her is untrue?" Answer: "I do not remember making any such statement; I am not in the habit of using any such language."

It is too clear for discussion that the use permitted to be made of this letter was erroneous, and if the matter had stopped there we should be compelled to grant a new trial. The presiding judge, however, instructed the jury in behalf of the caveators, and, it would seem, at their request, as follows:

"While the caveator was allowed by the court to be cross-examined as to the statements contained in an undated letter, purporting to have been written by his aunt, 267]Sallie Woodbury, *addressed to William F. Turner, the jury are instructed that neither the said letter nor the use thereof so allowed by the court to be made upon the cross-examination of the caveator is to be taken as evidence of the truth of any of the said statements in said letter contained or allowed to be used for the purpose of cross-examination as aforesaid."

The general rule is that the admission of incompetent evidence is not reversible

error if it subsequently is distinctly withdrawn from the consideration of the jury. *Pennsylvania Co. v. Roy*, 102 U. S. 451, 458, 26 L. ed. 141, 144; *Hopt v. Utah*, 120 U. S. 430, 438, 30 L. ed. 708, 711, 7 Sup. Ct. Rep. 614. There are cases which emphasize the necessity of clearly and unmistakably withdrawing the evidence from the consideration of the jury. *Washington Gaslight Co. v. Lansden*, 172 U. S. 535, 554, 43 L. ed. 544, 551, 19 Sup. Ct. Rep. 296; *Throckmorton v. Holt*, 180 U. S. 552, 567, 45 L. ed. 663, 671, 21 Sup. Ct. Rep. 474. But we are satisfied that this was done in this case, and that the instruction cured the error. It directed that the letter should not be taken as evidence of the truth of any of its statements or even allowed to be used for the purpose of cross-examination.

7. The remaining assignments of error relate to two instructions given to the jury and the refusal of an instruction requested by the caveators. None of the questions raised here touches upon any vital part of the case, and, while not waived, they were not much insisted upon in argument. An examination of the charge satisfies us that it contained all that the caveators were entitled to, and that it was correct, full, and adequate to present the issues to the jury. We will not prolong this opinion beyond what was said in the court below on this subject, which we approve.

Judgment affirmed.

Mr. Justice Harlan did not take part in the decision of this case.

*MARIA GUISEPPA RAFFAELA[268
MAIORANO, Plff. in Err.,
v.

BALTIMORE & OHIO RAILROAD COMPANY.

(See S. C. Reporter's ed. 268-275.)

Error to state court — questions reviewable — statutory construction.

1. The construction by the highest state court of a statute of that state creating a

NOTE. — On what questions the Federal Supreme Court will consider in reviewing the judgments of state courts—see note to *Missouri ex rel. Hill v. Doekery*, 63 L.R.A. 571.

On the construction and operation of treaties—see note to *United States v. The Amisted*, 10 L. ed. U. S. 826.

Right of nonresident alien to maintain statutory action for death of other person.

Statutes similar to Lord Campbell's act (9 & 10 Vict. chap. 93), giving a right of

right of action for death in favor of the surviving relatives of the deceased as not extending to such relatives as are nonresident aliens must be accepted by the Federal Supreme Court on a writ of error to the state court.

[For other cases, see Appeal and Error, 2124-2151, in Digest Sup. Ct. 1908.]

Treaty guaranties — right of action for death.

2. Stipulations securing equality with the natives to the citizens of each of the contracting parties in respect of protection and security of person and property, contained in the treaty of November 18, 1871 (17 Stat. at L. 845), between the United States and Italy, do not require a state to give the nonresident alien relatives of an Italian subject a right of action for damages for his death, although such ac-

tion is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety.

[For other cases, see Aliens, III. b, 4, in Digest Sup. Ct. 1908.]

[No. 103.]

Argued March 5, 8, 1909. Decided April 5, 1909.

IN ERROR to the Supreme Court of the State of Pennsylvania to review a judgment which affirmed a judgment of the Court of Common Pleas of Allegheny County, in that state, granting a nonsuit in an action brought by alien nonresident relatives of an Italian subject to recover damages for his death. Affirmed.

action for death caused by wrongful act, neglect, or default, exist in many, if not all, of the several states of the United States. The language of the statutes being general, the question has frequently arisen whether it covers actions where the beneficiaries are nonresident aliens.

The courts of Pennsylvania and Wisconsin have decided this question in the negative. *Deni v. Pennsylvania R. Co.* 181 Pa. 527, 59 Am. St. Rep. 676, 37 Atl. 558; *Maiorano v. Baltimore & O. R. Co.* 216 Pa. 402, 116 Am. St. Rep. 778, 65 Atl. 1077; *McMillan v. Spider Lake Saw Mill & Lumber Co.* 115 Wis. 332, 60 L.R.A. 589, 95 Am. St. Rep. 947, 91 N. W. 979.

Lord Campbell's act was itself construed in *Adams v. British & F. S. S. Co.* [1898] 2 Q. B. 430, as not permitting such recovery; but the opposite view has since been taken and the earlier case expressly disapproved. *Davidsson v. Hill* [1901] 2 K. B. 606.

So, too, the Indiana appellate court, after first returning a negative answer to the question (*Cleveland, C. C. & St. L. R. Co. v. Osgood* [Ind. App.] 70 N. E. 839), later changed its decision to the affirmative,—at least, where the laws of the alien's country permit a similar recovery. *Cleveland, C. C. & St. L. R. Co. v. Osgood*, 36 Ind. App. 34, 73 N. E. 285.

These later English and Indiana decisions are in accord with the overwhelming weight of authority which supports the proposition that it is no defense to actions of this kind that the beneficiaries are nonresident aliens. *Luke v. Calhoun County*, 52 Ala. 115; *Bonthron v. Phoenix Light & Fuel Co.* 8 Ariz. 129, 61 L.R.A. 563, 71 Pac. 941; *Ferrara v. Auric Min. Co.* 43 Colo. 496, 17 L.R.A. (N.S.) 964, 95 Pac. 952; *Szymanski v. Blumenthal*, 3 Penn. (Del.) 558, 52 Atl. 347; *Kellyville Coal Co. v. Petraytis*, 195 Ill. 215, 88 Am. St. Rep. 191, 63 N. E. 94; *Romano v. Capital City Brick & Pipe Co.* 125 Iowa, 591, 68 L.R.A. 132, 106 Am. St. Rep. 323, 101 N. W. 437, 2 A. & E. Ann. Cas. 678; *Rietveld v. Wabash R. Co.* 129 Iowa, 249, 105 N. W. 515; *Atchison, T. & S. F. R. Co. v. Fajardo*, 74 Kan. 314, 653 L. ed.

L.R.A. (N.S.) 681, 86 Pac. 301; *Trotta v. Johnson*, 121 Ky. 827, 90 S. W. 540, 12 A. & E. Ann. Cas. 222; *Mulhall v. Fallon*, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; *Renlund v. Commodore Min. Co.* 89 Minn. 41, 99 Am. St. Rep. 534, 93 N. W. 1057; *Gaska v. American Car & Foundry Co.* 127 Mo. App. 169, 105 S. W. 3; *Alfson v. Bush Co.* 182 N. Y. 393, 108 Am. St. Rep. 815, 75 N. E. 230; *Tanas v. Municipal Gas Co.* 88 App. Div. 251, 84 N. Y. Supp. 1053; *Pittsburgh, C. C. & St. L. R. Co. v. Naylor*, 73 Ohio St. 115, 3 L.R.A. (N.S.) 473, 112 Am. St. Rep. 701, 76 N. E. 505; *Low Moor Iron Co. v. La Bianca*, 106 Va. 83, 55 S. E. 532, 9 A. & E. Ann. Cas. 1177; *Anustasakas v. International Contract Co. (Wash.)* 98 Pac. 93.

The Federal courts of necessity follow the construction given the statute by the courts of the state enacting it. Hence, a negative answer is demanded where the Pennsylvania statute is in question (*Zeiger v. Pennsylvania R. Co.* 151 Fed. 348, affirmed in 86 C. C. A. 69, 158 Fed. 809; *Fulco v. Schuylkill Stone Co.* 163 Fed. 124), and an affirmative answer where the Minnesota statute (*Mahoning Ore & Steel Co. v. Blomfelt*, 163 Fed. 827) or Ohio statute is involved (*Baltimore & O. R. Co. v. Baldwin*, 75 C. C. A. 211, 144 Fed. 53).

In California and New Jersey, where the state courts seem not to have passed upon the question, an affirmative answer has been given by the Federal courts. *Kaneko v. Atchison, T. & S. F. R. Co.* 164 Fed. 263; *Hirschkovitz v. Pennsylvania R. Co.* 138 Fed. 438.

And the same construction was given to the Massachusetts statute in *Vetaloro v. Perkins*, 101 Fed. 393, before *Mulhall v. Fallon*, supra, had been decided.

Prior to the decision in *Ferrara v. Auric Min. Co.* supra, the Colorado statute had been passed upon twice by the Federal courts, with opposite results. *Brannigan v. Union Gold Min. Co.* 93 Fed. 164 (sustaining demurrer to the complaint upon the ground that the plaintiffs were nonresident aliens), and *Patek v. American Smelting*

See same case below, 216 Pa. 402, 116 Am. St. Rep. 778, 65 Atl. 1077.

The facts are stated in the opinion.

Mr. George Calvert Bradshaw (by special leave) argued the cause, and, with Messrs. William Henry Seward Thomson and Walter V. R. Berry, filed a brief for plaintiff in error:

The purpose and effect of fatal accidents acts is to protect human life.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 42 L. ed. 537, 18 Sup. Ct. Rep. 105; Mulhall v. Fallon, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386; Kellyville Coal Co. v. Petraytis, 195 Ill. 217, 88 Am. St. Rep. 191, 63 N. E. 94; Davidsson v. Hill, 70 L. J. K. B. N. S. 788; Cleveland, C. C. & St. L. R. Co. v. Osgood, 36 Ind. App. 34, 73 N. E. 286; Trotta v. Johnson, 121 Ky. 827, 90 S. W. 540, 12 A. & E. Ann. Cas. 222.

The action by heirs is not separate and distinct from injury to deceased, but only a substitute for deceased's rights of action.

Hill v. Pennsylvania R. Co. 178 Pa. 227, 35 L.R.A. 196, 56 Am. St. Rep. 754, 35 Atl. 997; Read v. Great Eastern R. Co. L. R. 3 Q. B. 555; Hughes v. Delaware & H. Canal Co. 176 Pa. 259, 35 Atl. 190; Northern P. R. Co. v. Adams, 192 U. S. 449, 48 L. ed. 516, 24 Sup. Ct. Rep. 408.

Treaties will be interpreted in a spirit of the highest good faith, and with the most liberal leaning toward the rights of aliens who claim under a treaty.

Hauenstein v. Lynham, 100 U. S. 483, 25 L. ed. 628; Geofroy v. Riggs, 133 U. S. 266, 33 L. ed. 644, 10 Sup. Ct. Rep. 295; Tucker v. Alexandroff, 183 U. S. 437, 46 L. ed. 270, 22 Sup. Ct. Rep. 195.

This court must pass an independent judgment upon the meaning and effect of the Pennsylvania fatal accidents act.

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; Jefferson Branch Bank v. Skelly, 1 Black, 436-443, 17 L. ed. 173-177; Mobile & O. R. Co. v. Tennessee, 153 U. S. 486-492, 38 L. ed. 793-796, 14 Sup. Ct. Rep.

968; Huntington v. Attrill, 146 U. S. 657-684, 36 L. ed. 1123-1133, 13 Sup. Ct. Rep. 224.

Mr. Johns McCleave argued the cause, and, with Mr. John S. Wendt, filed a brief for defendant in error:

A nonresident alien is not within the right given by the Pennsylvania statutes.

Deni v. Pennsylvania R. Co. 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558; Zeiger v. Pennsylvania R. Co. 151 Fed. 348, affirmed in 86 C. C. A. 69, 158 Fed. 809; Fulco v. Schuylkill Stone Co. 163 Fed. 124.

The same conclusion is reached by the circuit court of the United States in respect to the statute of Colorado on the same subject.

Brannigan v. Union Gold Min. Co. 93 Fed. 164.

Fixed and received construction of the statute laws of a state by its own courts constitutes a part of such statutory law.

Green v. Neal, 6 Pet. 297, 8 L. ed. 404; Piqua Branch of State Bank v. Knoop, 16 How. 391, 14 L. ed. 986.

The Federal courts will respect state court decisions, and will regard them as conclusive in all cases upon the construction of their own constitution and laws.

Rowan v. Runnels, 5 How. 139, 12 L. ed. 87; Bucher v. Cheshire R. Co. 125 U. S. 583, 31 L. ed. 798, 8 Sup. Ct. Rep. 974; Gormley v. Clark, 134 U. S. 348, 33 L. ed. 913, 10 Sup. Ct. Rep. 554.

Each state court will construe its own statute on the subject, and differences are to be expected.

Dennick v. Central R. Co. 103 U. S. 11, 26 L. ed. 439.

The action is not for the injury to the dead man, but it is to restore compensation for his death to those who were pecuniarily interested in the continuance of the life. It is a new and distinct right of action created by the statute, and vested in the parties named by force of the statute, and does not come to them by way of succession or inheritance from the dead man, because the dead man had no such right.

Pennsylvania R. Co. v. Zebe, 33 Pa. 329; Fink v. Garman, 40 Pa. 95; Books v. Dan-

& Ref. Co. 83 C. C. A. 284, 154 Fed. 190, (adopting the contrary view).

And prior to the decision of the Washington supreme Court in Anustasakas v. International Contract Co., supra, a Federal court had decided that the action was not maintainable. Roberts v. Great Northern R. Co. 161 Fed. 239.

The difference in the language of the various statutes is not believed to be material, although the court, in McMillan v. Spider Lake Saw Mill & Lumber Co., supra, distinguishing Mulhall v. Fallon, supra, and

similar cases, rests its decision upon the ground that, in Wisconsin, the right of action which survives the death for the benefit of the estate of the deceased is separate and distinct from the right of action for the loss to surviving relatives; but other courts seem not to have yielded assent to this reasoning.

For a more extended review of some of the cases herein cited, see notes to Mulhall v. Fallon, 54 L.R.A. 934, and Pittsburgh, C. C. & St. L. R. Co. v. Naylor, 3 L.R.A. (N.S.) 473.

ville, 95 Pa. 166; Chambers v. Baltimore & O. R. Co. 207 U. S. 142, 151, 52 L. ed. 143, 147, 28 Sup. Ct. Rep. 34; Pennsylvania R. Co. v. Henderson, 51 Pa. 322; Birch v. Pittsburgh, C. C. & St. L. R. Co. 165 Pa. 345, 30 Atl. 826; McCafferty v. Pennsylvania R. Co. 193 Pa. 345, 74 Am. St. Rep. 690, 44 Atl. 435.

It is intended primarily for the benefit of the family of which the deceased was a member, and to restore to those who are dependent upon the life taken away pecuniary compensation for the loss so sustained.

Stewart v. Baltimore & O. R. Co. 168 U. S. 445, 448, 42 L. ed. 537, 538, 18 Sup. Ct. Rep. 105.

Mr. Justice Moody delivered the opinion of the court:

The husband of the plaintiff in error was killed while a passenger on a train by the negligence of the defendant. The death occurred within the state of Pennsylvania, and this action was brought in a court of that state to recover damages for it. *The plaintiff was a resident of Italy and a subject of the King of Italy. By the statutory law of the state of Pennsylvania (act of April 15, 1851, P. L. 669, §§ 18 and 19, as amended by the act of April 26, 1855, P. L. 309, § 1), the right to recover damages for death occasioned by unlawful violence or negligence is, in certain cases, conferred upon the husband, wife, children, or parents of the person killed. By its literal terms the benefits of the statute are extended to all such surviving relatives, irrespective of their condition. It has, however, been held by the supreme court of Pennsylvania, in the case of *Deni v. Pennsylvania R. Co.* 181 Pa. 525, 59 Am. St. Rep. 676, 37 Atl. 558, as well as in the case at bar, that this statute does not give to relatives of the deceased, who are nonresident aliens, the right of action therein provided for. There is nothing in this case to take it out of the general rule that the construction of a state statute by the highest court of the state must be accepted by this court. It is therefore not material that similar statutes have been differently construed, as, for instance, in *Mulhall v. Fallon*, 176 Mass. 266, 54 L.R.A. 934, 79 Am. St. Rep. 309, 57 N. E. 386, and *Kellyville Coal Co. v. Petraytis*, 195 Ill. 217, 88 Am. St. Rep. 191, 63 N. E. 94.

The plaintiff rests her right to recover not upon this statute alone, but upon certain provisions of a treaty between the United States and the King of Italy, ratifications of which were exchanged on November 18, 1871. 17 Stat. at L. 845. She asserts that the effect of the treaty was to confer upon the plaintiff the same right to

recover damages for the death of her husband that she would have enjoyed by the statute of the state of Pennsylvania if she had been a resident and citizen of that state. The contention of the plaintiff in this respect was denied by the trial court, which granted a judgment of nonsuit, which was affirmed by the supreme court of the state, and is now here on writ of error. The only question for our decision is whether a proper interpretation and effect were allowed to the treaty.

We do not deem it necessary to consider the constitutional limits of the treaty-making power. A treaty, within those *lim-[273 its, by the express words of the Constitution, is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights. *Ware v. Hylton*, 3 Dall. 199, 1 L. ed. 568; *United States v. The Peggy*, 1 Cranch, 103, 110, 2 L. ed. 49, 51; *Foster v. Neilson*, 2 Pet. 253, 314, 7 L. ed. 415, 435; *Hauenstein v. Lynham*, 100 U. S. 483, 25 L. ed. 628; per Mr. Justice Miller, in *Head Money Cases* (*Edye v. Robertson*) 112 U. S. 580, 598, 28 L. ed. 798, 803, 5 Sup. Ct. Rep. 247, quoted with approval by Mr. Chief Justice Fuller in *Re Cooper*, 143 U. S. 472, 501, 36 L. ed. 232, 241, 12 Sup. Ct. Rep. 453; *United States v. Rauscher*, 119 U. S. 407, 418, 30 L. ed. 425, 428, 7 Sup. Ct. Rep. 234; *Geofroy v. Riggs*, 133 U. S. 258, 33 L. ed. 642, 10 Sup. Ct. Rep. 295.

We put our decision upon the words of the treaty. By a fair interpretation of them, did they directly confer upon the plaintiff the right which she seeks to maintain? We are of the opinion that they did not.

Three articles only are relied on as material. They are:

"Article 2.

"The citizens of each of the high contracting parties shall have liberty to travel in the states and territories of the other, to carry on trade, wholesale and retail, to hire and occupy houses and warehouses, to employ agents of their choice, and generally to do anything incident to or necessary for trade, upon the same terms as the natives of the country, submitting themselves to the laws there established.

"Article 3.

"The citizens of each of the high contracting parties shall receive, in the states and territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as

are, or shall be, granted to the natives, on their submitting themselves to the conditions imposed upon the natives."

"Article 23.

"The citizens of either party shall have free access to the courts of justice, in order to maintain and defend their own rights, without any other conditions, restrictions, 274] or taxes than *such as are imposed upon the natives. They shall, therefore, be free to employ, in defense of their rights, such advocates, solicitors, notaries, agents, and factors as they may judge proper, in all their trials at law; and such citizens or agents shall have free opportunity to be present at the decisions and sentences of the tribunals in all cases which may concern them, and, likewise, at the taking of all examinations and evidences which may be exhibited in the said trials."

Article 23 bestows upon citizens of either power, whether resident or nonresident, free access to the courts, "in order to maintain and defend their own rights," with the ancillary privileges of suitors. This article does not define substantive rights, but leaves them to be ascertained by the law governing the courts, and administered and enforced in them.

Articles 2 and 3 deal with the rights of the citizens of one party sojourning in the territory of the other. There seems to be nothing pertinent to the case in article 2. But special stress is laid upon article 3, which stipulates for the citizens of each, in the territory of the other, equality with the natives of rights and privileges in respect of protection and security of person and property. It cannot be contended that protection and security for the person or property of the plaintiff herself have been withheld from her in the territory of the United States, because neither she nor her property has ever been within that territory. She herself, therefore, is entirely outside the scope of the article. The argument, however, is that if the right of action for her husband's death is denied to her, that he, the husband, has not enjoyed the equality of protection and security for his person which this article of the treaty assures to him. It is said that if compensation for his death is withheld from his surviving relatives, a motive for caring for his safety is removed, the chance of his death by unlawful violence or negligence is increased, and thereby the protection and security of his person are materially diminished. The conclusion is drawn that a full compliance with the treaty demands that, for his protection and security, this action by 275] his surviving *relatives should lie. The

argument is not without force. Doubtless one reason which has induced legislators to give to surviving relatives an action for death has been the hope that care for life would be stimulated. This thought was dwelt upon in *Mulhall v. Fallon*, supra, in considering a statute which made the amount recoverable dependent upon the degree of culpability of the negligent person. Another reason for such legislation, quite as potent, was the desire to secure compensation to those who might be supposed to suffer directly and materially by the death. This thought seems to have been uppermost in Pennsylvania, according to the courts of that state. See *Chambers v. Baltimore & O. R. Co.* 207 U. S. 142, 52 L. ed. 143, 28 Sup. Ct. Rep. 34, and cases cited. Without dwelling further upon the purpose and effect of legislation of this kind, and assuming that both might be calculated in some degree to increase the protection and security of persons who may be exposed to dangers, we are of opinion that the protection and security thus afforded are so indirect and remote that the contracting powers cannot fairly be thought to have had them in contemplation.

If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection and security, the treaty is fully complied with, without going further and giving to his nonresident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety.

Judgment affirmed.

*BOISÉ ARTESIAN HOT & COLD[276
WATER COMPANY, LIMITED, Appt.,
v.

BOISÉ CITY.

(See S. C. Reporter's ed. 276-287.)

Injunction — against illegal license fee — Federal equity jurisdiction.

1. Circumstances bringing the case within some acknowledged head of equity jurisdiction so as to give the right to injunctive relief in a Federal court against the enforcement of a municipal ordinance imposing a license fee upon a water company,

NOTE. — On injunction against illegal taxation—see notes to *Odlin v. Woodruff*, 22 L.R.A. 699; *Dows v. Chicago*, 20 L. ed. U. S. 65; and *Ogden v. Armstrong*, 42 L. ed. U. S. 445.

upon the ground that such ordinance is unconstitutional, illegal, and void, are not shown by a vague allegation in the bill that the city has threatened to remove the company's pipes and works, without averring any facts showing such threat, or by suggesting the danger of a multiplicity of suits, or of the casting of a cloud upon the title of the company to its franchises, where a single action has been brought to collect the license fee, with an honest purpose to settle the rights of the parties, and the real basis for the contention as to the cloud on title is that the city's claim that the company has no more than a mere permission to occupy the streets, which is the reason said to have induced the enactment of the ordinance, unfavorably affects the company's property and impairs its credit. [For other cases, see Injunction, 136-149, in Digest Sup. Ct. 1908.]

Equity — multiplicity of suits.

2. A court of equity ought not to interfere upon the ground of danger of multiplicity of suits by the same person against the complainant for causes of action arising out of the same facts and legal principles, unless it is clearly necessary to protect the complainant against continued and vexatious litigation.

[For other cases, see Equity, 79-86, in Digest Sup. Ct. 1908.]

[No. 131.]

Argued March 17, 1909. Decided April 5, 1909.

A PPEAL from the Circuit Court of the United States for the District of Idaho to review a decree sustaining a demurrer to and dismissing a bill to enjoin the enforcement of a municipal ordinance imposing a license fee upon a water company. Affirmed.

The facts are stated in the opinion.

Mr. Richard H. Johnson argued the cause, and, with Messrs. Edgar Wilson and Richard Z. Johnson, filed a brief for appellant.

Messrs. William E. Borah and Charles M. Kahn argued the cause, and, with Messrs. Charles P. McCarthy, Charles C. Cavanah, and John J. Blake, filed a brief for appellee.

Mr. Justice Moody delivered the opinion of the court:

The appellant, a West Virginia corporation, brought in the circuit court of the United States for the district of Idaho, this bill in equity against Boise City, a municipal corporation. There was a demurrer to the bill, which, upon consideration of the merits of the case set forth therein, was sustained by the judge of the circuit court, and the bill dismissed. The company appealed directly to this court. The facts

set forth in the bill and exhibits, and the relief and grounds of relief claimed, so far as necessary to develop the point decided, may conveniently be stated in narrative form.

The company was incorporated for and is engaged in supplying the city and its inhabitants with water for municipal and domestic purposes. It had acquired the property, franchises, rights, and privileges of certain individuals and corporations, who had been, from time to time, granted by ordinance of the city the privilege of laying and maintaining pipes in the streets and supplying through them water for municipal and domestic uses. The company conducted its business by virtue of these ordinances, and has invested large sums of money. The ordinances need not be set forth in detail, and it is enough to say that the company contends that they are franchises for a term of not less than fifty years, and constitute a contract inconsistent with the license fee or tax hereafter referred to, while the city contends that they are mere permissions, revocable at any time. The rates are fixed by commissioners, acting under the authority of a law of the state, and are to remain in force three years from the date of their establishment. After the fixing of the rates, and before the expiration of the three years, on the 31st day of May, 1906, the city enacted an ordinance requiring that the company "hereafter pay to said Boise City, on the first day of each and every month, a monthly license of \$300, for the privilege granted . . . to lay and repair water pipes in the streets and alleys of said city." The ordinance then made a demand for the monthly payment of said license, and directed the city clerk to notify the company of the requirements of the ordinance.

The main object of the bill is to obtain an injunction against the enforcement of this ordinance, upon the grounds: (1) That other corporations, associations, and individuals using the streets and alleys of the city for various purposes are not required to pay a license, and therefore there was, by the ordinance, a denial of the equal protection of the laws; (2) that the city, in pursuance of its claim that the ordinances grant only a revocable permission to occupy the streets, threatens and intends to impose further burdens and assessments, and threatens to remove the pipes and the works from the city; (3) that the city has presented monthly bills and has brought an action at law in the state court to recover the amount alleged to be due on account of the license fee imposed, and that there is therefore danger of a multiplicity of suits; (4) that the ordinance has cast

a cloud upon the company's franchises and right to supply water to the city and its inhabitants, and thereby depreciated the value of the company's property, impaired its credit, embarrassed its business, and confiscated its property; (5) that the ordinance impairs the obligation of the contract made by the ordinances granting the rights, privileges, and franchises; (6) that the enforcement of the ordinance would deprive the company of its property without due process of law and abridge its privileges [281]*and immunities granted by the 14th Amendment; (7) and that the ordinance violates the Constitution and laws of the state.

A subordinate object of the bill is to recover from the city certain amounts due on account of water supplied to fire hydrants, which the city declines to pay, disputing its liability so to do.

The decree of the court below, dismissing the bill, proceeded upon a consideration of the merits of the controversy between the parties. We do not enter upon that subject, because there is a deeper question which seems to us decisive of the case. That question is whether the plaintiff is entitled, on the allegations of its bill, to relief in equity in the Federal courts.

It is obvious that the rights of which the company seeks to avail itself are rights cognizable in a court of law, and not rights created only by the principles of equity. The sum of the company's contentions is that the imposition of the license fee was illegal, unconstitutional, and void. All these contentions are open in a court of law. It is a guiding rule in equity that, in such a case, it will not interpose where there is a plain, adequate, and complete remedy at law. This rule at an early date was crystallized into statute form by the 16th section of the judiciary act [1 Stat. at L. 82, chap. 20] (Rev. Stat. § 723, U. S. Comp. Stat. 1901, p. 583), which, if it has no other effect, emphasizes the rule and presses it upon the attention of courts. *New York Guaranty & I. Co. v. Memphis Water Co.* 107 U. S. 205, 214, 27 L. ed. 484, 487, 2 Sup. Ct. Rep. 279. It is so well settled and has so often been acted upon that no authority need be cited in its support, though it must not be forgotten that the legal remedy must be as complete, practicable, and efficient as that which equity could afford. *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 11, 43 L. ed. 341, 19 Sup. Ct. Rep. 77.

A notable application of the rule in the courts of the United States has been to cases where a demand has been made to enjoin the collection of taxes or other impositions made by state authority, upon the ground that they are illegal or unconstitutional. The decisions of the state courts

in cases of this kind are in conflict, and we need not examine them. It is a mere matter of choice of convenient remedy of a state to permit *its courts to enjoin the [282] collection of a state tax, because it is illegal or unconstitutional. Very different considerations arise where courts of a different, though paramount, sovereignty, interpose in the same manner and for the same reasons. An examination of the decisions of this court shows that a proper reluctance to interfere by prevention with the fiscal operations of the state governments has caused it to refrain from so doing in all cases where the Federal rights of the persons could otherwise be preserved unimpaired. It has been held uniformly that the illegality or unconstitutionality of a state or municipal tax or imposition is not of itself a ground for equitable relief in the courts of the United States. In such a case the aggrieved party is left to his remedy at law, when that remedy is as complete, practicable, and efficient as the remedy in equity. And the rule applies as well where the right asserted is by way of defense. *Phoenix Mut. L. Ins. Co. v. Bailey*, 13 Wall. 616, 623, 20 L. ed. 501, 503.

In order to give equity jurisdiction, there must be shown, in addition to the illegality or unconstitutionality of the tax or imposition, other circumstances bringing the case under some recognized head of equity jurisdiction, before the remedy by injunction can be awarded. The leading case on the subject is *Dows v. Chicago*, 11 Wall. 108, 20 L. ed. 65. In that case the plaintiff sought to enjoin the collection of a tax levied upon shares of the capital stock of a national bank on the ground that the levy was unconstitutional under the state law, and that the property was not within the jurisdiction of the state. This court declined to pass upon the validity of the tax, saying, through Mr. Justice Field (p. 109):

"The illegality of the tax and the threatened sale of the shares for its payment constitute of themselves alone no ground for such interposition. There must be some special circumstances attending a threatened injury of this kind, distinguishing it from a common trespass, and bringing the case under some recognized head of equity jurisdiction before the preventive remedy of injunction can be invoked. It is upon taxation that the several states chiefly rely to obtain the means to carry on *their [283] respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.

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"No court of equity will, therefore, allow its injunction to issue to restrain their action, except where it may be necessary to protect the rights of the citizen whose property is taxed, and he has no adequate remedy by the ordinary processes of the law. It must appear that the enforcement of the tax would lead to a multiplicity of suits, or produce irreparable injury, or, where the property is real estate, throw a cloud upon the title of the complainant, before the aid of a court of equity can be invoked."

This case has been frequently followed and its governing principle never doubted. *Hannewinkle v. Georgetown*, 15 Wall. 547, 21 L. ed. 231; *State Railroad Tax Cases*, 92 U. S. 575, 613, 23 L. ed. 663, 673; *Union P. R. Co. v. Cheyenne (Union P. R. Co. v. Ryan)* 113 U. S. 516, 525, 526, 28 L. ed. 1098, 1101, 1102, 5 Sup. Ct. Rep. 601; *Milwaukee v. Kœfler*, 116 U. S. 219, 29 L. ed. 612, 6 Sup. Ct. Rep. 372; *Pittsburgh, C. C. & St. L. R. Co. v. Board of Public Works*, 172 U. S. 32, 43 L. ed. 354, 19 Sup. Ct. Rep. 90; *Arkansas Bldg. & L. Asso. v. Madden*, 175 U. S. 269, 44 L. ed. 159, 20 Sup. Ct. Rep. 119.

In the case last cited, Mr. Chief Justice Fuller made the following important observation (p. 274):

"It is quite possible that, in cases of this sort, the validity of a law may be more conveniently tested by the party denying it by a bill in equity than by an action at law; but considerations of that character, while they may explain, do not justify, resort to that mode of proceeding."

In *Shelton v. Platt*, 139 U. S. 591, 35 L. ed. 273, 11 Sup. Ct. Rep. 646, a bill was filed in the circuit court of the United States to restrain the collection of a license tax imposed by the state of Tennessee on the United States Express Company, upon the ground that it was unconstitutional. The bill alleged that the property of the company was employed in interstate commerce, and was necessary to the conduct of it, and that if it were seized by the sheriff it would greatly embarrass the company in the conduct of its interstate business, subject it to heavy damage, and the public to great loss and inconvenience, and that the company was without adequate remedy at law. A plea alleged that the only remedy under the laws of the state was to pay the taxes under protest and bring suit to recover them back. The plaintiff had an injunction from the lower court. This court reversed the decree upon appeal, upon the ground that the remedy in equity would not lie merely because the tax was unconstitutional, unless there were allegations in the bill otherwise bringing the case with-

in some acknowledged head of equity jurisdiction, and that the allegations of the bill were not sufficient to do this. This case was followed in *Allen v. Pullman's Palace Car Co.* 139 U. S. 658, 35 L. ed. 303, 11 Sup. Ct. Rep. 682, and in *Pacific Exp. Co. v. Seibert*, 142 U. S. 339, 35 L. ed. 1035, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250, where a tax was alleged to be unconstitutional because imposed upon interstate commerce, because it denied to the taxpayer the equal protection of the laws, and because it was void for repugnancy to the Constitution of the state.

A brief reference to some cases cited by the company, in which this court has asserted the authority of equity to interfere, will define the rule quite as well as the cases in which the court has declined to exercise the power of injunction. In *Walla Walla v. Walla Walla Water Co.* supra, the city was about to construct, in violation of its contract, a competing water plant, and the resulting damage to the company would have been irreparable. The same conditions existed in *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585. See same case, 202 U. S. 453, 50 L. ed. 1102, 26 Sup. Ct. Rep. 660, 6 A. & E. Ann. Cas. 253. In *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410, a schedule of rates for transportation of passengers was fixed in violation of the contract rights of the company, and possible suits would be limited only by the number of passengers. The same condition existed in *Cleveland v. Cleveland City R. Co.* 194 U. S. 517, 48 L. ed. 1102, 24 Sup. Ct. Rep. 756; and see *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, where the grounds of the jurisdiction in equity in rate cases are fully set forth and discussed. In *Ogden City v. Armstrong*, 168 U. S. 224, 42 L. ed. 444, 18 Sup. Ct. Rep. 98, not only was there danger of a multiplicity of suits, but the tax there in question was a lien upon realty and a cloud on the title.

*It is safe to say that no case can be found where this court has deliberately approved the issuance of an injunction against the enforcement of an ordinance resting on state authority, merely because it was illegal or unconstitutional, unless further circumstances were shown which brought the case within some clear ground of equity jurisdiction.

These decisions make it clear that an injunction ought not to be granted unless the bill, besides alleging illegality and unconstitutionality of the ordinance imposing the license fee, sets forth other circumstances which bring the case within some acknowl-

edged head of equity jurisdiction. The only suggestions of this kind which the bill presents are that the enforcement of the ordinance will lead to irreparable injury, to multiplicity of suits, and cast a cloud upon the company's title to its franchises.

But there is nothing in the bill which leads us to suppose that any of these results would be brought about by leaving the company to its defense at law. If the city had taken any steps indicating a purpose to remove the pipes and works of the company from the streets of the city, and to deny it the right to continue its business, there would be clear reason for the interposition of a court of equity, for if that were done illegally or unconstitutionally an injury would be inflicted for which the law could afford no adequate remedy. In such a case it would be the plain duty of a court of equity to arrest the destructive steps until their legality or constitutionality could be determined. Such a course would be for the best interests of both parties.

It is true that the bill contains a vague allegation that the city has threatened to remove the company's pipes and works from the city, but no facts whatever are alleged showing such a threat. The city does not speak except by its council, and nothing has been said or done by them in this direction. On the contrary, the imposition of the license fee and the bringing of a suit for its recovery contemplate continuance, and not restraint, of the business of the company.

Nor do we think that there is any danger 286] of a multiplicity *of suits in the sense that would authorize the issuance of an injunction. One suit only has been brought, and that by direction of the city council. It remains pending, and when it reaches judgment it will determine finally every question in dispute between the parties. There is no need of any other suit except to prevent the running of the statute of limitations, and nothing to indicate that any will be brought. Where the multiplicity of suits to be feared consists in repetitions of suits by the same person against the plaintiff for causes of action arising out of the same facts and legal principles, a court of equity ought not to interfere upon that ground unless it is clearly necessary to protect the plaintiff from continued and vexatious litigation. Something more is required than the beginning of a single action with an honest purpose to settle the rights of the parties. 1 Pom. Eq. Jur. 3d ed. § 254. Perhaps it might be necessary to await the final decision of one action at law (see, for analogies, *Sharon v. Tucker*, 144 U. S. 533, 36 L. ed. 532, 12 Sup. Ct. Rep. 720; *Boston & M. Consol. Copper &*

S. Min. Co. v. Montana Ore Purchasing Co. 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434), but that we need not decide.

Nor do we think that the ordinance casts a cloud upon the title of the company to its franchises. It is not a lien upon them or upon any other property of the company. The city's only remedy is that which it has employed,—an action at law for the collection of the license fee. The plaintiff's real point here is not that the ordinance imposing a license fee casts a cloud upon its title, but that the reason alleged to have induced the ordinance, namely, the city's claim that the company has no more than a mere permission to occupy the streets, unfavorably affects its property and impairs its credit. But we cannot restrain a belief or an expression of it, and are not asked to. We are asked only to restrain an ordinance which in no way fixes a lien or cloud upon the plaintiff's title. It is possible that the ordinance imposing the license fee could be sustained without passing upon the nature of the company's tenure of its privileges. On the other hand, it might be condemned without regard to that consideration.

*Here is a case where every possible [287 defense to the collection of the license fee which has been suggested by the company is available to it in the action at law pending in the courts of the state of Idaho, and there is no reason whatever shown why the law should not take its course. Presumably, the company, on the ground of diversity of citizenship, might have removed the case from the state court to the circuit court of the United States, if the attempt had been seasonably made. If, however, the litigation continues up to the court of final resort of the state of Idaho, and all claims under the Constitution of the United States are seasonably and properly made in the state courts, and are denied, then the company would be entitled to a review by this court of the judgment of the state court.

The attempt to recover the hydrant rentals is so clearly a matter for a court of law that nothing need be said of it.

The circuit court dismissed the bill for entirely different reasons than those which have influenced us. We neither approve nor disapprove those reasons, nor intimate any opinion whatever upon the questions passed on by the circuit court. It would be superfluous formalism to reverse the decree of the court below and remand the case to that court, with instructions to dismiss the bill for the reasons given in this opinion, for that court has already dismissed the bill. Therefore, the decree of the court below is affirmed.

288] *BERNARR MACFADDEN

v.

UNITED STATES.

(See S. C. Reporter's ed. 288-297.)

Error to circuit court of appeals — in criminal case.

A judgment of a circuit court of appeals in a case in which the jurisdiction of the district court depended solely upon the fact that the case was one arising under the criminal laws is, by the very terms of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), § 6, "final," and is not reviewable in the Federal Supreme Court, although constitutional rights were invoked by the accused, and the case might, therefore, under § 5 of that act, have been brought directly from the district court to the Supreme Court.

[For other cases, see Appeal and Error, III. d, 2, g, in Digest Sup. Ct. 1908.]

[No. 14, Original.]

Submitted April 5, 1909. Decided April 12, 1909.

APPPLICATION for Writ of Error to the Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a conviction in the District Court for the District of New Jersey for mailing obscene literature. Denied.

See same case below, 165 Fed. 51.

The facts are stated in the opinion.

Mr. **Henry M. Earle** submitted the cause for petitioner.

Solicitor General **Bowers** submitted the cause for the United States.

Mr. Justice **Moody** delivered the opinion of the court:

The petitioner, Bernarr Macfadden, was 292] indicted in the district *court of the United States for the district of New Jersey for mailing obscene literature, in violation of § 3893 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 2658). He pleaded not guilty, and upon trial before a jury was found guilty.

Various questions of law arose in the course of the trial, which need not be stated.

After the evidence was concluded, the petitioner presented to the presiding judge

many requests for instructions to the jury, which were refused, under exception. For the purposes of this case four only need be referred to, and they summarily. The judge was requested to rule that the statute under which the indictment was returned was unconstitutional (a) because it abridged the freedom of the press; (b) because it was uncertain and created no general rule of conduct, and therefore the indictment was without due process of law; (c) because it was an *ex post facto* law; (d) because it delegated legislative power to the court or jury.

There was a motion in arrest of judgment, which was overruled. Thereupon judgment was entered, and the petitioner sued out a writ of error to the circuit court of appeals for the third circuit. That court affirmed the judgment.

After a denial of a petition for a writ of certiorari, the petitioner made application to one of the justices of this court for a writ of error, directed to the circuit court of appeals. The question of the right of the petitioner to such a writ of error has been referred to the full court, and, by direction of the court, briefs on the part of the United States and the petitioner have been filed and considered.

The object of the act of March 3, 1891 (26 Stat. at L. 826, chap. 517, U. S. Comp. Stat. 1901, p. 488), was to distribute the appellate jurisdiction of the Supreme Court between it and the newly-created circuit courts of appeal, and to abolish the appellate jurisdiction of the circuit courts. The first necessary step in this undertaking was to determine in what cases appeals (using the word in its broader sense) might be taken directly to this court. This was done in § 5, which is as follows:

"Sec. 5. That appeals or writs of [293 error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

"From the final sentences and decrees in prize causes.

"In cases of conviction of a capital or otherwise infamous crime.

"In any case that involves the construction or application of the Constitution of the United States.

"In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

"In any case in which the Constitution or law of a state is claimed to be in contraven-

NOTE. — On the appellate jurisdiction of the Federal Supreme Court over the circuit courts of appeals—see note to Bagley v. General Fire Extinguisher Co. ante, 605.

On direct review in Federal Supreme Court of judgments of district and circuit courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

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tion of the Constitution of the United States."

Clause 3 of this section has been amended (act of January 20, 1897, 29 Stat. at L. 492, chap. 68, U. S. Comp Stat. 1901, p. 556), by striking out the words "or otherwise infamous."

Assuming, without decision, that the constitutional questions were real and substantial, it is clear that a writ of error might have been sued out originally directly from this court under clause 5. *Loeb v. Columbia Twp.* 179 U. S. 472, 45 L. ed. 280, 21 Sup. Ct. Rep. 174. But this was not done, and, by the appeal to the circuit court of appeals, the right of direct appeal here was lost. *Robinson v. Caldwell*, 165 U. S. 359, 41 L. ed. 745, 17 Sup. Ct. Rep. 343.

Section 6 of the act provides that the circuit courts of appeal shall exercise appellate jurisdiction "in all cases other than those provided for in the preceding section of this act;" and the fact that there were in the case questions which would have warranted a direct appeal to this court does not deprive the circuit court of appeals of its jurisdiction. *American Sugar Ref. Co. v. New Orleans*, 181 U. S. 277, 45 L. ed. 859, 21 Sup. Ct. Rep. 646. In the case at bar the circuit court of appeals has assumed jurisdiction and rendered judgment. May the petitioner 294] have a writ of error directed to *that judgment? The answer to this question depends upon whether the judgment of the circuit court of appeals was final. The act contemplated that certain judgments of the circuit court of appeals might be reviewed on writ of error in this court, and that certain other judgments could not be so reviewed. The line of division is marked in § 6 of the act. It is to be observed that the line of division between cases appealable directly to this court and those appealable to the circuit court of appeals, made by § 5 of the act, is based upon the nature of the case or of the questions of law raised. But the line of division between cases appealable from the circuit court of appeals to this court and those not so appealable, drawn by § 6, is different, and is determined, not by the nature of the case or of the questions of law raised, but by the sources of jurisdiction of the trial court, namely, the circuit court or the district court,—whether the jurisdiction rests upon the character of the parties or the nature of the case. *Huguley Mfg. Co. v. Galetton Cotton Mills*, 184 U. S. 290, 46 L. ed. 546, 22 Sup. Ct. Rep. 452, where it was said by the chief justice, citing cases, "The jurisdiction referred to is the jurisdiction of the circuit court as originally invoked." The difference in the test for determining whether a case is appealable from the trial court directly to this court, and

the test for determining whether a case is appealable from the circuit court of appeals to this court, is important, and a neglect to observe it leads to confusion.

The statute says that the judgment of the circuit court of appeals "shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws, and in admiralty cases." In all other cases there is a right of review by this court if the matter in controversy exceeds \$1,000.

As this is a case arising under the criminal laws, the judgment of the circuit court of appeals, rendered within its lawful jurisdiction, *is, by the very terms of the [295 act, final. And so it was held in *Cary Mfg. Co. v. Acme Flexible Clasp Co.* 187 U. S. 427, 47 L. ed. 244, 23 Sup. Ct. Rep. 211, this court saying, through the chief justice: "Although it is insisted that the judgment imposing the fine was a final judgment in a criminal matter, it is argued that it involved the denial of constitutional rights, and hence that this court has jurisdiction under § 5 of that act; but it is settled that, even if a party might be entitled to come directly to this court under that section, yet, if he does not do so, and carries his case to the circuit court of appeals, he must abide by the judgment of that court;" and the writ of error to the circuit court of appeals was accordingly dismissed. Unless this case has been overruled, it governs the case at bar.

But it is argued that the right to this writ of error is supported by the decision of this court in *Spreckels Sugar Ref. Co. v. McClain*, 192 U. S. 397, 48 L. ed. 496, 24 Sup. Ct. Rep. 376. An examination of that case, however, shows that the exact decision has no relevancy to the question now before us. The language of the opinion should be interpreted in the light of the facts of the case. The plaintiff there brought an action against the collector of internal revenue to recover certain taxes imposed by the revenue laws of the United States, paid by it under protest. The plaintiff's claim, as stated in his declaration, was twofold; first, that the taxes were not due under the act, as properly construed; and, second, that the act itself was unconstitutional. The jurisdiction, therefore, of the trial court, was invoked upon two grounds: first, because it was a revenue case; and, second, because it arose under the Constitution and laws of the United States (25 Stat. at L. 433, chap. 866, U. S. Comp. Stat. 1901, p. 508), which means that the plaintiff's case thus arose.

Louisville & N. R. Co. v. Mottley, 211 U. S. 149, ante, 126, 29 Sup. Ct. Rep. 42, and cases cited. Judgment went against the plaintiff, and it was affirmed by the circuit court of appeals. A writ of error from this court to the circuit court of appeals was sued out, and the question was whether it would lie. That question, as we have seen, is determinable by the jurisdiction of the trial court. If the jurisdiction depended solely upon the fact that it was a case arising **296**] under the revenue laws, the judgment of the circuit court of appeals was a final judgment. If, on the other hand, the jurisdiction depended solely upon the fact that it was a case arising out of the Constitution or laws of the United States, the jurisdiction of the circuit court of appeals was not final, and it was reviewable upon writ of error as matter of right in this court.

Here was a case, then, which, in one aspect of the jurisdiction, was reviewable by this court, and, in another aspect of the jurisdiction, was not reviewable here. The precise case had not arisen before, and the statute was silent upon it. It was held that the writ of error could be maintained, as the jurisdiction of the trial court did not depend solely upon grounds which, by the terms of the act, would have made the judgment of the circuit court of appeals final, but depended also upon grounds which would have permitted a writ of error from this court to the circuit court of appeals. That this was the precise ground of the decision is clear from the whole trend of the reasoning and from the statement in the opinion, p. 410, that "the judgment of the circuit court of appeals is not final, within the meaning of the 6th section, in a case which, although arising under a law providing for internal revenue, and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the Constitution, or the constitutionality of an act of Congress." The case decides nothing more than that, where the jurisdiction of the trial court is shown, by the plaintiff's statement of his own case, to rest upon two distinct grounds,—first, a ground where the appellate jurisdiction of the circuit court of appeals was made final by the statute; and, second, a ground where the appellate jurisdiction of the circuit court of appeals was made by the statute reviewable in this court,—the latter ground of jurisdiction would control, and the writ of error to the circuit court of appeals would lie. Thus construed, the case is consistent with all the decisions and has no application here, because the only ground of jurisdiction **297**] tion of the district court in the case *at bar was that it was a case arising under the **53 L. ed.**

criminal laws. In such a case the statute makes the judgment of the circuit court of appeals final, and it is no less final because the petitioner here might, if he had been so advised, originally have invoked directly, under § 5 of the act, the appellate jurisdiction of this court.

We are of the opinion that the writ of error does not lie, and the application for it is denied.

UNITED STATES, Petitioner,
v.

CHARLES R. EVANS and Harry J. O'Donnell.

(See S. C. Reporter's ed. 297-301.)

Appeal — review by government in criminal case — effect of acquittal.

1. An appeal after a verdict of not guilty in a criminal case was not authorized on behalf of the government by the provisions of D. C. Code § 935, that, "in all criminal prosecutions, the United States or the District of Columbia, as the case may be, shall have the same right of appeal as is given to the defendant, including the right to a bill of exceptions; provided, that if, on such appeal, it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

[For other cases, see Appeal and Error, 866-868, in Digest Sup. Ct. 1908.]

Constitutional law — delegating non-judicial function to court — moot questions.

2. The review of rulings of the trial court in a criminal case by the appeal taken, under D. C. Code, § 935, on behalf of the government after acquittal, on which the court has no power to set aside the verdict, involves a determination of moot questions only, which is not a judicial function, and cannot be required of a Federal court by Congress.

[For other cases, see Constitutional Law, III. b, 2, in Digest Sup. Ct. 1908.]

[No. 394.]

Submitted December 18, 1908. Decided April 19, 1909.

ON WRIT of Certiorari to the Court of Appeals of the District of Columbia to review a judgment dismissing, for want of jurisdiction, an appeal from the Supreme Court of that District, sued out on behalf of the government in a criminal case after a verdict of not guilty. Quashed.

See same case below, 30 App. D. C. 58.

The facts are stated in the opinion.

NOTE. — On the right of a state to appeal in a criminal case—see note to People ex rel. Hodson v. Miner, 19 L.R.A. 342.

Solicitor General Hoyt submitted the cause for petitioner:

The allowance of an appeal for the purpose of settling questions of law, practice, and procedure, for the guidance of trial courts in future cases, is not new in the legislation of this country.

State v. Granville, 45 Ohio St. 278, 12 N. E. 803; State v. Buechler, 57 Ohio St. 95, 48 N. E. 507; State v. Ruedy, 57 Ohio St. 224, 48 N. E. 944; State v. Van Valkenburg, 60 Ind. 302; Com. v. Bruce, 79 Ky. 560; Com. v. Van Tuyl, 1 Met. (Ky.) 1, 71 Am. Dec. 455; State v. Ward, 75 Iowa, 637, 36 N. W. 765.

Nor was the granting of a right of appeal to the government in a criminal case entirely new legislation in the District of Columbia. By the act of Congress of March 2, 1897, the government was given a right of appeal to the court of appeals from the police court of the District in all cases, without any limitation whatsoever.

District of Columbia v. Lynham, 16 App. D. C. 85.

Congress has the power to give the right of appeal to the government in a criminal case.

United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609; United States v. Macdonald, 207 U. S. 120, 127, 52 L. ed. 130, 134, 28 Sup. Ct. Rep. 53; State v. Lee, 65 Conn. 265, 27 L.R.A. 498, 48 Am. St. Rep. 202, 30 Atl. 1110.

This is a case of controversy within the meaning of the third article of the Constitution.

2 Story, Const. § 1646; Osborn v. Bank of United States, 9 Wheat. 738, 819, 6 L. ed. 204, 223; Pacific Steam Whaling Co. v. United States, 187 U. S. 447, 47 L. ed. 253, 23 Sup. Ct. Rep. 154; Smith v. Adams, 130 U. S. 167, 32 L. ed. 895, 9 Sup. Ct. Rep. 566; Home Ins. Co. v. North Western Packet Co. 32 Iowa, 238, 7 Am. Rep. 183; Fisk v. Henarie, 32 Fed. 423.

The courts of the District of Columbia are created by Congress by virtue of its authority to exercise exclusive legislation in all cases whatsoever over such District. In this respect, the courts of the District are to be classed with the territorial courts.

McAllister v. United States, 141 U. S. 174, 184, 35 L. ed. 693, 696, 11 Sup. Ct. Rep. 949.

The spirit of the Constitution is not such as to prohibit Congress from imposing upon the courts of the District any other than judicial powers and duties.

Loughborough v. Blake, 5 Wheat. 317, 324, 5 L. ed. 98, 100.

The determination of questions of law, practice, and procedure arising in an actual case, by an appellate court, for the guidance

of the trial courts, is purely a judicial matter.

No appearance for respondents.

*Mr. Chief Justice Fuller delivered [299 the opinion of the court:

Appellees were tried under an indictment for murder in the supreme court of the District of Columbia on February 1, 1907, and found not guilty. The United States appealed to the court of appeals of the District, and assigned error on exceptions taken during the trial to the exclusion of certain evidence. This right to appeal was claimed under § 935 of the Code [31 Stat. at L. 1341, chap. 854], which reads as follows:

"In all criminal prosecutions the United States or the District of Columbia, as the case may be, shall have the same right of appeal that is given to the defendant, including the right to a bill of exceptions; provided, that if, on such appeal, it shall be found that there was error in the rulings of the court during the trial, a verdict in favor of the defendant shall not be set aside."

The appeal was dismissed for want of jurisdiction, and the case brought here on certiorari.

The case of United States v. Sanges, 144 U. S. 310, 36 L. ed. 445, 12 Sup. Ct. Rep. 609, reiterated the then well-settled rule that the right of review in criminal cases was limited to review at the instance of the defendant after a decision in favor of the government. United States v. Dickinson, 213 U. S. 92, ante, 711, 29 Sup. Ct. Rep. 485.

In United States v. Evans, 28 App. D. C. 264, under § 935 of the Code, the right was exercised without question in a case where an indictment had been set aside on demurrer, and Chief Justice Shepard, in delivering the opinion of the court in this case (30 App. D. C. 58), said:

"It may be assumed also that such a writ of error would lie to review a judgment arresting a judgment of conviction for the insufficiency of the indictment, or one sustaining a special plea in bar, when the defendant has not been put in jeopardy."

But the Chief Justice further said that it was contended by appellants that a writ of error lies also "upon a judgment where there has been a verdict of not guilty; not, however, to obtain a reversal of that [300 judgment, but to obtain an opinion upon exceptions taken at the trial that may serve as a rule of observance in cases that may hereafter arise."

But this contention was rejected by the court, in view of the objectionable consequences that would result from such an exercise of jurisdiction. "The appellee in such

a case, having been freed from further prosecution by the verdict in his favor, has no interest in the question that may be determined in the proceedings on appeal, and may not even appear. Nor can his appearance be enforced. Without opposing argument, which is so important to the attainment of a correct conclusion, the court is called upon to lay down rules that may be of vital interest to persons who may hereafter be brought to trial. All such persons are entitled to be heard on all questions affecting their rights, and it is a harsh rule that would bind them by decisions made in what are practically 'moot' cases, where opposing views have not been presented."

It was in the light of these considerations that the act of Congress of March 2, 1907 (34 Stat. at L. 1246, chap. 2564, U. S. Comp. Stat. Supp. 1907, p. 209), was subjected to the limitations therein contained. *United States v. Keitel*, 211 U. S. 370, 398, ante, 230, 244, 29 Sup. Ct. Rep. 123; *United States v. Mason*, 213 U. S. 115, ante, 725, 29 Sup. Ct. Rep. 480.

By the Constitutions of several of the states, the justices of the highest judicial tribunals are obliged to give their opinions on important questions of law upon solemn occasions, when required by either branch of the legislature, or the governor, or governor and council, and there are many interesting discussions in the state reports, as well as in articles by the law writers, in respect of such a provision.†

But no such requirement obtains in Federal jurisprudence.

Such a provision was suggested in the Federal Constitutional Convention, but disappeared in the committee on detail.

301] *In 1793, President Washington sought to take the opinion of the judges of the Supreme Court of the United States as to various questions arising under our treaties with France, but they declined to respond. Marshall thus speaks of the matter in his *Life of Washington*:

"About this time it is probable that the difficulties felt by the judges of the Supreme Court in expressing their sentiments on the points referred to them were communicated to the Executive. Considering themselves as merely constituting a legal tribunal for the decision of controversies brought before them in legal form, these gentlemen deemed it improper to enter the field of politics by declaring their opinion

on questions not growing out of the case before them." Story, *Constitution*, § 1571.

It was long ago held by this court that the discharge of such a function was not an exercise of judicial power. *United States v. Ferreira*, 13 How. 40, note on page 52, 14 L. ed. 42, note on page 47; *Hayburn's Case*, 2 Dall. 409; see note, pp. 410-414, 1 L. ed. 436, see note pp. 436-438. And that ruling sustains the conclusion of the court of appeals in the matter of the construction of this act, to which the opinion is confined.

Writ of certiorari quashed.

LEEDS & CATLIN COMPANY, Petitioner,
v.

VICTOR TALKING MACHINE COMPANY and United States Gramophone Company.

(See S. C. Reporter's ed. 301-325.)

Patents — combination or function.

1. A combination, and not a function, of a machine, is embodied in claim 35 of the Berliner patent No. 534,543, for a "sound-reproducing apparatus consisting of a traveling tablet having a sound record formed thereon and a reproducing stylus shaped for engagement with said record, and free to be vibrated and propelled by the same, substantially as described."

[For other cases, see *Patents*, 131-184, 203-205, in *Digest Sup. Ct.* 1908.]

Preliminary injunction — patent case — former adjudication as ground.

2. A prior adjudication of a Federal court, sustaining the validity of the patent in suit, is a valid ground for granting a preliminary injunction against infringement.

[Injunctions in patent cases, see *Injunction*, I. m, in *Digest Sup. Ct.* 1908.]

Certiorari — in patent case — scope of review.

3. Defenses of anticipation and want of infringement will not ordinarily be passed upon by the Federal Supreme Court on certiorari to a circuit court of appeals, to review an order granting a preliminary injunction in a patent suit.

[For other cases, see *Certiorari*, II. c, in *Digest Sup. Ct.* 1908.]

Patents — expiration with foreign patent.

4. All the claims of a domestic patent do not necessarily expire with a foreign patent because of the provisions of U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p.

NOTE. — On grounds for denying preliminary injunction in patent infringement suit—see note to *Johnson v. Foos Mfg. Co.* 72 C. C. A. 123.

On foreign patents and their effect—see note to *Grant v. Walter*, 37 L. ed. U. S. 553.

On certiorari from Federal Supreme Court to circuit courts of appeals—see note to *United States v. Dickinson*, ante, 711.

†Thayer, *Advisory Opinions, Legal Essays*, 43; *Dubuque, The Duty of Judges as Constitutional Advisers*, 24 Am. L. Rev. 369; *Emery, C. J.*, 2 Maine L. Rev. 1; *Cases collected in 6 Am. & Eng. Enc. Law*, 2d ed. p. 1065. And see 103 Me. 506, and especially opinion of *Savage, J.*

3382, that "every patent granted for an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent," but only such claims expire as are embodied in the foreign patent.

[For other cases, see Patents, 28-37, in Digest Sup. Ct. 1908.]

Patents — expiration with foreign patent.

5. The expiration of foreign patents for sound reproducers or recorders does not, under U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, making domestic patents expire with foreign patents for the same invention; affect the duration of the Berliner patent No. 534,543, for sound-reproducing apparatus, so far as claim 5, for a method, and claim 35, for a combination, are concerned, even though such recorder or reproducer is made the subject of one of the claims of such patents.

[For other cases, see Patents, 28-37, in Digest Sup. Ct. 1908.]

Certiorari — in patent case — scope of review.

6. Whether or not the inventions covered by the claims of the patent in suit were exhibited in an expired foreign patent will not be considered by the Federal Supreme Court on certiorari to a circuit court of appeals, to review an order granting a preliminary injunction, where the question is largely one of fact, and pertains rather to the evidence than to a construction of the patents.

[For other cases, see Certiorari, II. c, in Digest Sup. Ct. Rep. 1908:]

Patents — expiration with foreign patent.

7. The expiration of a Canadian patent by reason of the failure to pay the fee required to keep such patent alive for the second six years of the eighteen-year term for which it was granted does not affect the duration of a domestic patent, under U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382, making such patents expire with foreign patents for the same invention.

[For other cases, see Patents, 28-37, in Digest Sup. Ct. 1908.]

[No. 80.]

Argued January 15, 18, 1909. Decided April 19, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of New York, granting a preliminary injunction in a suit to restrain infringement of a patent. Affirmed.

See same case below, 79 C. C. A. 536, 148 Fed. 1022.

Statement by Mr. Justice McKenna:

This case is here on certiorari to an interlocutory decree of injunction restrain-

ing the petitioner, Leeds & Catlin Company, from manufacturing, using, or selling sound-reproducing apparatus or devices embodied in claim No. 35 of letters patent No. 534,543, issued to Emil Berliner, bearing date 19th of February, 1895, and also from manufacturing, using, or selling or in any way disposing of apparatus or devices which embody the method specified in claim No. 5 of the same patent. These claims will be given hereafter.

The bill is in the usual form and alleges the issuing of the patent and the existence of the necessary conditions thereof under the laws of the United States. It also alleges the transfer of title to the plaintiffs in the suit and the infringement of claims 5, 32, and 35 by the defendant, petitioner herein.

Petitioner answered, denying some of the allegations of the bill, and, of others, denying that it had knowledge or information sufficient to form a belief. Explicitly denied infringement, and alleged anticipation of the invention described in the patent by a great number of patents and publications in this country and other countries, an enumeration of which was made. And hence it is alleged that, in view of the state of the art, Berliner was not the first inventor or discoverer of any material or substantial part of the alleged improvement and invention described or claimed.

The answer further alleged that said letters patent did not describe or specify or claim any subject-matter patentable under the statutes of the United States, and are and always have been null and void. Abandonment is alleged and a two-years' use of the invention in this country before the application for the patent, that the invention and improvement were known and used by others, and were in public use and on sale in this country by divers persons, a list of whose names is given.

It is alleged that before the invention was patented in the United States the same was patented, or caused to be patented, by Emil Berliner, in foreign countries, and that by reason whereof, under § 4887 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 3382), the letters patent in suit were limited to expire at the same time with said foreign patents and each of them. The numbers and dates of the foreign patents are given,—two in Great Britain, three in France, three in Germany, and one in Canada. They will be specifically referred to hereafter. And it is alleged that, in consequence thereof, the said letters patent of the United States have long since expired,

and plaintiff is not entitled to any relief by injunction or other relief in equity, that a court of equity has no jurisdiction of the suit, and that plaintiff has an adequate remedy at law. A replication was filed to the answer.

304] *Upon the bill and certain supporting affidavits an order to show cause against a preliminary injunction was issued, which, coming on to be heard upon such affidavits, and other affidavits and exhibits, a preliminary injunction was granted. 146 Fed. 534. It was affirmed by the circuit court of appeals. 79 C. C. A. 536, 148 Fed. 1022.

Mr. Louis Hicks argued the cause and filed a brief for petitioner:

Whether two patents are granted for the same invention is a question of law, to be determined by the court from a comparison of the patents. The question of infringement is also one of law.

Miller v. Eagle Mfg. Co. 151 U. S. 186, 196, 38 L. ed. 121, 127, 14 Sup. Ct. Rep. 310; Heald v. Rice, 104 U. S. 737, 749, 26 L. ed. 910, 914; Singer Mfg. Co. v. Cramer, 192 U. S. 265, 275, 48 L. ed. 437, 443, 24 Sup. Ct. Rep. 291; Thomson-Houston Electric Co. v. Western Electric Co. 86 C. C. A. 73, 158 Fed. 816; Western Electric Co. v. Robertson, 73 C. C. A. 587, 142 Fed. 478.

Claims 5 and 35 of the patent in suit are void because they are claims for the function of a machine.

Westinghouse v. Boyden Power Brake Co. 170 U. S. 537, 554, 42 L. ed. 1136, 1143, 18 Sup. Ct. Rep. 707, 17 C. C. A. 430, 25 U. S. App. 475, 70 Fed. 829; Corning v. Burden, 15 How. 252, 14 L. ed. 683; Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 78, 39 L. ed. 899, 903, 15 Sup. Ct. Rep. 745; Telephone Cases, 126 U. S. 531, 31 L. ed. 863, 988, 8 Sup. Ct. Rep. 788; Busch v. Jones, 184 U. S. 598, 607, 46 L. ed. 707, 712, 22 Sup. Ct. Rep. 511; United States ex rel. Steinmetz v. Allen, 192 U. S. 543, 559, 48 L. ed. 555, 561, 24 Sup. Ct. Rep. 416; Hatch v. Moffitt, 15 Fed. 252; Stokes Bros. Mfg. Co. v. Heller, 96 Fed. 104; Cleveland Foundry Co. v. Detroit Vapor Stove Co. 131 Fed. 742; Manhattan General Constr. Co. v. Helios-Upton Co. 135 Fed. 785; Tyden v. Ohio Table Co. 81 C. C. A. 425, 152 Fed. 183; American Lava Co. v. Steward, 84 C. C. A. 157, 155 Fed. 738; American Steel & Wire Co. v. Denning Wire & Fence Co. 160 Fed. 108.

Claims which describe the operation and effect of a machine have, without exception, been held invalid.

Busch v. Jones, supra; Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68,

39 L. ed. 899, 15 Sup. Ct. Rep. 745; McKay v. Jackman, 20 Blatchf. 466, 12 Fed. 615; Brainard v. Cramme, 20 Blatchf. 530, 12 Fed. 621; Gage v. Kellogg, 23 Fed. 891; Hatch v. Moffitt, supra; Sickles v. Falls Co. 4 Blatchf. 508, Fed. Cas. No. 12,834; Excelsior Needle Co. v. Union Needle Co. 23 Blatchf. 147, 32 Fed. 221; Coupe v. Weatherhead, 16 Fed. 673, affirmed in 147 U. S. 322, 37 L. ed. 188, 13 Sup. Ct. Rep. 312; Stokes Bros. Mfg. Co. v. Heller, supra; Dodge Mfg. Co. v. Ohio Valley Pulley Works, 101 Fed. 584; Dodge Mfg. Co. v. Collins, 40 C. C. A. 53, 106 Fed. 937; Cleveland Foundry Co. v. Detroit Vapor Stove Co. supra; Travers v. Hammock & Fly-Net Co. 78 Fed. 638; Wells Glass Co. v. Henderson, 15 C. C. A. 84, 34 U. S. App. 19, 67 Fed. 935; American Strawboard Co. v. Elkhart Egg-Case Co. 84 Fed. 960; Gindorff v. Deering, 81 Fed. 952; A. B. Dick Co. v. Henry, 160 Fed. 692.

A patent cannot expire in parcels,—cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion. Such principle is derived from, and is the only principle which can be derived from, the provision of U. S. Rev. Stat. § 4887, U. S. Comp. 1901, p. 3382, fixing the term of the patent.

Sieman v. Sellers (Guarantee Ins. Trust & S. D. Co. v. Sellers) 123 U. S. 276, 31 L. ed. 153, 8 Sup. Ct. Rep. 117.

As the claims of the home patent for patentable inventions not contained in the foreign patent were held to have expired with the foreign patent, the law became settled that the home patent could not be kept alive as to such features by disclaiming the features of the expired foreign patent. Thomson-Houston Electric Co. v. McLean, 82 C. C. A. 629, 153 Fed. 886.

Broadening or narrowing the claims of an American patent will not prevent the operation of the statute.

5 Fed. Stat. Anno. p. 470.

The test of the question whether an American patent is granted for an invention previously patented in a foreign country is whether an article made according to the description of the invention patented by the foreign patent would infringe the American patent,—that is, any claim of the American patent.

Commercial Mfg. Co. v. Fairbank Canning Co. 135 U. S. 176, 34 L. ed. 88, 10 Sup. Ct. Rep. 718.

In determining whether a home patent is granted for an invention previously patented in a foreign country, the precise question is whether any of the claims of the home patent include the invention, or some substantive part of the invention, shown by the prior foreign patent. If so, the home patent expires as to all its claims with the foreign

patent, since a patent cannot expire in parcels.

Western Electric Co. v. Citizens' Teleph. Co. 106 Fed. 215; *Thomson-Houston Electric Co. v. McLean*, supra.

A patent cannot expire in part and survive in part; and a generic claim covering the specific form of a specific claim and other forms as well, must, under any construction of the statute, expire with the expiration of the specific claim.

Sawyer Spindle Co. v. Carpenter, 133 Fed. 238, affirmed in 75 C. C. A. 162, 143 Fed. 976.

A home patent, granted only for an invention which is a patentable improvement upon an invention covered by a prior foreign patent, or *vice versa*, is not granted for the invention covered by the foreign patent, and does not expire therewith.

Aquarama Co. v. Old Mill Co. 124 Fed. 229.

Congress intended, by the enactment of U. S. Rev. Stat. § 4887, that an invention previously patented in a foreign country should become free to the American people whenever, by reason of the expiration of the foreign patent, it becomes free to the people abroad.

Commercial Mfg. Co. v. Fairbank Canning Co. supra; *Gramme Electrical Co. v. Arnoux & H. Electric Co.* 21 Blatchf. 450, 17 Fed. 838; *Western Electric Co. v. Citizens' Teleph. Co.* supra; *Electrical Accumulator Co. v. Brush Electric Co.* 2 C. C. A. 682, 1 U. S. App. 320, 52 Fed. 139; *Edison Electric Light Co. v. United States Electric Lighting Co.* 3 C. C. A. 83, 11 U. S. App. 1, 52 Fed. 312; *Pohl v. Anchor Brewing Co.* 134 U. S. 381, 385, 33 L. ed. 953, 954, 10 Sup. Ct. Rep. 577.

Under the provisions of the patent act of Canada, payment of a further fee for the prolongation of the patent for a further term is a condition precedent to the existence of a term beyond the original term of six years, and not a condition subsequent, operating, on nonperformance, to forfeit the unexpired portion of a term previously granted.

Davis v. Gray, 16 Wall. 229, 21 L. ed. 456; *Giddings v. Northwestern Mut. L. Ins. Co.* 102 U. S. 111, 26 L. ed. 93; *Doepfner v. Bowers*, 55 Misc. 561, 106 N. Y. Supp. 932; *Kerr v. Purdy*, 51 N. Y. 629; *Precht v. Howard*, 187 N. Y. 136, 9 L.R.A.(N.S.) 483, 79 N. E. 847.

A Canadian patent for which the fee for a five-year term only had been paid, and which was not prolonged by payment of a further fee for a further term before the expiration of the original five-year term, expired with the expiration of the original five-year term, and did not lapse or become forfeited.

Bonsack Mach. Co. v. Smith, 70 Fed. 383.

Mr. Horace Pettit argued the cause and filed a brief for respondents:

There has been too much of a tendency to misinterpret the decision in the case of *Siemen v. Sellers* (Guarantee Ins. Trust & S. D. Co. v. Sellers) 123 U. S. 276, 31 L. ed. 153, 8 Sup. Ct. Rep. 117.

Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. 71 C. C. A. 189, 138 Fed. 823.

Each claim for the purposes under consideration, is practically a separate invention.

United Nickel Co. v. California Electrical Works, 25 Fed. 479; *Gage v. Herring*, 107 U. S. 640, 646, 27 L. ed. 601, 604, 2 Sup. Ct. Rep. 819; *Leggett v. Standard Oil Co.* 149 U. S. 287, 293, 37 L. ed. 737, 741, 13 Sup. Ct. Rep. 902; *Russell v. Place*, 94 U. S. 606, 609, 24 L. ed. 214, 215; *Celluloid Mfg. Co. v. Zylonite Brush & Comb Co.* 27 Fed. 294; *Carlton v. Bokee*, 17 Wall. 463, 472, 21 L. ed. 517, 519.

Every reasonable doubt should be resolved in favor of the patent, for the law does not favor forfeiture.

Pitts v. Hall, 2 Blatchf. 238, Fed. Cas. No. 11,192; *McCormick v. Seymour*, 2 Blatchf. 256, Fed. Cas. No. 8,726; *Crown Cork & Seal Co. v. Aluminum Stopper Co.* 48 C. C. A. 72, 108 Fed. 850; *Walker, Patents*, 4th ed. § 108.

Defendant's contention that the patenting of a minor detail in a foreign country previous to the patenting of the broad generic invention in the United States forfeits the United States patent as a whole is contrary to the letter and spirit of U. S. Rev. Stat. § 4887, U. S. Comp. Stat. 1901, p. 3382.

Sawyer Spindle Co. v. Carpenter, 133 Fed. 238; *Aquarama Co. v. Old Mill Co.* 124 Fed. 233; *Welsbach Light Co. v. Rex Incandescent Light Co.* 94 Fed. 1006; *Electrical Accumulator Co. v. Brush Electric Co.* 2 C. C. A. 682, 1 U. S. App. 320, 52 Fed. 130; *Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. and Siemen v. Sellers*, supra; *Accumulator Co. v. Julien Electric Co.* 57 Fed. 605; 2 Robinson, Patents, § 623.

The prior foreign patent, in order to curtail the term of the United States patent, must be for the identical invention.

Western Electric Co. v. Citizens' Teleph. Co. 106 Fed. 215; *Commercial Mfg. Co. v. Fairbank Canning Co.* 135 U. S. 176, 34 L. ed. 88, 10 Sup. Ct. Rep. 718; *Clark v. Wilson*, 28 Fed. 95; *Accumulator Co. v. Julien Electric Co.* supra; *J. L. Mott Iron Works v. Henry McShane Mfg. Co.* 80 Fed. 516; *Aquarama Co. v. Old Mill Co.* 124 Fed. 229;

Sawyer Spindle Co. v. Carpenter, 133 Fed. 238, 75 C. C. A. 162, 143 Fed. 976; Westinghouse Electric & Mfg. Co. v. Stanley Instrument Co. *supra*; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 39 L. ed. 601, 15 Sup. Ct. Rep. 508; Electrical Accumulator Co. v. Brush Electric Co. *supra*.

The duration of the United States patent is fixed, when the United States patent issues, by the longest possible term of the foreign patent; and shall not be subject to be terminated by the occurrence or nonoccurrence of certain facts which would require extraneous proof.

Diamond Match Co. v. Adirondack Match Co. 65 Fed. 803; Pohl v. Anchor Brewing Co. 134 U. S. 381, 33 L. ed. 953, 10 Sup. Ct. Rep. 577; Pohl v. Heyman, 58 Fed. 568; Holmes Electric Protective Co. v. Metropolitan Burglar Alarm Co. 22 Blatchf. 471, 21 Fed. 458; Consolidated Roller-Mill Co. v. Walker, 43 Fed. 575; Welsbach Light Co. v. Apollo Incandescent Gaslight Co. 37 C. C. A. 508, 96 Fed. 332; Paillard v. Bruno, 29 Fed. 864; Walker, Patents, p. 151; Bate Refrigerating Co. v. Gillett, 31 Fed. 809; Edison Electric Light Co. v. Electric Engineering & Supply Co. 60 Fed. 404; Bon-sack Mach. Co. v. Smith, 70 Fed. 383.

The method claimed in claim 5 of the patent in suit, under the authorities cited, is clearly a patentable method.

Telephone Cases, 126 U. S. 1, 31 L. ed. 863, 8 Sup. Ct. Rep. 778; American Bell Teleph. Co. v. Dolbear, 15 Fed. 448; Corning v. Burden, 15 How. 252, 14 L. ed. 683; Melvin v. Thomas Potter Sons & Co. 91 Fed. 151; McKay v. Jackman, 20 Blatchf. 466, 12 Fed. 615; Hatch v. Moffitt, 15 Fed. 253; Risdon Iron & Locomotive Works v. Medart, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745; Tilghman v. Proctor, 102 U. S. 708, 26 L. ed. 280; Mowry v. Whitney, 14 Wall. 620, 20 L. ed. 860; Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; American Fibre-Chamois Co. v. Buckskin-Fibre Co. 18 C. C. A. 662, 37 U. S. App. 742, 72 Fed. 508; Hake v. Brown, 37 Fed. 783; Kirchberger v. American Acetylene Burner Co. 124 Fed. 764; Chisholm v. Johnson, 106 Fed. 191; Chisholm v. Randolph Canning Co. 135 Fed. 815; Chisholm v. Canastota Canning Co. 135 Fed. 816; Eames v. Andrews, 122 U. S. 40, 30 L. ed. 1064, 7 Sup. Ct. Rep. 1073; Dayton Fan & Motor Co. v. Westinghouse Electric & Mfg. Co. 55 C. C. A. 390, 118 Fed. 562.

The granting of a preliminary injunction is within the discretion of the circuit court. If the discretion is not improvidently exercised, the injunction should stand.

Duplex Printing-Press Co. v. Campbell Printing-Press & Mfg. Co. 16 C. C. A. 220, 37 U. S. App. 250, 69 Fed. 250; Ritter v. 53 L. ed.

Ulman, 24 C. C. A. 71, 42 U. S. App. 263, 78 Fed. 222; Garrett v. T. H. Garrett & Co. 24 C. C. A. 173, 47 U. S. App. 250, 78 Fed. 472; Blount v. Société Anonyme, 3 C. C. A. 455, 6 U. S. App. 335, 53 Fed. 98; Paris Medicine Co. v. W. H. Hill Co. 42 C. C. A. 227, 102 Fed. 148.

Mr. Justice McKenna delivered the opinion of the court:

The motion for preliminary injunction was made upon affidavits. Those of respondent (complainant in the circuit court) described the invention and the machine made in accordance therewith, averred the practical identity of petitioner's machine therewith, and set forth the record in the case of Victor Talking Mach. Co. v. American Graphophone Co., instituted in the circuit court for the southern district of New York. The affidavits averred that the suit was pending and awaiting decision when this suit was brought, and was subsequently decided; that by the decision, claims 5 and 35 of the patent in suit were held valid and infringed by the talking machine of the defendants, and that an injunction was ordered. 140 Fed. 860. And it was stated that the circuit court of appeals, though not concurring with the circuit court in all of its reasoning, affirmed the decree. [76 C. C. A. 180, 145 Fed. 350.]

The affidavits of petitioner (the defendant in the courts below) set forth the defenses which were made in the case just referred to, a summary of the proofs introduced to sustain the defense, and submitted new matter. The affidavits also contained a description of the patent in suit and what was considered to be its basic invention; averred its identity with certain foreign patents which were not in evidence in the other suit. The affidavits also undertook to meet and refute the charge of infringement. The affidavits were very long and circumstantial, and had attached to them copies of the foreign and domestic patents relied on, translations of foreign laws, copies of publications, and certain testimony. Such parts of these exhibits as we deem relevant will be referred to hereafter.

Upon this body of proof, formidable even in its quantity, and having no other elucidation than the arguments of counsel and *some mechanical exhibits, presenting [311 grave questions of fact, we are asked by petitioner to go beyond the action of the lower courts, and not only reverse them as to a preliminary injunction, but decide the case. If we should yield to this invocation and attempt a final decision, it would be difficult to say whether it would be more unjust to petitioner or to respondent.

The circuit court felt a like embarrassment, as will be observed from its opinion. The court did not pass on the defense of infringement, and said that, except as to one patent, the petitioner had failed to introduce any new matter which would have led the courts in the other case, if such matter had been before them, to have reached a different conclusion. And, speaking of the patents referred to, the circuit judge said: "But even if I am mistaken in this view, and if the expiration of the *Suess Canadian* patent is a complete defense, or if a decision of the questions raised as to the character and scope of the various patents now introduced for the first time should be postponed until final hearing, yet I am constrained to grant the injunction in order to permit an appeal and a determination of the questions at the earliest possible moment."

And the lower courts also reserved to the merits the consideration of the defense that claims 5 and 35 were invalid because they were the functions of machines, resting those defenses, so far as the preliminary injunction was concerned, upon the adjudication in the prior suit. We shall do the same, remarking, however, that the contention, if it has any strength as to claim 5, seems to us untenable as to claim 35. We think the latter is a valid combination, consisting of the elements, (1) a traveling tablet having a sound record formed thereon; (2) a reproducing stylus, shaped for engagement with the record, and free to be vibrated and propelled by it. It is, therefore, a true mechanical device, producing by the co-operation of its constituents the result specified and in the manner specified.

In passing on the other foreign patents the circuit court considered that the prior adjudications fortified the presumption of the validity of the patent in suit, and established its scope, *and that the new matter introduced by petitioner did not repel the presumption or limit the extent of the patent. That the lower courts properly regarded the prior adjudications as a ground of preliminary injunction is established by the cases cited in *Walker on Patents*, §§ 665 et seq. See also *Robinson on Patents*, §§ 117 et seq. And in that aspect the question must be considered, and, so considering it, we may pass the defenses of anticipation, whether complete or partial, and the defense of infringement. These are, we have already said, questions of fact which we are not inclined to pass upon unaided by the judgments of the lower courts, made after a hearing on the merits.

The patent in suit and the patents which, it is contended, anticipate it or limit its extent or duration, are for methods or de-

vices whereby sound undulations trace or inscribe themselves upon a solid material, and are by suitable devices made to reproduce themselves and the sounds which made them. One of the questions in the case is, as we have seen, the relation of the patent in suit to the prior art. It is contended by the respondent that Berliner (he was the patentee of the patent in suit), improved the prior art, not only in the methods of recording and reproducing sounds, but in the devices by which the methods are accomplished.

In the old method the sound record was produced by vertical vibrations, either indenting a pliable material, by and in accordance with the sound waves along a helical or spiral line, as in Edison patents, or by like vibrations engraving a suitable material, by and in accordance with the sound waves, as in the Bell and Tainter patent. By both of these methods there was produced a record consisting of a groove of varying depth, that is, containing elevations and depressions corresponding to the sound waves which produced them. In the Berliner patents the vibrations are made to inscribe a laterally undulating line in the general direction of a spiral. The line, therefore, is of even depth, the inequalities or sinuosities produced by the sound waves being upon its sides. By this method there is produced *a sound record tablet, consisting of a flat disc of hard, resisting material, having in its surface inscribed a spiral groove of practically even depth, but undulating laterally in accordance with the sound waves. The patent in suit describes and specifies the ways of making such record tablet, as do the prior patents the sound records of the respective patentees. Further description of the records, however, is not necessary, as we shall have with them but incidental concern.

The records being made, the next step is the reproduction of the sounds which they record. This is done by adjusting to the line or groove inscribed upon the records a point or stylus attached to a diaphragm, which, being vibrated by the indentations or sinuosities of the groove, reproduces the sounds that made them. In the prior art the reproducing stylus and sound record were brought in operating relation to each other in two ways. The sound record was mechanically conveyed across the reproducing stylus, or the reproducer and its stylus were mechanically conveyed across the record. By one or the other of these means the stylus was kept in engagement with the record and accommodated to the shifting positions of its operative portions. In the patent in suit such independent means are dispensed with. The

stylus is made to engage with the grooves in the record tablet, is vibrated laterally by its undulations, and guided or propelled at the same time with its diaphragm attachment across the face of the tablet, the successive portions of the groove reproducing the sound waves, which are transmitted to the air. The sound records are made of hard, indestructible material, and, as stated in one of respondent's affidavits, the groove impressed therein "serves the two-fold purpose of vibrating the stylus and producing the necessary vibrations in the diaphragm of the sound box, and also to automatically propelling the stylus in the groove across the surface of the record without a feed screw or other mechanism independent of the record itself." The method of doing that is the subject-matter of claim 5, and the means of performing the method is the subject-matter of claim 35. They are, respectively as follows: No. 5. "The method 314]*of reproducing sounds from a record of the same, which consists in vibrating a stylus, and propelling the same along the record by and in accordance with the said record, substantially as described." No. 35. "In a sound-reproducing apparatus, consisting of a traveling tablet having a sound record formed thereon and a reproducing stylus shaped for engagement with said record, and free to be vibrated and propelled by the same, substantially as described."

We may now understandingly consider the new matter which was relied on in the courts below. The first in importance of these is that the patent in suit is for the same invention of certain foreign patents, and expired with them. These patents consist of three French patents to Emil Berliner, respectively dated November 8, 1887, May 15, 1888, and July 19, 1890; German patents to Berliner dated November 8, 1887, May 16, 1888, and November 20, 1889; a Canadian patent of February 11, 1893, assigned by W. Suess to Berliner; English patents of November 8, 1887, and May 15, 1888. These patents are presented in an affidavit by the leading counsel for petitioner, accompanied by such comparisons of them with the patent in suit as established, it is contended, the identity of their inventions with its invention, and made applicable and controlling § 4887 of the Revised Statutes, which is as follows:

"Sec. 4887. No person shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented in a foreign country, unless the same has been introduced into public use in the United States for more than two years prior to the application. But every patent granted for

an invention which has been previously patented in a foreign country shall be so limited as to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term, and in no case shall it be in force more than seventeen years."

The affidavits describe not only the reproducer of the patent in suit, but also the recorded, and give details to the construction of both, and petitioner, in its briefs, elaborately traces *the development of Ber-[315 liner's ideas in comparison with the prior art through three stages, each of which, it is contended, "is represented by domestic and foreign patents, obtained or applied for, respectively, in 1887, 1888, and 1889-1892." Each stage, it is insisted, is claimed as an improvement upon the preceding stage, and all of them are but improvements upon the prior art. Berliner did not employ, it is said, any new principles in the reproduction of sound from a sound record, "the difference in the sound-reproducing machines employed by him and those of the prior art consisting of modifications of details of construction." And it is further contended that an analysis of the patent in suit demonstrates "that the improvements described and claimed related, first, to the recording of sound; and, second, to the reproducing of sound." It is impossible, counsel say, "to seriously contend that the essence of the improvements consist rather in the reproduction of sound than in the recording of sound." It is nevertheless argued that the lower courts so regarded the patent in suit, and by that error adjudged that the foreign patents did not embody Berliner's invention, and that, therefore, the patent in suit did not expire with them. Indeed, it is urged that, "in the face" of the "expressed and positive declaration of the patentee as to what are the features of his invention, the courts below not only held that the patent included other features not enumerated by Berliner, but went even further, and held that the features which Berliner did enumerate as the features of his invention are not the principal features of his invention, but are mere minor details." This is a misapprehension of the view of the courts below. They confine themselves, as it was proper to do, to the claims in suit and to the invention exhibited in them, and, in considering the relation of the patent in suit with foreign patents, they distinguished between what the circuit court denominates the "broad and basic invention" covered by those claims and the "minor part" shown in the foreign patents. Petitioner attempts to make the recording and reproduction of sounds essential parts of one invention, of which the claims are *but parts. The[316

purpose is to identify the invention of the patent with every one of the foreign patents, and bring the case under what is conceived to be the doctrine of *Siemen v. Sellers* (*Guarantee Ins. Trust & S. D. Co. v. Sellers*) 123 U. S. 276, 31 L. ed. 153, 8 Sup. Ct. Rep. 117.

That case, it is contended, precludes a distinction between the claims of a patent into basic and not basic, principal or subordinate, and establishes that all the claims of a home patent must be so limited as to expire with the expiration of a foreign patent, or, if there be more than one prior foreign patent, with the expiration of the one having the shortest term. Upon the expiration of a patent, it is argued, all of its claims expire, since, as this court said in *Siemen v. Sellers*, as it is contended, a patent cannot be considered as running partly to one date and partly to another, for this would be productive of endless confusion. In other words, a patent cannot expire in parcels, it cannot have a plurality of terms. Therefore it is contended that it is the patent, and not the separate claims thereof, which are by the statute limited to expire with the foreign patent. *Siemen v. Sellers* is cited for this doctrine, as we have said, and also the following cases: *Western Electric Co. v. Citizens' Teleph. Co.* 106 Fed. 215; *Sawyer Spindle Co. v. Carpenter*, 133 Fed. 238, affirmed in 75 C. C. A. 162, 143 Fed. 976; *Thomson-Houston Electric Co. v. McLean*, 82 C. C. A. 629, 153 Fed. 883.

Siemen v. Sellers is especially relied upon, and whatever there is in the other cases that support the contention of petitioner is based on that case. In *Siemen v. Sellers* the patent passed upon was for an improved regenerator furnace, so called, and the question presented was whether it was identical with that described in an expired English patent. The court said:

"We have carefully compared the two patents, the English and American, and can see no essential difference between them. They describe the same furnace in all essential particulars. The English specification is more detailed, and the drawings are more minute and full; but the same thing is described in both. There is only one claim in the English patent, it is true. But that claim, under the English patent system, entitled the *patentees to their entire invention, and is at least as broad and comprehensive as all four claims in the American patent."

It will be observed, therefore, that there was no distinction in the subject-matter of the claims. There was a difference in the number of the claims, arising from the difference in the patent systems, but the claims were co-extensive in substance and

in invention. There was no question, therefore, of a difference in claims covering different inventions, but such contingency, it is contended, is embraced in the following passage:

"It is contended by the counsel of the complainants that the American patent contains improvements which are not exhibited in the English patent. But, if this were so, it would not help the complainants. The principal invention is in both; and if the American patent contains additional improvements, this fact cannot save the patent from the operation of the law which is invoked, if it is subject to that law at all. A patent cannot be exempt from the operation of the law by adding some new improvements to the invention; and cannot be construed as running partly from one date and partly from another. This would be productive of endless confusion."

This passage must be construed by what precedes it. It was said that there was no essential difference between the patents. "They described the same functions in all essential particulars," is the language used. "The principal invention," therefore, was "the same in both," and the improvements, which it was asserted the American patent contained, did not destroy its essence or its identity with the English patent; necessarily, therefore, did not save it "from the operation of the law." And the court meant no more than that. It was not said that a patentable improvement could not be made which could be secured by a patent which would endure beyond the expiration of a prior foreign patent for that which was improved. Such a ruling would contravene the right given by the statute. Section 4886 (U. S. Comp. Stat. 1901, p. 3382) provides that "any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or *any new and useful improvement* *there-[318 of, . . . may . . . obtain a patent therefor." The improvement would be the invention and would endure for the period given to it by law. Besides, a patent may embrace more than one invention. *United States ex rel. Steinmetz v. Allen*, 192 U. S. 543, 48 L. ed. 555, 24 Sup. Ct. Rep. 416. A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be made the subject of different patents. So may other dependent and related inventions. If patented separately, a foreign patent for either would not affect the other. Why would such effect follow if they are embraced in the same patent? What policy of the law would be subserved by it? The purpose of § 4887 of the Revised Statutes is very clear. It is that, whenever an invention is made

free to the public of a foreign country, it shall be free in this. The statute has no other purpose. It is not intended to confound rights, and to make one invention free because another is made so. This will even more distinctly appear in case of a patent for a combination, such as claim 35 is of the patent in suit.

A combination is a union of elements, which may be partly old and partly new, or wholly old or wholly new. But, whether new or old, the combination is a means—an invention—distinct from them. They, if new, may be inventions and the proper subjects of patents, or they may be covered by claims in the same patent with the combination.

But whether put in the same patent with the combination or made the subjects of separate patents, they are not identical with the combination. To become that they must be united under the same co-operative law. Certainly, one element is not the combination, nor, in any proper sense, can it be regarded as a substantive part of the invention represented by the combination, and it can make no difference whether the element was always free or becomes free by the expiration of a prior patent, foreign or domestic. In making a combination, an inventor has the whole field of mechanics to draw from. This view is in accordance with the principles of the patent laws. It is in accordance with the policy of § 4887 of the 319] Revised Statutes, which is urged against it. That policy is, as we have seen, that an American patent is not precluded by a foreign patent for the same invention, but, if a foreign patent be granted, an American patent is granted upon the condition that the "invention shall be free to the American people whenever, by reason of the expiration of the foreign patent, it becomes free to the people abroad." *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 36, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508. And all of the provisions of the statutes are accommodated. Each invention is given the full period of seventeen years, which the statute prescribes for it.† If limited at all, it can only be by a prior foreign patent identical with it. Nor can confusion result. Why should

it? It does not result from analogous applications of the patent laws. Claims are independent inventions. One may be infringed, others not, and the redress of the patentee is limited to the injury he suffers, not by the abstract rights which have been granted him in other claims. One claim may be valid, all the rest invalid,—invalid for the want of some essential patentable attribute. But what is good remains and is unaffected by its illegal associates. In such cases the patent does not stand or fall as a unity. If claims may be separable, as in the case of infringement of some and not of others,—if claims can be separable, though some are invalid,—may they not be separable when some of them have expired? Certainly confusion cannot arise in one case more than in the other. Confusion might result in such circumstances as were presented in *Siemen v. Sellers*, where it was sought to extend the principal invention—indeed the only invention—by the date of a mere formal improvement of it. In such case, as *it was said, the patent "cannot be[320 construed as running partly from one date and partly from another."

In the light of these principles, let us examine the foreign patents relied upon. Special stress is given to German patent No. 53,622 to Berliner, and it is contended that it expired before this suit was brought, and that the patent in suit expired with it. The patent refers to two others in which, it is said, there is described an apparatus for the recording of sound, and that "the present invention [that covered by the patent] relates to the instrument in the part of the apparatus performing the reproduction." The instrument is exhibited by a drawing and is specifically described. Petitioner says that that instrument covered the most important part of a Berliner gramophone, and that Berliner, in his Franklin Institute lecture, specifically stated that, of the three principal features of the improvement of the patent in suit, the *reproducer* formed one. But granting that he did say so, and that it is so, the inquiry yet remains, Is it identical with the invention of claim 5 or claim 35 of the patent in suit? It is not of claim 5, for that is for a method, and a method is independent of the instruments employed to perform it. It is not of claim 35, for that claim is for a combination, and one element is not the combination. Indeed, all of the elements are not. To be that,—to be identical with the invention of the combination,—they must be united by the same operative law. Of course, an element is a part, an essential part, of the combination, and enters as an operative agent in the performance of its functions. But this does not make it identical with the combination. It

†Sec. 4884. Every patent shall contain a short title or description of the invention or discovery, correctly indicating its nature and design, and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States, and the territories thereof, referring to the specification for the particulars thereof. A copy of the specification and drawings shall be annexed to the patent and be a part thereof.

may be novel, patentable of itself, subject to its own special monopoly, or it may be free for everybody's use; but, whether free or not free, free when the combination was formed (invented) or became free, it is not identical with the combination. It follows, therefore, that the expiration of the German patent No. 53,622 for the reproducer did not affect the duration of the patent in suit so far as claims 5 and 35 are concerned, even though such reproducer is made the subject of one of the claims of the patent 321]in suit. To some extent there remarks are applicable to all the foreign patents relied on by petitioner.

In the French patent No. 207,090, granted to Berliner, the claims cover a recorder as well as a reproducer of sound. They are practically the same instrument, and are denominated respectively in the patent as a recording sound box and as a reproducing sound box. As the first, to quote the patent, it is used to "trace acoustic curves upon the surface" of a sound record. As the second, that is, as a reproducer, it reproduces the sounds which made the "acoustic curves."

It is contended by respondent that the recorder and reproducer of the patent in suit differ in certain details of construction and operation from the recorder and reproducer of the German and French patents, but the circuit court said that that question could only be determined by expert testimony, and assumed the details to be substantially identical. We shall do the same, and are of the opinion, for the reasons which we have given, that the expiration of those patents, the French patent as well as the German patent, did not carry with them the expiration of the inventions exhibited in claims 5 and 35 of the patent in suit.

It is further contended that the patent in suit expired with the British, French, and German patents of November 8, 1887, to Berliner. These patents, it is contended, are for the "basic invention" covered by claims 5 and 35 of the patent in suit. The patents are identical, and therefore we consider only the British patent. The reasoning by which this is attempted to be supported is somewhat circuitous. Among the publications referred to in petitioner's answer and introduced in evidence was one in the *Electrical World* for November 12, 1887, one published in the same paper, August 18, 1888, and a paper read by Berliner before the Franklin Institute, May 16, 1888. In these publications there is description of the invention, and, in the paper read before the Franklin Institute, Berliner describes the genesis of his ideas and the ideas of others in the process of recording and reproducing 322]sounds. He entered into a somewhat de-

tailed description of his invention, exhibited a machine and gave an illustration of its powers, among others letting the audience "listen to some phonautograms," which he said he had prepared within two weeks before in Washington. This was urged as a public use, but the circuit court decided that neither that lecture and exhibition nor the description in the *Electrical World* in 1887, constituted a public use within the meaning of the statutes. And the court also decided that the broad claims of the patent in suit were not made a part of the earlier application for patent No. 564,586, and that that omission, even when combined with such exhibition and publication, was not an abandonment and forfeiture of those claims. The circuit court of appeals did not discuss those questions or express an opinion upon them, but decided that the specifications in the application for patent No. 564,586, issued subsequently to the patent in suit, were broad enough to warrant the making of the claims in controversy (5 and 35) and that the second application could fairly be considered a continuation of the first, and antedated the alleged public use. If this be so, petitioner contends, the two patents must be treated as one patent, covering one invention, that described in No. 564,586, and, it is further contended, that as that invention was previously patented by the three foreign patents, the patent in suit expired with them. The reasoning is extremely technical, and we may adopt the answer made to it by the circuit court: "An examination of the drawings of the prior British patent shows that there is omitted therefrom the figure 10 of the United States patent No. 564,586, which was the only figure illustrating the form of the device covered by the claims here in suit. There is nothing either in the specifications or drawings of the said British patent which describes, illustrates, or shows the method or apparatus of the claims here in suit. These considerations apply equally to said earlier German and French patents."

It would be a very strange application of § 4887 to hold that it covers what is omitted from a foreign patent as well as what is included in such patent. At any rate, whatever was the ruling *in the prior suit, [323 in the suit at bar the circuit court and the circuit court of appeals both held that the inventions of claims 5 and 35 of the patent in suit were not exhibited in the British patent, and that is so far a question of fact, pertains so much to evidence rather than to a construction of the patents, that we may well remit it, as we have other questions of the kind, to the merits of the case.

There yet remains the *Suess Canadian* patent to be considered. It was granted to Berliner as the assignee of *Suess*, and Judge Townsend, in the circuit court, said that the patent disclosed and broadly claimed the invention covered by the claims in suit, and, on account of it, defendant (petitioner here) contended that Berliner thereby admitted that *Suess* was the inventor of the reproducing apparatus of those claims; that in his application as the assignee of *Suess* he abandoned the broad claim in suit, and that, as the patent covered the invention of the patent in suit, and expired in 1899, the patent in suit expired with it. The learned judge further said:

"The evidence introduced in the original suit showed and the court found on the *Suess* patent 427,279, that *Suess* was merely an improver of a particular form of swinging arm device, and some of the language used in the specifications of this *Suess Canadian* patent, which, however, was not before the court in the original suit, seems to indicate that its structure is merely an improvement on the broad Berliner invention, and Berliner himself afterwards applied for and obtained a Canadian patent for the broad invention covered by the claims here in suit."

The court, however, decided that the Canadian patent in terms described and claimed "the broad, generic invention of Berliner covered by the claims here in suit," and, to establish this, quoted claims 5, 7, and 11† of the Canadian patent, and concluded that, if that patent expired in 1899, the patent in suit also expired. The court, however, decided, expressing, however, 324]*some hesitation, that the patent did not then expire, stating the rule to be, as established by the cases, that a United States patent is limited by the terms expressed in the foreign patent, and that it is not affected by any lapse or forfeiture of any portion of the terms by means of any condition subsequent.

The patent was granted for the term of eighteen years from its date, February 11, 1893, but provides as follows:

"The partial fee required for the term of six years having been paid to the Commis-

sioner of Patents, this patent shall cease at the end of six years from date, unless at or before the expiration of the said term the holder thereof pay the fee required for the further term or terms, as provided by law."

And it appears that the fee for the second term of six years was not paid, and that because of such nonpayment the patent expired February 11, 1899. The contention of petitioner is, as has been seen, that the patent in suit expired at the same date by virtue of § 4887, Revised Statutes. The necessary effect of that section, it is contended by petitioner, being that if, by any act of omission of the patentee, the invention becomes free in a foreign country, it becomes free in this country. The contention of the respondent is that the domestic patent endures for the longest possible term of the foreign patent. In other words, endures for the period expressed in the grant, and is not dependent upon or "subject to be terminated by the occurrence or nonconcurrence by certain facts which would require extraneous proof." These opposing contentions are discussed at great length by counsel and a number of cases are cited.

*We omit, however, the consideration[325 of the cases and comment upon the arguments based upon them, as we think the questions involved are determined by *Pohl v. Anchor Brewing Co.* 134 U. S. 381, 33 L. ed. 953, 10 Sup. Ct. Rep. 577. It is there decided that "the statute manifestly assumes that the patent previously granted in a foreign country is one granted for a definite term; and its meaning is that the United States patent shall be so limited as to expire at the same time with such term of the foreign patent." And it is further said that the duration of the United States patent is not "limited by any lapsing or forfeiture of any portion of the term of such foreign patent by means of the operation of a condition subsequent, according to the foreign patent."

From these views it follows that there was no abuse of discretion in granting the preliminary injunction, and the decree is affirmed.

†5. In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consisting of a sound-conveying tube and a diaphragm and stylus mounted at one end of the tube; of a freely swinging supporting frame for the said producer mechanism, substantially as described.

7. In an apparatus for reproducing sounds from a record tablet, the combination with a reproducer mechanism consist-

ing of a sound conveyer, and a diaphragm and stylus mounted at one end thereof; of a supporting frame for the said reproducer, loosely pivoted to swing freely both laterally and vertically, substantially as described.

11. In an apparatus for reproducing sounds from a rotating record tablet, a reproducing stylus mounted to have a free movement over the surface of the record tablet, substantially as described.

LEEDS & CATLIN COMPANY, Petitioner,
v.
VICTOR TALKING MACHINE COM-
PANY and United States Gramophone
Company.

(See S. C. Reporter's ed. 325-337.)

**Patents — infringement — purchaser's
right to repair or replace element.**

The sale of disc sound records which, though themselves unpatented, form an essential element of the combination covered by claims 5 and 35 of the Berliner patent No. 534,543, for sound-producing apparatus, with the intention that such discs be used in such patented combination, cannot be justified under the purchaser's right of repair and replacement.

[For other cases, see Patents, XIII. g, in Digest Sup. Ct. 1908.]

[No. 81.]

Argued January 18, 1909. Decided April 19, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, imposing a fine for a violation of an injunction granted in a suit to restrain infringement of a patent. Affirmed.

See same case below, 83 C. C. A. 170, 154 Fed. 58.

The facts are stated in the opinion.

Mr. Louis Hicks argued the cause and filed a brief for petitioner:

There is no distinction whatever between the question here involved and the question involved in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 40 Fed. 577, 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627. See also *Wilson v. Simpson*, 9 How. 109, 125, 13 L. ed. 66, 73; *Goodyear Shoe Machinery Co. v. Jackson*, 55 L.R.A. 692, 50 C. C. A. 159, 112 Fed. 150; *Aiken v. Manchester Print Works*, 2 Cliff. 435, Fed. Cas. No. 113; *Wagner Typewriter Co. v. F. S. Webster Co.* 144 Fed. 405.

The purchaser of a patented combination has the legal right immediately to substitute for an important or essential element of the combination one which he conceives to be better suited to his purposes, even though such element was intended to be permanent; and anyone has an equal right to make and sell such elements to such purchaser for such purpose.

NOTE. — On contributory infringement of patents—see notes to *Edison Electric Light Co. v. Peninsular Light, Power, & Heat Co.* 43 C. C. A. 485, and *Æolian Co. v. Harry H. Juelg Co.* 86 C. C. A. 206.

Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co. 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005; *Chaffee v. Boston Belting Co.* 22 How. 217, 16 L. ed. 240; *Wilson v. Simpson*, 9 How. 109, 13 L. ed. 66; *Mitchell v. Hawley*, 16 Wall. 544, 548, 21 L. ed. 322, 323.

The patented sound-reproducing apparatus, forming the combination of claim 35 of the patent in suit, passes out of the monopoly of the patent and the protection of the patent laws of the United States when sold unconditionally by complainants or their licensees.

Bloomer v. McQuewan, 14 How. 539, 549, 14 L. ed. 532, 537; *Adams v. Burke*, 17 Wall. 453, 456, 21 L. ed. 700, 703; *Edison Electric Light Co. v. Peninsular Light, Power, & Heat Co.* 43 C. C. A. 479, 101 Fed. 835; *Hobbie v. Jennison*, 149 U. S. 355, 37 L. ed. 766, 13 Sup. Ct. Rep. 879; *Keeler v. Standard Folding Bed Co.* 157 U. S. 659, 39 L. ed. 848, 15 Sup. Ct. Rep. 738; *Daimler Mfg. Co. v. Conklin*, 160 Fed. 679.

A careful reading of the cases wherein contributory infringement has been found will show that, in each case, stress has been laid upon the fact that the article made and sold by the defendant, held to be a contributory infringer, was adapted for use only in the patented combination, or upon affirmative proof of a concert of action between two infringers, acting without legal right.

Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co. 63 C. C. A. 607, 129 Fed. 111; *Cortelyou v. Charles E. Johnson & Co.* 76 C. C. A. 455, 145 Fed. 933; *Snyder v. Bunnell*, 29 Fed. 48; *Thomson-Houston Electric Co. v. Ohio Brass Co.* 26 C. C. A. 107, 54 U. S. App. 1, 80 Fed. 712; *Standard Computing Scale Co. v. Computing Scale Co.* 61 C. C. A. 541, 126 Fed. 639; *Canda v. Michigan Malleable Iron Co.* 61 C. C. A. 194, 124 Fed. 486.

Complainants and their licensees, by selling the sound-reproducing apparatus of claim 35 of the patent in suit, impliedly licensed the purchaser thereof to combine a suitable record therewith in every case where the apparatus was sold without a sound-record combined therewith, and for that purpose to purchase such a record from persons other than complainants or their licensees.

Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co. 152 U. S. 425, 432, 38 L. ed. 500, 503, 14 Sup. Ct. Rep. 627; *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 300; *Edison Electric Light Co. v. Peninsular Light, Power, & Heat Co.* 43 C. C. A. 479, 101 Fed. 836; *Thomson-Houston Electric Co. v. Illinois Teleph. Constr. Co.* 81 C. C. A.

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473, 152 Fed. 631, 143 Fed. 539; *Roosevelt v. Western Electric Co.* 20 Fed. 724.

The finding of the circuit court places an intolerable burden upon defendant's conceded right to make and sell the unpatented sound-records of the prior art.

Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co. supra; *Cortelyou v. Johnson*, 207 U. S. 196, 52 L. ed. 167, 28 Sup. Ct. Rep. 105; *Welsbach Light Co. v. Union Incandescent Light Co.* 41 C. C. A. 255, 101 Fed. 131.

Mr. Horace Pettit argued the cause and filed a brief for respondents:

The decision in *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 40 Fed. 577, 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627, was never intended to be so sweeping and far-reaching as to include the practically indestructible record disc of the combination of claim 35.

While an ordinary working part may be substituted on the doctrine of repair, a chief part of the combination, or a vital element thereof, cannot.

Wagner Typewriter Co. v. F. S. Webster Co. 144 Fed. 405; *Davis Electrical Works v. Edison Electric Light Co.* 8 C. C. A. 615, 21 U. S. App. 74, 60 Fed. 276.

Defendant is an infringer in selling records where they are used or intended to be used on infringing reproducing apparatus.

Thomson-Houston Electric Co. v. Ohio Brass Co. 26 C. C. A. 107, 54 U. S. App. 1, 80 Fed. 712; *Wallace v. Holmes*, 9 Blatchf. 65, Fed. Cas. No. 17,100; *Schneider v. Pountney*, 21 Fed. 399; *Bullock Electric & Mfg. Co. v. Westinghouse Electric & Mfg. Co.* 63 C. C. A. 607, 129 Fed. 111; *Walker*, Patents, § 407; *Boyd v. Cherry*, 50 Fed. 279; *Celluloid Mfg. Co. v. American Zylonite Co.* 30 Fed. 437; *Alabastine Co. v. Payne*, 27 Fed. 559; *American Cotton-Tie Supply Co. v. McCreedy*, 17 Blatchf. 291, Fed. Cas. No. 295; *Snyder v. Bunnell*, 29 Fed. 47; *Travers v. Beyer*, 23 Blatchf. 423, 26 Fed. 450.

The doctrine of repair has no application to the present suit.

Davis Electrical Works v. Edison Electric Light Co. supra; *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* 22 C. C. A. 1, 45 U. S. App. 95, 75 Fed. 1005; *Morrin v. Robert White Engineering Works*, 138 Fed. 68; *Red Jacket Mfg. Co. v. Davis*, 27 C. C. A. 204, 53 U. S. App. 478, 82 Fed. 432; *Stearns v. Phillips*, 43 Fed. 792; *Wagner Typewriter Co. v. F. S. Webster Co.* supra; *Cortelyou v. Johnson*, 76 C. C. A. 455, 145 Fed. 933.

The record is of equal, if not greater, importance than the producer element.

American Graphophone Co. v. Leeds, 87 Fed. 873; *American Graphophone Co. v. Amet*, 74 Fed. 789.

53 L. ed.

The complainant, by the sale of the reproducing apparatus of claim 35, does not license the purchaser to buy from others a suitable record, where the apparatus was sold without a sound record.

Ibid. *American Graphophone Co. v. Hawthorne*, 92 Fed. 516; *Roosevelt v. Western Electric Co.* 20 Fed. 724; *United Nickel Co. v. California Electrical Works*, 25 Fed. 475; *Thomson-Houston Electric Co. v. Ohio Brass Co.* supra; *Wallace v. Holmes*, 9 Blatchf. 65, 5 Fisher, Pat. Cas. 37, Fed. Cas. No. 17,100; *National Phonograph Co. v. Fletcher*, 117 Fed. 149.

There is no implied license, as the reproducing apparatus is not the complete patented thing.

2 Robinson, Patents, § 825; *United Nickel Co. v. California Electrical Works*, supra.

The defendant, in selling records, infringes the process claim.

Westinghouse Electric & Mfg. Co. v. Dayton Fan & Motor Co. 106 Fed. 724.

If defendant can sell one element of the combination, another defendant can sell the other.

Strobridge v. Lindsay, 6 Fed. 510.

Mr. Justice McKenna delivered the opinion of the court:

This writ was issued to bring up for review the judgment of the circuit court, affirmed by the circuit court of appeals, adjudging petitioner guilty of contempt of court for violating the injunction which has just been considered in No. 80 [213 U. S. 302, ante, 805, 29 Sup. Ct. Rep. 495], and to pay a fine of \$1,000, one half to the United States and one half to complainants in the suit, respondents here.

The injunction, as we said in the opinion in No. 80, enjoined petitioner, the Leeds & Catlin Company, from manufacturing, using, or selling the method expressed in claim 5 of letters patent No. 534,543 to Emil Berliner, dated February 19, 1895, or the apparatus covered by claim 35.

On the 15th of November, 1906, respondent Victor Talking Machine Company filed a petition in the circuit court, charging petitioner with a violation of such injunction. A rule was issued against the Leeds & Catlin Company to show cause why an attachment should not issue against it for contempt of court for violating the injunction, which came on to be heard upon supporting and opposing affidavits and the answer of the Leeds & Catlin Company.

*A judgment was entered adjudging [330] the Leeds & Catlin Company guilty of contempt, which was affirmed by the circuit court of appeals. 150 Fed. 147, 83 C. C. A. 170, 154 Fed. 58.

The answer of petitioner referred to the record in No. 80, and in this court it is

stipulated that that record shall be used as part of the record in the pending cases, and certain of the defenses there made are repeated here. For instance, it is contended, and the record in No. 80 is adduced to support the contention, that (1) the patent in suit having expired before the suit was begun, the circuit court was without jurisdiction to entertain the suit; (2) claims in suit being for the functions of a machine are void. And it is further contended that "hence the judgment finding defendant [petitioner] in contempt (a) was void because beyond the jurisdiction of the court; and (b) should be set aside because, the claims being void, the injunction was improperly granted." These contentions are disposed of by the opinion in No. 80, and we may confine our discussions to the other defenses made in the contempt proceedings.

The facts are practically undisputed, and a detail of them is unnecessary. It is enough to say that petitioner is a manufacturer of disc records, such as are described in No. 80. That is, a record upon which is inscribed a lateral undulating groove of even depth, which, when the disc is revolved, compels the reproducing stylus to be vibrated and propelled across its face.

It will be observed how important the record is to the invention embodied in the claims. It is the undulations in the side walls of the spiral groove which vibrate the stylus back and forth, transmitting the recorded sound waves to the diaphragm, at the same time propelling the stylus as it engages with the record. If a comparison may be made between the importance of the elements, as high a degree (if not a higher degree) must be awarded to the disc with its lateral undulations as to the stylus. It is the disc that serves to distinguish the invention,—to mark the advance upon the prior art. "As to the reproducing stylus," as is said by respondent, "it is only necessary that it should be shaped for engagement with the record, *and so positioned and supported as to be free to be vibrated and propelled by the record."

The lower courts found that most of the sales (we quote from the opinion of the circuit court of appeals) of the records by petitioner "were knowingly made . . . to enable the owners of Victor talking machines to reproduce such musical pieces as they wished by the combination of the Leeds & Catlin record with said machines; that the Leeds & Catlin Company made no effort to restrict the use to which their records might be put until after motion to punish for contempt had been made; that the only effort at such restriction ever made was to insert upon the face of the record a notice to the effect that such record was intended and sold for use with the 'feed-device machine;'

that the records sold by plaintiff in error [petitioner] were far more frequently bought to increase the repertoire of the purchaser's Victor machine than to replace wornout or broken records." The "feed-device machine" referred to by the court was a talking machine bought by petitioner after, as petitioner avers, the circuit court of appeals affirmed the injunction, and in connection with which it sold, as it also avers, and used, its sound records. The court assumed, for the purpose of the cause, that the feed-device machine might be regarded as not infringing any of the rights of the Victor Company under the Berliner patent. The court further found that it was established by the evidence that the discs were equally suitable for that machine as for the machine of the Victor Company, but that it "was not, at or before the time of beginning this proceeding, a practically or commercially known reproducer of musical or spoken sound, whereas the Victor machine, embodying the claims of the Berliner patent here under consideration, was at such times widely known and generally used, and that the plaintiff in error [petitioner] knew, and sold its records with the knowledge that, if its output was to be used at all by the public, it would be used with the Victor machine, and in the combination protected by the claims of the Berliner patent, above referred to." And the court concluded that upon these facts it was clear that petitioner had "made and sold a single element of the claims of the Berliner patent, with the intent that it should be united to the other element and complete the combination; and this is infringement (*Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.* 35 L.R.A. 728, 25 C. C. A. 267, 47 U. S. App. 146, 77 Fed. 297); adopted by this court (*Cortelyou v. Lowe*, 49 C. C. A. 671, 111 Fed. 1005)."

Petitioner contests the conclusion and opposes it by the principle which, it is contended, is established by cases in this court, as well as at circuit, that "the person who has purchased a patented combination from the patentee has the right to replace an unpatented element of the combination, and for such purpose to purchase such element from another than the patentee or his licensee." To bring this principle in clear relief it is said that "the majority of the circuit court of appeals has held that such replacement of a single unpatented element of the combination is reconstruction, and not within the rights of the purchaser of the patented combination from the patentee." And, to complete its argument, petitioner adds that where an inventor so arranges the parts of his patented combination that it cannot satisfactorily, successfully, or usefully be continued in use without

successive replacements of one of its elements, "the replacement of such element, if unpatented, by the purchaser of the combination from the patentee, is in accordance with the intention of the patentee, and not a reconstruction of the patented combination, but an act within the rights of the purchaser." For these principles *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* 152 U. S. 425, 38 L. ed. 500, 14 Sup. Ct. Rep. 627; *Wilson v. Simpson*, 9 How. 109, 13 L. ed. 66; *Goodyear Shoe Machinery Co. v. Jackson*, 55 L.R.A. 692, 50 C. C. A. 159, 112 Fed. 146, are adduced.

The question in the case, therefore, is single and direct, and its discussion may be brought to a narrow compass. Its solution depends upon the application of some rudimentary principles of patent law.

A combination is a composition of elements, some of which may be old and others new, or all old or all new. It is, however, the combination that is the invention, and is as much a unit in contemplation of law as a single or noncomposite instrument. 333] *Whoever uses it without permission is an infringer of it. Whoever contributes to such use is an infringer of it. It may be well here to get rid of a misleading consideration. It can make no difference as to the infringement or noninfringement of a combination that one of its elements or all of its elements are unpatented. For instance, in the case at bar the issue between the parties would be exactly the same, even if the record disc were a patented article which petitioner had a license to use or to which respondent had no rights independent of his right to its use in the combination. In other words, the fact that the disc sold by petitioner is unpatented does not affect the question involved except to give an appearance of a limitation of the rights of an owner of a Victor machine other than those which attach to him as a purchaser. The question is, What is the relation of the purchaser to the Victor Company? What rights does he derive from it? To use the machine, of course, but it is the concession of the argument of petitioner that he may not reconstruct it. Has he a license to repair deterioration, and when does repair become reconstruction? It would seem that, on principle, when deterioration of an element has reached the point of unfitness, there is a destruction of the combination, and a renewal of the element is a reconstruction of the combination. And it would also seem on principle that there could be no license implied from difference in the durability of the elements or periodicity in their use. This, however, is asserted; and we come to the consideration of the cases upon which the assertion is based, and how

far it has application under the facts of this record.

Great stress is put upon *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.* supra. That case was a bill in equity for the infringement of three letters patent,—one for a "package of toilet paper," known as an "oval roll" or "oval king" package; one for a "toilet paper fixture," and one for an "apparatus for holding toilet paper." The first patent was declared invalid for want of novelty. Of the other two it was said that they were practically the same, and were for a "combination of the paper roll described in [334] the former patent, with a mechanism for the delivery of the paper to the user in an economical manner." It was conceded that the mechanism of the patents involved patentable novelty, but it was contended that, it being constructed for the purpose of delivering paper to users in convenient length, such a roll was not a proper part of the combination, and that, conceding it was a part of the combination, there was no infringement. The first contention, the court said, raised the question whether, when a machine is designed to manufacture, distribute, or serve out to users a certain article, the article so dealt with can be said to be a part of the combination of which the machine itself is another part. In commenting on the question the court expressed the view that, if the contention could be sustained, "it would seem to follow that the log which is sawn in the mill, the wheat which is ground by the rollers, the pin which is produced by the patented machine, the paper which is folded and delivered by the printing press," might be claimed as an element of a combination. The court, however, refrained from expressing an opinion upon the point, because it conceived that the facts of the case failed to sustain the charge of infringement. And this on the ground that the defendants in the suit had neither made, sold, nor used the patented mechanism, except as they purchased it from the patentee, and the only acts proven against them were that they sold rolls of paper of their own manufacture with fixtures manufactured and sold by the plaintiff, the fixtures having been obtained by defendants from the original purchasers of the patented combination; and also of selling oval rolls of paper of their own manufacture to persons who had previously purchased fixtures and paper from the plaintiff, with the knowledge and information that the paper so sold was to be used in connection with plaintiff's fixtures. The court stated the question to be whether, considering the combination of the oval roll with the fixture to be a valid combination,

the sale of one element of *such* (italics ours) a combination with the intention that it should be used with the other elements was an infringement. The answer was in the 335]*negative. The court, however, stated, that there were cases to the effect that the sale of one element of a combination with intention that it should be used with another was an infringement, but decided that they had no application to one where the element made by the alleged infringer was "an article of manufacture, perishable in its nature, which it is the object of the mechanism to deliver, and must be renewed periodically whenever the device is put to use." The case, therefore, is not a precedent for the decision of that at bar. Not one of the determining factors there stated exist in the case at bar. If the operative relation of the paper roll to the mechanism was as illustrated (and the court left no doubt that it was), that is, of the log to the saw in the mill, wheat to the rollers which grind it, pins which are produced by a patent machine,—in other words, in no more operative relation than a machine and its product are,—the invalidity of the combination was hardly questionable. And, besides, it was made a determining circumstance that the paper perished by its use, and a periodical renewal was indicated to be a renewal "whenever the device was put to use." The case has no principle or reasoning applicable to the case at bar. The combination in the case at bar is valid, as we have unhesitatingly declared. The function it performs is the result of the joint action of the disc and the stylus. The disc is not a mere concomitant to the stylus; it coacts with the stylus to produce the result. Indeed, as we have seen, it is the distinction of the invention, constituting, by its laterally undulating line of even depth and the effect thereof, the advance upon the prior art. To confound its active co-operation with the mere passivity of the paper in the mechanism described in the Morgan Envelope Company is not only to confound essential distinctions made by the patent laws, but essential distinctions between entirely different things. Besides, the lower courts found that the discs were not perishable. As said by the court of appeals, by Judge Hough: "Disc records are fragile, *i. e.*, brittle and easily broken; but they are not perishable, *i. e.*, subject to decay by their inherent qualities, 336]or consumed by few uses *or a single use. Neither are they temporary, *i. e.*, not intended to endure; on the contrary, we find them capable of remaining useful for an indefinite period, and believe that they usually last as long as does the vogue of the sounds they record."

Can petitioner find justification under the

right of repair and replacement as described in *Wilson v. Simpson*, 9 How. 109, 13 L. ed. 66, and *Chaffee v. Boston Belting Co.* 22 How. 217, 16 L. ed. 240? The court of appeals, in passing on these cases, considered that there was no essential difference between the meaning of the words "repair and replacement." That they both meant restoration of worn-out parts. This distinction was recognized in *Wilson v. Simpson*, supra, where it is said that the language of the court in *Wilson v. Rousseau*, 4 How. 709, 11 L. ed. 1169, did not permit the assignee of a patent to make other machines or reconstruct them in gross upon the frame of machines which the assignee had in use, "but it does comprehend and permit the resupply of the effective ultimate tool of the invention, which is liable to be often worn out or to become inoperative for its intended effect, which the inventor contemplated would have to be frequently replaced anew, during the time that the machine as a whole might last." But there is no pretense in the case at bar of mending broken or worn-out records, or of repairing or replacing "the operative ultimate tool of the invention" which has deteriorated by use. The sales of petitioner, as found by the courts below, and as established by the evidence, were not to furnish new records identical with those originally offered by the Victor Company, but, to use the language of Judge Lacombe in the circuit court, "more frequently in order to increase the repertory of tunes than as substituted for worn-out records."

The right of substitution or "resupply" of an element depends upon the same test. The license granted to a purchaser of a patented combination is to preserve its fitness for use so far as it may be affected by wear or breakage. Beyond this there is no license.

It is further contended by petitioner that the disc records, *being unpatented articles of commerce, which could be used upon the mechanical feed-device machine or exported to foreign countries, or concededly for repair of machines sold by respondent, petitioner could legally sell the same. A detailed comment on this contention or of the cases cited to support it we need not make. The facts of the case exclude petitioner from the situation which is the foundation of the contention. The injunction did not forbid the use of the records, except in violation of claims 5 and 35 of respondent's patent. The judgment for contempt was based upon the facts which we have detailed, and they show a sale of the records for use in the Victor machine,—an entirely voluntary and intentional" (to use the language of Judge Lacombe) contributory infringement.

We have seen that the circuit court of ap-

peals assumed, for the purposes of this cause, that the feed-device machine was not an infringement of the machine of the patent. We may assume the same, and we are relieved from reviewing the very long and complex affidavits submitted by the petitioner to explain the same, petitioner's relation to it, or its position in the art of sound reproduction. Petitioner was found guilty of selling records which constituted an element in the combination of the patent in suit, and for that petitioner was punished. Upon whatever questions or contentions may arise from the use of the feed-device machine we reserve opinion.

We have not reviewed or commented upon the other cases cited respectively by petitioner and respondents in support of their contentions, deeming those we have considered and the principles we have announced sufficient for our decision.

Judgment affirmed.

338]*HENRY VAN GIESON, Appt.,
v.

C. B. MAILE.

(See S. C. Reporter's ed. 338, 339.)

Judicial sale — setting aside — inadequate price.

A sale on execution in defiance of an order restraining the sale, made by the court rendering the judgment, will be set aside where the existence of such order, whether valid or not, was the cause of the very inadequate price obtained.

[For other cases, see *Judicial Sale, V.*, in Digest Sup. Ct. 1908.]

[No. 121.]

Submitted April 6, 1909. Decided April 19, 1909.

APPEAL from the Supreme Court of the Territory of Hawaii to review a decree which, on appeal from the Circuit Court of the First Circuit in that territory, set aside a sale on execution, and ordered a reconveyance upon payment into court of the amount of the judgment. Affirmed.

See same case below, 18 Haw. 307.

The facts are stated in the opinion.

Mr. Henry Van Gieson, *in propria persona*, submitted the cause for appellant:

Inadequacy of price alone is not sufficient to invalidate an execution sale.

17 Cyc. Law & Proc. p. 1276; Graffam v. Burgess, 117 U. S. 180, 29 L. ed. 839, 6 Sup. Ct. Rep. 686.

NOTE. — On setting aside judicial sales — see note to *Schroeder v. Young*, 40 L. ed. U. S. 721.
53 L. ed.

The cause, in order to defeat the sale, must be attributable or traceable to the purchaser.

17 Cyc. Law & Proc. p. 1278; Carden v. Lanc, 48 Ark. 216, 3 Am. St. Rep. 228, 2 S. W. 709; Hudgins v. Morrow, 47 Ark. 515, 2 S. W. 104; Adams v. Thomas, 44 Ark. 267; Bach v. May, 163 Ill. 547, 45 N. E. 248; Thomas v. Hebenstreit, 68 Ill. 115; Fletcher v. McGill, 110 Ind. 395, 10 N. E. 651, 11 N. E. 779; Lechner v. Loomis, 83 Iowa, 416, 49 N. W. 1018; Cavender v. Smith, 1 Iowa, 306; Iona Sav. Bank v. Blair, 56 Kan. 430, 43 Pac. 686; Jones v. Carr, 41 Kan. 329, 21 Pac. 258; Aldrich v. Maitland, 4 Mich. 205; Drake v. Collins, 5 How. (Miss.) 253; Durfee v. Moran, 57 Mo. 374; Knoop v. Kelsey, 121 Mo. 642, 26 S. W. 683; Tripp v. Silkman, 29 Phila. Leg. Int. 29; Westmoreland Guarantee Bldg. & L. Asso. v. Nesbit, 21 Pa. Super. Ct. 150; Irvin v. Ferguson, 83 Tex. 491, 18 S. W. 820; McLaury v. Miller, 64 Tex. 381; Graffan v. Burgess, *supra*.

The defendant had a plain, adequate, and complete remedy at law.

Gardner v. Mobile & N. W. R. Co. 102 Ala. 635, 48 Am. St. Rep. 84, 15 So. 271; White v. Farley, 81 Ala. 563, 8 So. 215; Holly v. Bass, 68 Ala. 206; Lee v. Davis, 16 Ala. 516; Anthony v. Shannon, 8 Ark. 52; Boles v. Johnston, 23 Cal. 226, 83 Am. Dec. 111; Herr v. Broadwell, 5 Colo. App. 467, 39 Pac. 70; Starr v. United States, 8 App. D. C. 552; Woody v. Jameson, 5 Idaho, 466, 50 Pac. 1008; Prather v. Hill, 36 Ill. 402; Swiggart v. Harber, 5 Ill. 364, 39 Am. Dec. 418; Meacham v. Sunderland, 10 Ill. App. 123; Davis v. Campbell, 12 Ind. 192; Capital Bank v. Huntoon, 35 Kan. 577, 11 Pac. 369; Baker v. Hall, 29 Kan. 617; Bach v. Whittaker, 109 Ky. 612, 60 S. W. 410; Cassiday v. McDaniel, 8 B. Mon. 519; Hope v. Hollis, 5 Ky. L. Rep. 319; Cavanaugh v. Jakeway, Walk. Ch. (Mich.) 344; American Wine Co. v. Scholer, 85 Mo. 496; Groner v. Smith, 49 Mo. 318; Nelson v. Brown, 23 Mo. 13; Miller v. Cherry, 2 Nev. 165; Hastings v. Burning Moscow G. & S. Min. Co. 2 Nev. 100; Vanduyne v. Vanduyne, 16 N. J. Eq. 93; Gould v. Mortimer, 16 Abb. Pr. 448, 26 How. Pr. 167; Morgan v. Holladay, 48 How. Pr. 86; Perkins v. Bullinger, 2 N. C. (1 Hayw.) 367; Warren v. Stinson, 6 N. D. 293, 70 N. W. 279; McCarthy v. Speed, 16 S. D. 584, 94 N. W. 411; Cravens v. Wilson, 48 Tex. 324; Wilson v. Aultman & T. Co. (Tex. Civ. App.) 39 S. W. 1103.

No brief was filed for appellee.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the appellee to set aside a sale on execution to

Van Gieson. The bill alleges the bringing of an action for taxes by a collector, recovery of a judgment on default, and the issue of execution thereupon. It sets up various supposed technical defects in the summons and subsequent proceedings, but these do not need to be stated. It is enough to say that, on the ground of such supposed defects, motions were made in the district court where the judgment was rendered, that the execution be recalled, that the service of summons be set aside and quashed, and that the high sheriff be ordered not to sell under the execution until further order of the court. This order was made and a 339]time was fixed for the *hearing of the motion at an early day. Nevertheless, the sheriff proceeded with the sale as it had been advertised, on the day before that fixed for the hearing, and sold three lots of land, at a very inadequate price, to Van Gieson, an assistant of his. He gave notice pending the sale that, at the fall of the hammer, he should require a deposit of 50 per cent of the purchase money for each parcel then unsold,—a condition not contained in the notice of sale, and not enforced against Van Gieson. The bill is founded on the alleged defects in the proceedings before execution as well as in the sale, and prays to have the judgment declared void, and, as we have said, the sale set aside. The supreme court of the territory set aside the sale, and, upon the plaintiff paying into court the amount of the judgment, ordered a reconveyance, whereupon Van Gieson appealed to this court.

The ground on which the supreme court went was the single short point that the existence of the order, whether valid or not, was what made the sale disastrous. We see no reason for not accepting this conclusion. However vexatious the conduct of the appellee may have been, his property should not be sacrificed by reason of the act of a court.

Decree affirmed.

BOQUILLAS LAND & CATTLE COMPANY, Appt.,
v.

J. N. CURTIS, Samuel C. Curtis, Lyman Curtis, and John Summers.

(See S. C. Reporter's ed. 339-347.)

Waters — prior appropriation — Mexican law.

1. The grantee from the state of Sonora, Mexico, of land on the San Pedro river, cannot claim to have acquired, under the grant, rights as a riparian proprietor of which he could not be deprived by a subsequent attempt to appropriate the water, since the

doctrine of appropriation was, to some extent, at least, in force in that state by custom, irrigation having been practised in the Santa Cruz valley prior to the cession to the United States, and the right of appropriation, without regard to the riparian character of the lands, having been in force there probably from the time when the Spaniards first settled in the valley.

[For other cases, see *Waters*, II. c, in *Digest Sup. Ct.* 1908.]

Waters — prior appropriation — effect of patent — confirming Mexican grant.

2. The acquisition of rights as a riparian proprietor which could not be displaced by a subsequent attempt to appropriate the water cannot be based upon a patent from the United States, issued pursuant to a decree of the court of private land claims, confirming a Mexican grant to riparian lands, on the theory that such patent not only confirms the Mexican title, but releases that of the United States.

[For other cases, see *Waters*, II. c, in *Digest Sup. Ct.* 1908.]

Waters — prior appropriation — adoption of common law.

3. The general adoption of the common law by Howell's *Ariz. Code*, 1864, chap. 61, § 7, cannot be deemed to have included the common-law doctrine of riparian rights, in view of the declaration of the Bill of Rights, art. 22, that streams susceptible of use for irrigation purposes are public property, and of the various provisions of chap. 55 of the Code, giving those owning or possessing irrigable lands the right to divert, by means of irrigating canals, necessary water from any convenient stream.

[For other cases, see *Waters*, II. c, in *Digest Sup. Ct.* 1908.]

Waters — prior appropriation — irrigation.

4. The right to appropriate water for irrigation purposes where the doctrine of prior appropriation obtains is not confined to riparian proprietors.

[For other cases, see *Waters*, II. c, in *Digest Sup. Ct.* 1908.]

[No. 133.]

Argued and submitted April 7, 1909. Decided April 19, 1909.

A PPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Cochise County, in that territory, dismissing the bill in a suit to enjoin the withdrawal of water from the San Pedro river, and from building for that purpose a

NOTE. — On the right of prior appropriation of water—see note to *Isaacs v. Barber*, 30 L.R.A. 665, and *Atchison v. Peterson*, 22 L. ed. U. S. 414.

On the right to divert water for irrigation purposes—see note to *Barnard v. Shirley*, 41 L.R.A. 741.

dam and ditch upon and through the plaintiff's land. Affirmed.

See same case below (Ariz.) 89 Pac. 504. The facts are stated in the opinion.

Mr. Eugene S. Ives argued the cause and filed a brief for appellant:

Riparian rights once vested are property rights, and cannot be taken away except by the exercise of the right of eminent domain.

Long, Irrigation, § 12; Black's Pom. Water Rights, § 9; Lux v. Haggin, 69 Cal. 255, 10 Pac. 674; Sturr v. Beck, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350; 1 Farnham, Waters, 282; Benton v. Johncox, 17 Wash. 277, 39 L.R.A. 107, 61 Am. St. Rep. 912, 49 Pac. 495; Clark v. Cambridge & A. Irrig. & Improv. Co. 45 Neb. 798, 64 N. W. 239; Potomac S. B. Co. v. Upper Potomac S. B. Co. 109 U. S. 672, 27 L. ed. 1070, 3 Sup. Ct. Rep. 445, 4 Sup. Ct. Rep. 15; Delaplaine v. Chicago & N. W. R. Co. 42 Wis. 214, 24 Am. Rep. 386; Bell v. Gough, 23 N. J. L. 624; Trenton Water Power Co. v. Raff, 36 N. J. L. 335; Crawford Co. v. Hathaway (Crawford Co. v. Hall) 67 Neb. 325, 60 L.R.A. 889, 108 Am. St. Rep. 647, 93 N. W. 781; Yates v. Milwaukee, 10 Wall. 497, 504, 19 L. ed. 984, 986; Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570.

Appellant's ownership within the Mexican grant having been continuous since the date of the grant, the patent operated as a consummation of such title, and also as a quitclaim of whatever interest the United States acquired by the cession.

Beard v. Federy, 3 Wall. 478, 18 L. ed. 88; Knight v. United Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup. Ct. Rep. 258; Herriek v. Boquillas Land & Cattle Co. 200 U. S. 96, 50 L. ed. 388, 26 Sup. Ct. Rep. 192.

A patent issued by the Land Department of the United States relates back to the inception of the title, and cuts off all intervening claims.

Sturr v. Beck, supra; Shepley v. Cowan, 91 U. S. 330, 23 L. ed. 424.

The patent issued to the appellant's grantors, besides operating as a confirmation of the Mexican grant, effected also a conveyance of whatever rights the United States had in the granted premises, which, by relation, took effect as of the inception of the title. As the inception of the title was before the United States acquired the ceded territory, the effect of this conveyance was to transfer to the patentee all rights acquired by the United States by the treaty of cession, or which vested in them by operation of law at the time of such treaty.

Broder v. Natoma Water & Min. Co. 101 U. S. 274, 25 L. ed. 790; Atchison v. Peterson, 20 Wall. 507, 22 L. ed. 414; Basey v. 53 L. ed.

Gallagher, 20 Wall. 670, 22 L. ed. 452; Sturr v. Beck, supra; Faull v. Cooke, 19 Or. 455, 20 Am. St. Rep. 836, 26 Pac. 662; 3 Farnham, Waters, pp. 2048, 2049, § 658; Kinney, Irrigation, §§ 188, 219, 220; Cruse v. McCauley, 96 Fed. 369.

The doctrine of appropriation—that is, the right to the use of water by mere priority of appropriation, or, as the courts sometimes express it, "priority of time is priority of right"—is distinctly an American doctrine, which arose in the mining regions of California following the exodus to that state in 1849 and succeeding years.

Jennison v. Kirk, 98 U. S. 457, 458, 25 L. ed. 242, 243; Atchison v. Peterson and Basey v. Gallagher, supra; Black's Pom. Water Rights, §§ 13-15; Kinney, Irrigation, §§ 100-103.

The effect of the act of 1866 was twofold: First, it was in the nature of a quitclaim, recognizing and confirming title to water in those who had already taken or appropriated it. Second, it was in the nature of a grant, conferring the title to the government's waters upon those who, in the future, should appropriate it in pursuance of the local customs, laws, and decisions of courts.

Basey v. Gallagher; Broder v. Natoma Water & Min. Co.; and Lux v. Haggin, supra; Meng v. Coffee, 67 Neb. 500, 60 L.R.A. 910, 108 Am. St. Rep. 697, 93 N. W. 713; Black's Pom. Water Rights, § 30.

The provisions of the Howell Code are not inconsistent with or repugnant to the rights of the riparian proprietor at common law.

Swan v. United States, 3 Wyo. 151, 9 Pac. 933; Shaw v. North Pennsylvania R. Co. (Shaw v. Merchants' Nat. Bank) 101 U. S. 557, 25 L. ed. 892; Fitzgerald v. Quann, 109 N. Y. 441, 17 N. E. 354; Brown v. Barry, 3 Dall. 365, 1 L. ed. 638; Smith v. Laatsch, 114 Ill. 271, 2 N. E. 59; Jennings v. Com. 17 Pick. 82; State v. Dalton (Mo. App.) 114 S. W. 1132; Henderson's Tobacco (United States v. Henderson) 11 Wall. 652, 20 L. ed. 235; Red Rock v. Henry, 106 U. S. 596, 27 L. ed. 251, 1 Sup. Ct. Rep. 434.

Both the common-law doctrine of riparian rights and the modern rule of appropriation may be in force.

Crawford Co. v. Hathaway, supra; Thorpe v. Tenem Ditch Co. 1 Wash. 566, 20 Pac. 588; Ellis v. Pomeroy Improv. Co. 1 Wash. 572, 21 Pac. 27; Geddis v. Parrish, 1 Wash. 587, 21 Pac. 314; Crook v. Hewitt, 4 Wash. 749, 31 Pac. 28; Rigney v. Tacoma Light & Water Co. 9 Wash. 576, 26 L.R.A. 425, 38 Pac. 147; Benton v. Johncox, supra; Lone Tree Ditch Co. v. Cyclone Ditch Co. 15 S. D. 519, 91 N. W. 352; Sturr v. Beck, supra; 3 Farnham, Waters, p. 2052; Lux v. Hag-

gin, *supra*; Isaacs v. Barber, 10 Wash. 124, 30 L.R.A. 665, 45 Am. St. Rep. 772, 38 Pac. 871.

The provisions of the Howell Code cannot be so construed as to deny riparian rights to those already owning riparian lands.

Smith v. Denniff, 24 Mont. 22, 50 L.R.A. 741, 81 Am. St. Rep. 408, 60 Pac. 398; Prentice v. McKay (Mont.) 98 Pac. 1081.

Prior to the abolition in Arizona of the doctrine of riparian rights, the right of appropriation was limited to public lands, and waters flowing through them.

3 Farnham, Waters, pp. 2027, 2049, §§ 652, 659; Curtis v. LaGrande Hydraulic Water Co. 20 Or. 34, 10 L.R.A. 484, 23 Pac. 808, 25 Pac. 378; Benton v. Johncox, *supra*; Black's Pom. Water Rights, § 30.

The common-law doctrine of riparian rights is not so unfitted to the natural conditions in the arid regions as to be wholly inapplicable.

Long, Irrigation, § 10; Meng v. Coffee, *supra*; 3 Farnham, Waters, p. 2038; Lux v. Haggin; Benton v. Johncox; and Crawford Co. v. Hathaway,—*supra*.

Riparian rights which exist by reason of the adoption of the common law are not subject to future legislation.

Crawford Co. v. Hathaway, *supra*.

Under the Mexican law, the right of a riparian owner to the use of water was superior to that of a subsequent appropriator. Such right was preserved and guaranteed by the treaty of cession, and could not afterwards be affected by territorial legislation.

Kinney, Irrigation, § 292; Hall, Mexican Water Law, p. 400, §§ 1362, 1381, 1395, 1397; Lux v. Haggin, *supra*.

While the Roman law recognized the right to the use of water for irrigation, and encouraged such use in the interest of the development of agriculture, it nowhere recognized any doctrine like the modern doctrine of appropriation.

Ware, Roman Water Law, §§ 250, 272, 273, 286.

Messrs. H. L. Pickett and Ben Goodrich submitted the cause for appellees:

The common-law doctrine of riparian rights does not, and has never, existed in the territory of Arizona.

Clough v. Wing, 2 Ariz. 371, 17 Pac. 453; Boquillas Land & Cattle Co. v. Curtis (Ariz.) 89 Pac. 504; Stowell v. Johnson, 7 Utah, 215, 26 Pac. 290; Coffin v. Left Hand Ditch Co. 6 Colo. 443; Jones v. Adams, 19 Nev. 79, 3 Am. St. Rep. 788, 6 Pac. 442; Reno Smelting, Mill. & Reduction Works v. Stevenson, 20 Nev. 269, 4 L.R.A. 60, 19 Am. St. Rep. 364, 21 Pac. 317; Willey v.

Decker, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 211.

The construction of a statute of a territory by the local courts is of great, if not of controlling, weight with the Supreme Court of the United States.

Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 474, 51 L. ed. 1143, 27 Sup. Ct. Rep. 695; Lewis v. Herrera, 208 U. S. 309, 52 L. ed. 506, 28 Sup. Ct. Rep. 412; Sweeney v. Lomme, 22 Wall. 208, 22 L. ed. 727; Northern P. R. Co. v. Hambly, 154 U. S. 349, 38 L. ed. 1009, 14 Sup. Ct. Rep. 983; Fox v. Haarstick, 156 U. S. 674, 39 L. ed. 576, 15 Sup. Ct. Rep. 457; Whitney v. Fox, 166 U. S. 637, 41 L. ed. 1145, 17 Sup. Ct. Rep. 713.

A state can change or abrogate the common-law doctrine of riparian rights.

United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 703, 43 L. ed. 1136, 19 Sup. Ct. Rep. 770.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity, brought by the appellant to prevent the defendants from withdrawing water from the San Pedro river, and from building for that purpose a dam and ditch upon and through the plaintiff's land. The plaintiff owns a tract extending on both sides of the river for about 14½ miles and reaching back from the river for a mile and one-eighth on each side. It derives its title from a grant of the state of Sonora in 1833, confirmed by a decree of the court of private land claims on February 14, 1899, and a patent from the United States in pursuance of the decree, dated December 14, 1900. By reason of disputes before the date of the patent and wrongful disputes since, the plaintiff has not made actual use of all the waters of the river, although they are not sufficient to irrigate all the plaintiff's land that admits of irrigation. It has constructed no dams, canals, or the like, and has not taken the water except for watering stock and other similar uses of *it in its natural flow. The defendants[343 threaten and intend to build a dam, as alleged, in place of one built in 1903, but washed out, and to build and rebuild a ditch through land of the plaintiff to another ditch already established, and to divert the water through the same to land of theirs on the north. They set up no title, except that they have been the first to appropriate the water. The plaintiff claims as riparian owner, and argues that, as such, it has a right that cannot be taken from it by simple appropriation. The territorial court of first instance and the supreme court dismissed the bill (89 Pac. 504), and the plaintiff appealed to this court.

It is not denied that what is called the common-law doctrine of riparian water rights does not obtain in Arizona at the present day (Arizona Rev. Stat. 1887, § 3198), but the plaintiff contends that it had acquired such rights before that statutory declaration, and that it cannot be deprived of them now. So far as the claim is rested on the original grant and the Mexican law, it may be disposed of in a few words, without going into all the questions that would have to be answered before an opposite conclusion could be reached. "Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that, in the state of Sonora, the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this territory irrigation was practised in the Santa Cruz valley prior to the cession, and it is well known the right of appropriation without regard to the riparian character of the lands was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom." This is the statement of the territorial court, and we know nothing to control it. It is not met by arguments as to the general character of Mexican law, or by inference from the situation and nature of the grant. The same doctrine seems to be implied by the Howell Code, chap. 55, § 25, which we shall refer to again.

344] *The plaintiff draws another argument from the effect of the United States patent. It contends that the patent not only confirms the Mexican title, but releases that of the United States (*Beard v. Federy*, 3 Wall. 478, 491, 18 L. ed. 88, 92), and that, by the grant from the United States, it gained rights as a riparian proprietor that could not be displaced by a subsequent attempt to appropriate the water (*Sturr v. Beck*, 133 U. S. 541, 33 L. ed. 761, 10 Sup. Ct. Rep. 350). But, while it is true that in *Beard v. Federy*, supra, Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense. "Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power, makes it good and valid; so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by the force of such words that are foreign to the business of confirmation." *Gilbert, Tenures*, 75. It is not to be understood that when the United States executes a document on the footing of an earlier grant by a

former sovereign, it intends or purports to enlarge the grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and, in the most pertinent passage, directing a patent to be issued, says that it shall be issued "to the confirmer." Act of March 3, 1891, chap. 539, § 10, 26 Stat. at L. 854, 859, U. S. Comp. Stat. 1901, pp. 765, 771. It would be possible, perhaps, to argue to the contrary from provisions in §§ 8 and 13, that the confirmation shall only work a release of title by the United States, but we are satisfied that the true intent of the statute and the reason of the thing are as we have said.

The opinion that we have expressed makes it unnecessary to decide whether lands in the arid regions, patented after the act of March 3, 1877, chap. 107, 19 Stat. at L. 377, U. S. Comp. Stat. 1901, p. 1548, are not accepted subject to the rule that priority of appropriation gives priority of right by virtue of that act, construed with Rev. Stat. § 2339, U. S. Comp. Stat. 1901, p. 1437. The supreme court of Oregon has rendered a decision to that effect on plausible grounds. *Hough v. Porter* (Or.) 98 Pac. 1083. See further, act of March 3, 1891, chap. 561, § 18, 26 Stat. at L. 1101, U. S. Comp. Stat. 1901, p. 1570; **United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 704-706, 43 L. ed. 1136, 1142, 1143, 19 Sup. Ct. Rep. 770; *Gutierrez v. Albuquerque Land & Irrig. Co.* 188 U. S. 545, 553, 47 L. ed. 588, 592, 23 Sup. Ct. Rep. 338. So it is unnecessary to consider how far, if at all, the defendants represent an appropriation of the water before the patent was granted. For that reason we have not set forth the details found by the court below as to the dams, ditches, and use of water, going back to 1877.

But, perhaps, the main contention of the plaintiff is based on the legislation of the territory, and especially on the Howell Code of 1864, chap. 61, § 7, as follows: "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution and laws of the United States, or the Bill of Rights or laws of this territory, is hereby adopted, and shall be the rule of decision in all the courts of this territory." We assume that this section, however it may affect the case at bar, was within the power of the legislature to enact. *United States v. Rio Grande Dam & Irrig. Co.* 174 U. S. 690, 702, 703, 43 L. ed. 1136, 1141, 1142, 19 Sup. Ct. Rep. 700. *Gutierrez v. Albuquerque Land & Irrig. Co.* supra. Act of June 17, 1902, chap. 1093, § 8. 32 Stat. at L. 390, U. S. Comp. Stat. Supp. 1907, p. 515. But we agree with the territorial court that, construed with the rest

of the Code, it is far from meaning that patentees of a ranch on the San Pedro are to have the same rights as owners of an estate on the Thames.

In the first place, this is merely the adoption of a general system as against another general system (the Spanish-Mexican) that had been in force and that was repealed by § 1. If there were nothing more in the Code, it would be going a great way to say that such a broad phrase forbade the courts to hold that the common law was adaptable, and established the English rule of riparian rights only for English conditions, as suggested by Nave, J., below. It might be argued, with force, that an amendment inserting the words, "So far only as is consistent with and adapted to the natural and physical condition of the territory, and the necessities of the people thereof," merely expressed what was implied before. Rev. Stat. 1887, § 2935. And the like might be urged with regard to § 3198 of the Revised Statutes of 1887, which, in terms, enacted or declared that "the common-law doctrine of riparian water rights" should not obtain. But we are not left to rely upon reasonable implications and argument, for other parts of the original Code are express upon the point. Therefore we need not consider whether, in any event, the statute could be supposed to confer property rights not previously possessed and not subject to legislative change. Compare *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 387, 48 L. ed. 229, 231, 24 Sup. Ct. Rep. 107, and *Damon v. Hawaii*, 194 U. S. 154, 160, 48 L. ed. 916, 917, 24 Sup. Ct. Rep. 617.

By the statutory Bill of Rights, art. 22, all streams capable of being used for the purposes of irrigation are declared to be public property, and no one shall have the right to appropriate them exclusively except under such equitable regulations as the legislature shall provide. And then chapter 55, "Of Acequias or Irrigating Canals," after again declaring streams of running water public, § 1, enacts that "all the inhabitants of this territory who own or possess arable and irrigable lands shall have the right to construct public or private acequias, and obtain the necessary water for the same from any convenient river, creek, or stream of running water," § 3. By § 4, when such acequias run through the lands of private persons not benefited, the damages are to be assessed by the probate judge in a summary manner, on application of the party interested. § 4. Preference is given to irrigation over other uses. § 5. By § 7 the exclusive right to the water is given to the persons taking out a ditch for agricultural purposes, and a right to damages if the water afterwards is taken

for mining. By § 17 precedence is given in time of scarcity to the oldest titles, and by § 25, "the regulations of acequias which have been worked according to the laws and customs of Sonora and the usages of the people of Arizona shall remain as they were made and used up to this day;" and the chapter is to be enforced from the day of publication. There are many more details, but we have recited enough to show that the interpretation given by the court below to the general adoption of the common law by the Howell Code, and the qualifications imposed upon it, were correct. They simply follow what has been understood to be the law for many years. *Clough v. Wing*, 2 Ariz. 371, 17 Pac. 453.

The right to use water is not confined to riparian proprietors. *Gutierrez v. Albuquerque Land & Irrig. Co.* 188 U. S. 545, 556, 47 L. ed. 588, 593, 23 Sup. Ct. Rep. 338; *Coffin v. Left Hand Ditch Co.* 6 Colo. 443, 449, 450; *Willey v. Decker*, 11 Wyo. 496, 100 Am. St. Rep. 939, 73 Pac. 210, 220. Such a limitation would substitute accident for a rule based upon economic considerations, and an effort, adequate or not, to get the greatest use from all available land. Whether there are any limits of distance is a question not arising in this case.

A final objection urged is that the plaintiff's land is taken without compensation. It would seem that this is merely technical in this case. There does not appear to have been any discussion of the point below, and it is probable that the water is the only thing that has substantial value or really is cared for. But the plaintiff is authorized to have his damages assessed if he desires by chap. 55, § 4 (now Rev. Stat. § 3202), as we have mentioned. We think that it would be unjust to disturb the decree on this ground, although in other circumstances the objection might be grave.

Decree affirmed.

AMERICAN BANANA COMPANY, Plff. in Err.,
v.

UNITED FRUIT COMPANY.

(See S. C. Reporter's ed. 347-350.)

Monopolies — threefold damages — acts done outside United States.

Acts done by a domestic corporation outside the United States, which largely depend

NOTE. — Actions for threefold damages under Federal anti-trust act.

Any person injured in his business or property by any other person or corporation by reason of anything forbidden or declared

for their efficacy upon the co-operation, in a conspiracy to drive a rival out of business, of soldiers and officials in Costa Rica, acting under governmental sanction, in territory over which that state exercises a *de facto* sovereignty, cannot be made the basis of the action to recover threefold damages authorized by the Sherman anti-trust act of July 2, 1890 (26 Stat. at L. 209, 210, chap. 647, U. S. Comp. Stat. 1901, pp. 3200, 3202), § 7, on behalf of those injured in their business by reason of violations of that statute.

[Construction of Sherman act, see *Monopoly*, II. in Digest Sup. Ct. 1908.]

[No. 686.]

Argued April 12, 1909. Decided April 26, 1909.

to be unlawful by the Federal anti-trust act of July 2, 1890 (Sherman act), is given a right of action by § 7 of that act for threefold the damages so sustained, and the costs of suit, including a reasonable attorneys' fee.

This right of action for treble damages obviously depends primarily upon whether the contract or combination complained of comes within the scope of the act,—a question which is exhaustively discussed in a note to *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, on illegal trusts under modern anti-trust laws. It is not the intention here to re-enter upon a discussion of that question, but, rather, assuming that the contract or combination does offend against the provisions of the act, to point out when and how the action may be maintained.

Jurisdiction.

This action is within the exclusive jurisdiction of the Federal courts. *Loewe v. Lawlor*, 130 Fed. 633.

Injuries to business or property.

All that is necessary to support the action for threefold damages given by the act of July 2, 1890, § 7, is that the business or property of the plaintiff shall have been in some way injured by reason of the illegal scheme. *Monarch Tobacco Works v. American Tobacco Co.* 165 Fed. 774.

One who, by reason of an agreement and combination in violation of the anti-trust act of July 2, 1890, to increase the price of a commodity to consumers, is compelled to pay such unreasonable and excessive price, and more than its actual value, because of such agreement or combination, is injured in his property thereby, within the meaning of § 7 of that act, giving an action for threefold damages. *United States Tobacco Co. v. American Tobacco Co.* 163 Fed. 701.

One who is harmed in his business or property by a violation of the anti-trust act of July 2, 1890, suffers a legal injury, and is entitled to his action therefor for threefold damages, although there is no 53 L. ed.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, dismissing the complaint in an action to recover threefold damages under the Sherman anti-trust act. Affirmed.

See same case below, 166 Fed. 261.

The facts are stated in the opinion.

Mr. Everett P. Wheeler argued the cause, and, with Mr. Horace E. Deming, filed a brief for plaintiff in error:

The courts are not at liberty to limit the express words of a statute by engrafting upon it exceptions.

United States v. Union P. R. Co. 91 U. S.

technical injury and harm inflicted by a wrong or tort which would be recognized at common law. *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Asso.* 10 L.R.A. (N.S.) 972, 81 C. C. A. 658, 152 Fed. 864.

The action may be maintained by a Georgia municipal corporation against the foreign corporate members of a combination forbidden by the Federal anti-trust act, where the municipality was led, by reason of the illegal combination, to purchase from an Alabama corporation, at an excessive price, the iron pipe needed for its water-works system. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. Rep. 65.

A consumer injured in the purchase of supplies by a combination which is illegal under such anti-trust act may maintain an action to recover threefold damages, although he himself is not engaged in interstate business. *Atlanta v. Chattanooga Foundry & Pipe Works*, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23.

Threefold damages are recoverable by a dealer who, by reason of an association of wholesale dealers, in which such dealers agreed not to purchase from manufacturers not members of the association, and not to sell to nonmembers for less than list prices, which were more than 50 per cent higher than prices to members, while the manufacturers agreed not to sell to nonmembers at any price, under penalty of forfeiture of membership, was unable to procure goods except from the local dealers, and at the excessive price charged nonmembers of the association. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup. Ct. Rep. 307, affirming 63 L.R.A. 58, 52 C. C. A. 621, 115 Fed. 27.

See also *infra*, *Ellis v. Inman, P. & Co.* 65 C. C. A. 488, 131 Fed. 182.

But the owner of goods may dictate the prices at which he will sell them, and the damages which are caused to an applicant to buy because of the refusal of the owner to sell to him at prices which will enable him to resell them at a profit constitute no legal injury, and cannot give rise to this

72, 91, 23 L. ed. 224, 233; *French v. Spencer*, 21 How. 238, 16 L. ed. 99; *Demarest v. Wynkoop*, 3 Johns. Ch. 142, 8 Am. Dec. 467; *Chamberlain v. Western Transp. Co.* 44 N. Y. 309, 4 Am. Rep. 681; *National Bank v. St. Joseph*, 24 Blatchf. 439, 31 Fed. 216.

Whatever value the principles of comity may have, they cannot be extended so far as to cloak a violation of the laws of the nation whose comity is appealed to.

The *Santissima Trinidad*, 7 Wheat. 283, 354, 5 L. ed. 454, 472; *The Bello Corrunes*, 6 Wheat. 152, 169, 5 L. ed. 229, 233; *The Marianna Flora*, 11 Wheat. 1, 6 L. ed. 405; *The Merino*, 9 Wheat. 391, 405, 6 L. ed. 118, 121; *United States v. La Jeune Eugene*, 2 Mason, 409, Fed. Cas. No. 15,551.

The distinction between *Underhill v. Her-*

andez, 38 L.R.A. 405, 13 C. C. A. 51, 26 U. S. App. 573, 65 Fed. 577, and the case at bar, is illustrated by *People v. McLeod*, 25 Wend. 483.

The courts of this country can consider and collaterally pass upon the legality of acts of a foreign nation in a suit between its own citizens.

Vasse v. Ball, 2 Dall. 270, 275, 1 L. ed. 377, 379; 3 Kent. Com. 303, 304; *The Santissima Trinidad*, 7 Wheat. 283, 351, 354, 5 L. ed. 454, 471, 472; *The Estrella*, 4 Wheat. 298, 4 L. ed. 574; *Angle v. Chicago*, St. P. M. & O. R. Co. 151 U. S. 1, 19, 38 L. ed. 55, 64, 14 Sup. Ct. Rep. 240; *Rafael v. Verelst*, 2 W. Bl. 1055.

A court cannot sit in judgment on the act of a foreign power where that act is

action for threefold damages, because they are not the result of any breach of duty or of contract by the owner. *Whitwell v. Continental Tobacco Co.* 64 L.R.A. 689, 60 C. C. A. 290, 125 Fed. 454.

The action lies on behalf of one who, by reason of the combination, cannot secure all of a certain commodity required by his business, and is thus deprived of customers and the profit upon his legitimate business as theretofore existing. *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Asso.* supra.

Hence a dealer who is unable to buy books because of the rule adopted by a publishers' association controlling 90 per cent of the book business of the country, that they would not sell to anyone who cut prices on copyrighted books, nor to anyone who should be known to have sold to others at cut prices, may maintain an action for threefold damages to his business, occasioned thereby. *Mines v. Scribner*, 147 Fed. 927.

A corporation not engaged in business at the time of the conspiracy may maintain this action, where the conspiracy alleged was one to prevent its re-entry into business, when it had only temporarily ceased to do business, and had enlarged its plant at great expense with the expectation of resuming. *Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.* 166 Fed. 254, reversing 160 Fed. 144.

Shippers who were coerced by an unlawful combination of carriers to pay a certain percentage in addition to a reasonable freight rate, which was held subject to forfeiture in case they shipped by other lines or their consignees received freight by other lines, are damaged in their business thereby, within the meaning of the act of July 2, 1890, § 7, to the extent of the sum so paid. *Thomsen v. Union Castle Mail S. S. Co.* 166 Fed. 251, reversing 149 Fed. 933.

Limitation of action.

The limitation of five years, prescribed by U. S. Rev. Stat. § 1047, U. S. Comp. Stat. 1901, p. 727, for any "suit or prosecution

for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," does not apply to this action. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. ed. 241, 27 Sup. Ct. Rep. 65.

The ten years' limitation prescribed by Tenn. Code, § 2776, for "all other cases not expressly provided for," rather than the one year limitation prescribed by § 2772 for "statute penalties," or the three years' limitation prescribed by § 2773 for injuries to personal or real property, governs this action, where the right of recovery is based on the excessive price for iron water pipe which a municipality was led to pay by reason of an illegal arrangement between the members of a trust or combination formed in violation of the Federal anti-trust act. *Ibid.*

Pleading.

The declaration in an action under the anti-trust act of July 2, 1890, § 7, must describe with definiteness and certainty the alleged combination or conspiracy entered into by the defendant, and the acts done in pursuance thereof, which resulted in damage to the business or property of the plaintiff. *Rice v. Standard Oil Co.* 134 Fed. 464.

It is not sufficient to frame the declaration in the words of the statute, but the substance of the contracts in restraint of trade, or the substantial facts which constitute the attempt to monopoly, must be set forth. *Cilley v. United Shoe Mach. Co.* 152 Fed. 726.

The petition need not state the facts showing a right of action with all the fullness and particularity required in an indictment, but the sufficiency of such pleading must be tested by the local practice obtaining in civil actions. *Monarch Tobacco Works v. American Tobacco Co.* 165 Fed. 774.

A cause of action under the anti-trust act of July 2, 1890, § 7, is stated by a complaint filed by a builder, alleging that, in his business, he had occasion to purchase rough lumber from mills located in a neigh-

directly drawn in question in a suit directly against such foreign power, or against an officer acting within its territory under its commands. This is the extent of the rule.

Nabob of Arcot v. East India Co. 4 Bro. Ch. 181; *Brunswick v. King of Hanover*, 6 Beav. 1, affirmed in 2 H. L. Cas. 1; *Hatch v. Baez*, 7 Hun, 596.

Every voluntary entrance into neutral territory with hostile purpose is absolutely unlawful.

1 Kent. Com. 120.

In considering the defense that an act was done under authority of government, the courts have uniformly held that such authority must be valid or lawful.

Poindexter v. Greenhow, 114 U. S. 270,

boring state, and was unable to obtain finished lumber from the defendants, who comprised all the manufacturers and dealers in the city in which he was doing business, and upon whom he was dependent for his supply of finished lumber, because of an agreement among themselves that they would not sell any such lumber at any price to such consumers as bought lumber of any kind from other dealers, unless such consumer would pay the defendants the difference between the price he paid for lumber so bought from others and the price charged by defendants therefor, and should promise thereafter to buy all his lumber from them. *Ellis v. Inman, P. & Co.* 65 C. C. A. 488, 131 Fed. 182.

Injury to one's business, giving a right of action for threefold damages under the anti-trust act of July 2, 1890, § 7, was sufficiently shown by a declaration which alleged that because of defendant's combination, plaintiff could not secure all of a certain commodity required by his business, and was deprived of customers and the profit upon his legitimate business as theretofore existing. *Wheeler-Stenzel Co. v. National Window Jobbers' Asso.* 10 L.R.A. (N.S.) 972, 71 C. C. A. 658, 152 Fed. 864.

The complaint in an action for threefold damages states a cause of action where it charges, in substance, that the defendants obtained the control of the plaintiff corporation to ruin it, and prevent it from becoming a competitor, and that they carried out their unlawful purpose in violation of the trust imposed upon the majority of stockholders for the benefit of the minority, and by inducing directors to be unfaithful in performance of the duties of their office. *Pennsylvania Sugar Ref. Co. v. American Sugar Ref. Co.* supra.

An allegation in the petition that by reason of the alleged unlawful acts of the defendants, plaintiff was damaged in a specified sum, is sufficient as against a motion to have the averments as to damages made more definite and certain, where, under the local practice, it is sufficient to allege damages in general terms, unless the recovery of special damages is sought. *Mon-*

290, 29 L. ed. 185, 192, 5 Sup. Ct. Rep. 903, 962; *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204; *Ex parte Young*, 209 U. S. 123, 159, 52 L. ed. 714, 723, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; *Litchfield v. Bond*, 186 N. Y. 66, 78 N. E. 719; *People v. McLeod*, supra.

An injury to the private property of a citizen by an officer of government is justiciable in the courts of the country of which he is a citizen even if it be an "act of state."

Walker v. Baird [1892] A. C. 491; *Feather v. R.*, 6 Best. & S. 296; *Little v. Barreme*, 2 Cranch, 170, 179, 2 L. ed. 243, 246; *Poindexter v. Greenhow*, 114 U. S. 270, 29 L. ed. 185, 5 Sup. Ct. Rep. 903, 962; *Entick v.*

arch Tobacco Works v. American Tobacco Co. supra.

The declaration in such an action is bad for duplicity where it charges in a single count that the defendant entered into a contract, combination, and conspiracy in restraint of interstate or foreign commerce. The unlawful contract should be set up in one count and the unlawful combination or conspiracy in another. *Rice v. Standard Oil Co.* supra.

Evidence.

In such an action brought against members of a combination in restraint of trade, having for its object the driving out of business of aggressive cutters of prices, evidence is not admissible of other measures adopted by only part of the members of such combination, which are separate and distinct from it, unless they are shown to have been agreed to by all of the defendants. *Jayne v. Loder*, 7 L.R.A. (N.S.) 984, 78 C. C. A. 653, 149 Fed. 21, 9 A. & E. Ann. Cas. 294, reversing 142 Fed. 1010.

Parties.

All the members of the combination need not be made parties to the action, since each is responsible for the torts committed in the course of the illegal combination. *Atlanta v. Chattanooga Foundry & Pipe Works*, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23.

Attorneys' fee.

The discretion of the trial court under the anti-trust act of July 2, 1890, § 7, to allow a reasonable attorneys' fee to the successful plaintiff in an action brought under that section to recover damages for a violation of the provisions of that act against combinations in restraint of trade, is not abused by an allowance of \$750, although the verdict was for but \$500, where the trial took five days, and there was proof that from \$750 to \$1,000 would be a reasonable sum. *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. ed. 608, 24 Sup.

Harrington, 19 How. St. Tr. 1043; Money v. Leach, 3 Burr. 1762.

There is no distinction between the power of the court to sit in judgment upon the act of a foreign government and that of its own government.

Buron v. Denman, 2 Exch. 167; Musgrave v. Pulido, L. R. 5 App. Cas. 112; 1 Goodnow, Comparative Administrative Law, 35, 36; Moodaly v. Moreton, 2 Dick. 652.

The statute applies to acts done in a foreign country. The objection that the acts complained of were done abroad is entitled to no weight.

United States v. Gordon, 5 Blatchf. 18, Fed. Cas. No. 15,231; The Slavers (The Kate v. United States) 2 Wall. 350, 17 L. ed. 878; United States v. Furlong, 5 Wheat. 184, 5 L. ed. 64; The Carib Prince (Wuppermann v. The Carib Prince) 170 U. S. 655, 42 L. ed. 1181, 18 Sup. Ct. Rep. 753; The Silvia, 171 U. S. 462, 43 L. ed. 241, 19 Sup. Ct. Rep. 7; The Chattahoochee, 173 U. S. 540, 43 L. ed. 801, 19 Sup. Ct. Rep. 491; Thomsen v. Union Castle Mail S. S. Co. 166 Fed. 251; Liverpool & G. W. Steam Co. v. Phenix Ins. Co. 129 U. S. 397, 32 L. ed. 788, 9 Sup. Ct. Rep. 469; Wharton, Crim. Law, §§ 271, 278; Hall, International Law, 5th ed. 202; 1 Oppenheim, International Law, 195.

The act of combination is the element which gives to the acts complained of their illegal character. It is immaterial whether those acts would be lawful or unlawful in themselves if done by a single person. They become actionable when done in combination, and for the purpose of stifling commerce.

Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 Sup. Ct. Rep. 276; Aikens v. Wisconsin, 195 U. S. 194, 206, 49 L. ed. 154, 160, 25 Sup. Ct. Rep. 3; United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; Loewe v. California State Federation of Labor, 139 Fed. 71; Farmers' Loan & T. Co. v. Northern P. R. Co. 25 L.R.A. 414, note, 4 Inters. Com. Rep. 744, note, 60 Fed. 803; Rourke v. Elk Drug Co. 75 App. Div. 145, 77 N. Y. Supp. 373; Quinn v. Leathem [1901] A. C. 495; Shawnee Compress Co. v. Anderson, 209 U. S. 423, 52 L. ed. 865, 28 Sup. Ct. Rep. 572; Angle v. Chicago, St. P. M. & O. R. Co. 151 U. S. 1, 13, 38 L. ed. 55, 62, 14 Sup. Ct. Rep. 240; Loewe

Ct. Rep. 307, affirming 63 L.R.A. 58, 52 C. C. A. 621, 115 Fed. 27.

Election.

Plaintiff in an action for threefold damages under the anti-trust act of July 2, 1890, § 7, who has charged all of the defendants jointly with having entered into

v. Lawlor, 208 U. S. 274, 52 L. ed. 488, 28 Sup. Ct. Rep. 301.

Defendant did the wrong. The Costa Rican officials were its instruments.

7 Am. & Eng. Enc. Law, p. 809; Mechem, Agency, § 64; Killingsworth v. Portland Trust Co. 18 Or. 351, 7 L.R.A. 638, 17 Am. St. Rep. 737, 23 Pac. 66; Lyon v. Kent, 45 Ala. 663; Story, Agency, § 7; Clark & S. Agency, 66; Brown v. Brown, 174 Mass. 201, 75 Am. St. Rep. 292, 54 N. E. 532; Hopkins v. Mollinieux, 4 Wend. 465.

Costa Rica's immunity from suit has no bearing on defendant's liability.

Erwin v. Dundas, 4 How. 58, 78, 11 L. ed. 875, 883; Connecticut F. Ins. Co. v. Oldendorff, 19 C. C. A. 379, 44 U. S. App. 487, 73 Fed. 88; Mason v. Eldred, 6 Wall. 231, 18 L. ed. 783; Freeman, Judgm. § 231; Sessions v. Johnson, 95 U. S. 347, 352, 24 L. ed. 596, 598; Cooley, Torts, 3d ed. pp. 224, 226; Union Stock Yards Co. v. Chicago, B & Q. R. Co. 196 U. S. 217, 49 L. ed. 453, 25 Sup. Ct. Rep. 226, 2 A. & E. Ann. Cas. 525.

Messrs. Henry W. Taft and Moorfield Storey argued the cause, and, with Messrs. Walker B. Spencer and J. L. Thorndike, filed a brief for defendant in error:

The courts of one country will not sit in judgment on the acts of the government of another, done within its own territory.

Underhill v. Hernandez, 168 U. S. 252, 42 L. ed. 457, 18 Sup. Ct. Rep. 83; Webb's Pollock, Torts, pp. 132, 137; Kennett v. Chambers, 14 How. 38, 51, 14 L. ed. 316, 322; Williams v. Suffolk Ins. Co. 13 Pet. 415, 10 L. ed. 226; United States v. Holliday, 3 Wall. 419, 18 L. ed. 186; Brunswick v. King of Hanover, 2 H. L. Cas. 1, 6 Beav. 1, 13 L. J. Ch. N. S. 107; Secretary of State v. Kamachee Boye Sahaba, 13 Moore, P. C. 22; Buron v. Denman, 2 Exch. 167; Feather v. R. 6 Best. & S. 257; Doss v. Secretary of State, L. R. 19 Eq. 509.

It is immaterial whether Costa Rica had jurisdiction and sovereignty over this territory in dispute, or whether its attempt to exercise such jurisdiction was by legal right, or was an act of war or aggression against the Republic of Panama.

Underhill v. Hernandez, *supra*.

The acts complained of were acts of state; and, even if they had been done on territory

each of the alleged combinations and conspiracies complained of, and has alleged that they were all done in pursuance of the common design, is not put to his election because one of the defendants is charged with doing one thing and one with doing another. Monarch Tobacco Works v. American Tobacco Co. 165 Fed. 774.

in the possession of Panama, they could not be made the ground of an action in the courts of this country against anyone concerned in them, as is shown by *People v. McLeod*, 25 Wend. 483, referred to in *Underhill v. Hernandez*, 38 L.R.A. 405, 13 C. C. A. 51, 26 U. S. App. 573, 65 Fed. 581, as well as by *Buron v. Denman*, supra. If wrongful, they were international delinquencies, for which the government of Costa Rica was responsible to the nation, but not to a citizen of the nation.

It is the character of the act brought in question which halts a court when matters of state, political in nature, affecting the conduct of foreign nations, are drawn in question.

Nabob of Arcot v. East India Co. 4 Bro. Ch. 180; *Brunswick v. King of Hanover*, 6 Beav. 1.

Mr. Justice Holmes delivered the opinion of the court:

This is an action brought to recover three-fold damages under the act to protect trade against monopolies. July 2, 1890, chap. 647, § 7. 26 Stat. at L. 209, 210, U. S. Comp. Stat. 1901, pp. 3200, 3202. The circuit court dismissed the complaint upon motion, as not setting forth a cause of action. 160 Fed. 184. This judgment was affirmed by the circuit court of appeals, 166 Fed. 261, and the case then was brought to this court by writ of error.

354] *The allegations of the complaint may be summed up as follows: The plaintiff is an Alabama corporation, organized in 1904. The defendant is a New Jersey corporation, organized in 1899. Long before the plaintiff was formed, the defendant, with intent to prevent competition and to control and monopolize the banana trade, bought the property and business of several of its previous competitors, with provision against their resuming the trade, made contracts with others, including a majority of the most important, regulating the quantity to be purchased and the price to be paid, and acquired a controlling amount of stock in still others. For the same purpose it organized a selling company, of which it held the stock, that by agreement sold at fixed prices all the bananas of the combining parties. By this and other means it did monopolize and restrain the trade and maintained unreasonable prices. The defendant being in this ominous attitude, one McConnell, in 1903, started a banana plantation in Panama, then part of the United States of Columbia, and began to build a railway (which would afford his only means of export), both in accordance with the laws of the United States of Columbia. He was notified by the de-

fendant that he must either combine or stop. Two months later, it is believed at the defendant's instigation, the governor of Panama recommended to his national government that Costa Rica be allowed to administer the territory through which the railroad was to run, and this although that territory had been awarded to Colombia under an arbitration agreed to by treaty. The defendant, and afterwards, in September, the government of Costa Rica, it is believed by the inducement of the defendant, interfered with McConnell. In November, 1903, Panama revolted and became an independent republic, declaring its boundary to be that settled by the award. In June, 1904, the plaintiff bought out McConnell and went on with the work, as it had a right to do under the laws of Panama. But in July, Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation *of the plantation and rail-[355 way. In August one Astua, by *ex parte* proceedings, got a judgment from a Costa Rican court, declaring the plantation to be his, although, it is alleged, the proceedings were not within the jurisdiction of Costa Rica, and were contrary to its laws and void. Agents of the defendant then bought the lands from Astua. The plaintiff has tried to induce the government of Costa Rica to withdraw its soldiers, and also has tried to persuade the United States to interfere, but has been thwarted in both by the defendant and has failed. The government of Costa Rica remained in possession down to the bringing of the suit.

As a result of the defendant's acts the plaintiff has been deprived of the use of the plantation, and the railway, the plantation, and supplies have been injured. The defendant also, by outbidding, has driven purchasers out of the market and has compelled producers to come to its terms, and it has prevented the plaintiff from buying for export and sale. This is the substantial damage alleged. There is thrown in a further allegation that the defendant has "sought to injure" the plaintiff's business by offering positions to its employees, and by discharging and threatening to discharge persons in its own employ who were stockholders of the plaintiff. But no particular point is made of this. It is contended, however, that, even if the main argument fails and the defendant is held not to be answerable for acts depending on the co-operation of the government of Costa Rica for their effect, a wrongful conspiracy resulting in driving the plaintiff out of business is to be gathered from the complaint, and that it was entitled to go to trial upon that.

It is obvious that, however stated, the plaintiff's case depends on several rather startling propositions. In the first place, the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States, and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress.

No doubt in regions subject to no sovereign, like the high seas, or to no law that civilized countries would recognize as *adequate, such countries may treat some relations between their citizens as governed by their own law, and keep, to some extent, the old notion of personal sovereignty alive. See *The Hamilton* (Old Dominion S. S. Co. v. Gilmore) 207 U. S. 398, 403, 52 L. ed. 264, 269, 28 Sup. Ct. Rep. 133; *Hart v. Gumpach*, L. R. 4 P. C. 439, 463, 464; *British South Africa Co. v. Companhia de Moçambique*, [1893] A. C. 602. They go further, at times, and declare that they will punish anyone, subject or not, who shall do certain things, if they can catch him, as in the case of pirates on the high seas. In cases immediately affecting national interests they may go further still and may make, and, if they get the chance, execute, similar threats as to acts done within another recognized jurisdiction. An illustration from our statutes is found with regard to criminal correspondence with foreign governments. Rev. Stat. § 5335, U. S. Comp. Stat. 1901, p. 3624. See further, *Com. v. Macloon*, 101 Mass. 1, 100 Am. Dec. 89; *Sussex Peerage Case*, 11 Clark & F. 85, 146. And the notion that English statutes bind British subjects everywhere has found expression in modern times and has had some startling applications. *R. v. Sawyer*, 2 Car. & K. 101; *The Zollverein*, Swabey, 96, 98. But the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done. *Slater v. Mexican Nat. R. Co.* 194 U. S. 120, 126, 48 L. ed. 900, 902, 24 Sup. Ct. Rep. 581. This principle was carried to an extreme in *Milliken v. Pratt*, 125 Mass. 374, 28 Am. Rep. 241. For another jurisdiction, if it should happen to lay hold of the actor, to treat him according to its own notions rather than those of the place where he did the acts, not only would be unjust, but would be an interference with the authority of another sovereign, contrary to the comity of nations, which the other state concerned justly might resent. *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239, L. R. 6 Q. B. 1, 28; *Dacey*, Conf. L. 2d ed. 647. See also Appendix, 724, 726, note 2.

Law is a statement of the circumstances, in which the public force will be brought

to bear upon men through the courts. But the word commonly is confined to such prophecies or threats when addressed to persons living within the power of *the[357 courts. A threat that depends upon the choice of the party affected to bring himself within that power hardly would be called law in the ordinary sense. We do not speak of blockade running by neutrals as unlawful. And the usages of speech correspond to the limit of the attempts of the lawmaker, except in extraordinary cases. It is true that domestic corporations remain always within the power of the domestic law; but, in the present case, at least, there is no ground for distinguishing between corporations and men.

The foregoing considerations would lead, in case of doubt, to a construction of any statute as intended to be confined in its operation and effect to the territorial limits over which the lawmaker has general and legitimate power. "All legislation is *prima facie* territorial." *Ex parte Blain*, L. R. 12 Ch. Div. 522, 528; *State v. Carter*, 27 N. J. L. 499; *People v. Merrill*, 2 Park. Crim. Rep. 590, 596. Words having universal scope, such as "every contract in restraint of trade," "every person who shall monopolize," etc., will be taken, as a matter of course, to mean only everyone subject to such legislation, not all that the legislator subsequently may be able to catch. In the case of the present statute, the improbability of the United States attempting to make acts done in Panama or Costa Rica criminal is obvious, yet the law begins by making criminal the acts for which it gives a right to sue. We think it entirely plain that what the defendant did in Panama or Costa Rica is not within the scope of the statute so far as the present suit is concerned. Other objections of a serious nature are urged, but need not be discussed.

For again, not only were the acts of the defendant in Panama or Costa Rica not within the Sherman act, but they were not torts by the law of the place, and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute. The substance of the complaint is that, the plantation being within the *de facto* jurisdiction of Costa Rica, that state took and keeps possession of it by virtue of its sovereign power. But a seizure by a state is not a thing that can be *com-[358 plained of elsewhere in the courts. *Underhill v. Hernandez*, 168 U. S. 250, 42 L. ed. 456, 18 Sup. Ct. Rep. 83. The fact, if it be one, that *de jure* the estate is in Panama, does not matter in the least; sovereignty is pure fact. The fact has been recognized by the United States, and, by the implications of the bill, is assented to by Panama.

The fundamental reason why persuading a sovereign power to do this or that cannot be a tort is not that the sovereign cannot be joined as a defendant or because it must be assumed to be acting lawfully. The intervention of parties who had a right knowingly to produce the harmful result between the defendant and the harm has been thought to be a nonconductor and to bar responsibility (*Allen v. Flood* [1898] A. C. 1, 121, 151, etc.), but it is not clear that this is always true; for instance, in the case of the privileged repetition of a slander (*Elmer v. Fessenden*, 151 Mass. 359, 362, 363, 5 L.R.A. 724, 22 N. E. 635, 24 N. E. 208), or the malicious and unjustified persuasion to discharge from employment (*Moran v. Dunphy*, 177 Mass. 485, 487, 52 L.R.A. 115, 83 Am. St. Rep. 289, 59 N. E. 125). The fundamental reason is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act. The very meaning of sovereignty is that the decree of the sovereign makes law. See *Kawanakoa v. Polyblank*, 205 U. S. 349, 353, 51 L. ed. 834, 836, 27 Sup. Ct. Rep. 526. In the case of private persons, it consistently may assert the freedom of the immediate parties to an injury and yet declare that certain persuasions addressed to them are wrong. See *Angle v. Chicago, St. P. M. & O. R. Co.* 151 U. S. 1, 16-21, 38 L. ed. 55, 63-65, 14 Sup. Ct. Rep. 240; *Fletcher v. Peck*, 6 Cranch, 87, 130, 131, 3 L. ed. 162, 176.

The plaintiff relied a good deal on *Rafael v. Verelst*, 2 W. Bl. 983, 1055. But in that case, although the nabob who imprisoned the plaintiff was called a sovereign for certain purposes, he was found to be the mere tool of the defendant, an English governor. That hardly could be listened to concerning a really independent state. But of course 359] it is not alleged *that Costa Rica stands in that relation to the United Fruit Company.

The acts of the soldiers and officials of Costa Rica are not alleged to have been without the consent of the government, and must be taken to have been done by its order. It ratified them, at all events, and adopted and keeps the possession taken by them. *O'Reilly de Camara v. Brooke*, 209 U. S. 45, 52, 52 L. ed. 676, 678, 28 Sup. Ct. Rep. 439; *The Paquete Habana* (*United States v. The Paquete Habana*) 189 U. S. 453, 465, 47 L. ed. 901, 903, 23 Sup. Ct. Rep. 593; *Dempsey v. Chambers*, 154 Mass. 330, 332, 13 L.R.A. 219, 26 Am. St. Rep. 249, 28 N. E. 279. The injuries to the plantation 53 L. ed.

and supplies seem to have been the direct effect of the acts of the Costa Rican government, which is holding them under an adverse claim of right. The claim for them must fall with the claim for being deprived of the use and profits of the place. As to the buying at a high price, etc., it is enough to say that we have no ground for supposing that it was unlawful in the countries where the purchases were made. Giving to this complaint every reasonable latitude of interpretation we are of opinion that it alleges no case under the act of Congress, and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.

Further reasons might be given why this complaint should not be upheld, but we have said enough to dispose of it and to indicate our general point of view.

Judgment affirmed.

Mr. Justice Harlan concurs in the result.

*SAND FILTRATION CORPORA-[360
TION OF AMERICA, Appt.,
v.

SAMUEL P. COWARDIN, James F. Bradley, Sydney P. Clay, Thomas E. Stagg, Robert H. May, George E. Jekyll, and Arthur B. Jekyll.

(See S. C. Reporter's ed. 360-365.)

Contracts — construction — profits.

A contractor for the construction of a public work realizes a profit "under said contract with the United States," within the meaning of an agreement to repay, in the contingency of such profit, certain moneys advanced, where the contractor, without himself doing the work, made a profit out of his arrangement with a subcontractor, although the work was actually constructed at a heavy loss.

[Construction of contract, see *Contracts*, II. in Digest Sup. Ct. 1908.]

[No. 123.]

Argued April 6, 1909. Decided April 26, 1909.

APPEAL from the Court of Appeals of the District of Columbia to review a decree which affirmed a decree of the Supreme Court of the District, directing the distribution of a fund in the hands of a receiver. Affirmed.

See same case below, 29 App. D. C. 571.

The facts are stated in the opinion.

Mr. A. S. Worthington argued the cause, and, with Mr. Charles L. Frailey, filed a brief for appellant.

Messrs. Reginald S. Huidekoper and Charles Cowles Tucker argued the cause,

and, with Mr. J. Miller Kenyon, filed a brief for appellees May and Jekyll.

Mr. J. J. Darlington also filed a brief for appellees Cowardin, Bradley, Clay, and Stagg.

Mr. Justice Day delivered the opinion of the court:

This case presents a question as to the proper construction of a certain contract. It arises as follows: Cowardin, Bradley, Clay 361]& *Company, hereinafter called the Cowardin Company, had a contract with the government of the United States for the construction of a filtration plant in the city of Washington. In the partial performance of the contract they had expended about \$1,300 in money and had contracted debts somewhat in excess of \$14,000. Afterwards, on May 26, 1903, the Cowardin Company sublet the contract to the appellees May and Jekyll. By this contract May and Jekyll agreed to reimburse the Cowardin Company for their expenditures, to pay the liabilities incurred by them, and to complete the work for 90 per cent of the contract price, permitting the Cowardin Company to have 10 per cent thereof as its profit. And further, May and Jekyll agreed to lend the Cowardin Company \$10,000, and to furnish \$50,000 for the purchase of a plant for doing the work. On August 25, 1903, May and Jekyll made a new contract with the Cowardin Company, surrendering their subcontract, executed a bill of sale to the Cowardin Company of the plant by which the work was being done, and as to the debts which May and Jekyll had contracted, the Cowardin Company agreed to assume the same, and to procure the assumption thereof by anyone who might undertake to complete the contract. The plant, including that purchased with the \$50,000, was to be transferred to the Cowardin Company, and all the property to be conveyed in trust to certain trustees to secure the payment of the debts of May and Jekyll. As to the \$10,000 advanced by May and Jekyll under the contract of May 26, 1903, of which \$8,000 remained unpaid, the following stipulation was made:

"Inasmuch as the parties of the second part [May and Jekyll] have heretofore advanced to the parties of the first part [Cowardin Company] the sum of \$10,000 under the eighth paragraph of said contract of May 26, 1903, and there now remains due to the said parties hereto of the second part \$8,000 thereof, \$2,000 having been paid thereon, the parties of the first part hereby covenant and agree to repay the parties of the second part, or to their order, the said sum of \$8,000 out of the net profits which may be realized by the parties of the first 362]part *from the construction or erection of that portion of said filtration plant which

they have contracted with the United States to construct or erect. The said \$8,000, if the same shall not be sooner voluntarily paid by the parties of the first part to the parties of the second part, shall be reserved and paid out of the 10 per cent of the contract price for said work which will be reserved by the United States; and if the parties of the first part shall not themselves continue said work under their contract with the United States, but shall procure some third party or parties to perform the same, or if the same shall be performed by any person or persons on behalf of the parties hereto of the first part, appropriate provision shall be made for the reservation and payment of said \$8,000 to the parties hereto of the second part; it being distinctly understood and hereby declared to be the purpose of this agreement that the repayment of the \$8,000 shall be under the contingency that the parties of the first part shall realize a profit under said contract with the United States, and not otherwise; and that, if any profit shall be so realized by them, it shall be subject to the payment of the said \$8,000, or so much thereof as said profit will pay and satisfy."

On the same day, August 25, 1903, the Cowardin Company made a contract with one Dean, whereby, in consideration of the sale to Dean and Shibley, afterwards the Sand Filtration Corporation of America, appellant in this case, of the filtration plant, and of the employment of appellant by a receiver to be appointed, to complete the work, Dean agreed to pay to the receiver \$65,000 in instalments, to complete the work, and further "to comply with the provisions and conditions of one certain agreement entered into between the grantors (Cowardin Company) and May and Jekyll, a copy of which is hereto attached and to be read as a part thereof, including, among other provisions, the payment of the sum of \$8,000 to the said May and Jekyll, as in the said agreement is provided, and the payment of which is also assumed by the said grantee (Dean)."

As under the law the Cowardin Company could not assign the contract with the government, and as the company was in *fi-[363 nancial difficulties, it was agreed that the receiver to be appointed for the Cowardin Company should enter into a contract with the Sand Filtration Corporation, successor of Dean, for the carrying out of the provisions of the contract of August 25, 1903, with the Cowardin Company. A receiver was appointed and a contract made, and on August 27 a further contract was entered into, whereby it was agreed that the receiver was to deduct from the money to be paid by the government, as the work progressed, the sum of \$65,000, and also the

sum of \$8,000 therein mentioned, and to pay the same directly to the Cowardin Company instead of paying it to Dean, and then receiving it back from him.

The Sand Filtration Corporation of America, successor to Dean, completed the work, and, as the record shows, at a loss of \$100,000 or more. Pleadings were framed and issues made up, presenting to the court the question whether the receiver should be ordered to pay the sum of \$8,000 to the Sand Filtration Corporation of America, appellant, or to May and Jekyll, under the contracts hereinbefore set forth. Upon hearing in the supreme court of the District of Columbia, the court directed that this sum be paid by the receiver to May and Jekyll. From this decree the Sand Filtration Corporation of America appealed to the court of appeals of the District of Columbia, and that court affirmed the decree of the supreme court of the District. 29 App. D. C. 571. The case was then appealed here.

As we have said, the single question in this case is whether, under the facts recited, this \$8,000 should go to the appellant as successor to Dean, or to May and Jekyll, as the courts below have held. It is insisted for appellant that the proper construction of the contract required payment of the \$8,000 to May and Jekyll only upon the contingency that a profit should be realized under the construction contract with the United States; that is to say, if the construction of the filtration plant proved to be a profitable job, then May and Jekyll were to be paid \$8,000, or so much thereof as the profits would pay. The record discloses that appellant, successor of Dean, not only **364]** made no profits, but, on the contrary, lost a large sum of money.

Upon the pleadings and testimony the lower courts have found, and we accept the finding, in the absence of a clear showing of incorrectness, that, without doing the work, the Cowardin Company has made out of the contract a sum in excess of \$8,000, paid from the sums coming from the United States on account of the contract, in manner aforesaid.

The object of construction is to effectuate the intention of the parties in making a given contract. When the contract is in writing, the language used should be interpreted in the light of the circumstances surrounding the parties at the time the contract was made. It is contended by the learned counsel for the appellant that the agreements of August 25, 1903, were contemporaneous, and must be construed together as one agreement, and that the effect of such construction is to require the payment of \$8,000 to May and Jekyll only in the event that the contract should prove

profitable; and, as no profit was realized from the construction, nothing is to be paid. But while these contracts were dated the same day, whether they were executed at the same time or not does not appear, and certainly Dean was not in privity with May and Jekyll. The \$8,000 was to be paid out of moneys reserved, coming from the government, and upon the contingency that a profit should be realized by the Cowardin Company. There was no agreement that the payment of this sum should be upon the contingency that any subcontractor, such as Dean and his successor, should make a profit out of the contract. If such was the intention of the parties, it is not so written in the contract. May and Jekyll were to have the money advanced by them repaid if "the party of the first part," the Cowardin Company, "shall realize a profit under said contract." It is clear that the Cowardin Company did make a profit, and we are unable to see that it makes any difference that it was realized in the manner we have detailed, rather than from the construction of the work. The substance of the agreement between the Cowardin Company and May and Jekyll looked to the re-**365** payment of the money advanced in case the Cowardin Company realized a profit. This it has done, and we think the conditions of the contract have been kept.

It is suggested by the learned counsel for the plaintiff in error, that, as the profit of \$65,000 was realized by the Cowardin Company by the agreements of August 25, 1903, and as they were contemporaneous, the agreement for payment of the \$8,000 only in the contingency of profit cannot mean the \$65,000 so realized by the execution of the papers, but had reference to future profits in doing the work.

But it is to be noted that the Cowardin Company was the only party contracting with the United States, and had Dean thrown up the contract, or failed to complete the construction of the work, the Cowardin Company would still have been held on their contract and bond. Until Dean or his successor completed the work, the Cowardin Company was not absolved from liability so far as the government was concerned, and it could not be known whether a profit would be made or not.

As the Cowardin Company did realize such profit as required the payment of the \$8,000 to May and Jekyll by the receiver out of the sums received from the government, the courts below were right in so ordering.

The judgment of the Court of Appeals of the District of Columbia is affirmed.

Affirmed.

Dissenting: Mr. Justice McKenna and Mr. Justice Moody.

366]*UNITED STATES EX REL. ATTORNEY GENERAL OF THE UNITED STATES, Plff. in Err.,

v.

DELAWARE & HUDSON COMPANY.
(No. 559.)

SAME

v.

ERIE RAILROAD COMPANY. (No. 560.)

SAME

v.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY. (No. 561.)

SAME

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY. (No. 562.)

SAME

v.

PENNSYLVANIA RAILROAD COMPANY.
(No. 563.)

SAME

v.

LEHIGH VALLEY RAILROAD COMPANY.
NY. (No. 564.)

UNITED STATES, Appt.,

v.

DELAWARE & HUDSON COMPANY.
(No. 565.)

SAME

v.

ERIE RAILROAD COMPANY. (No. 566.)

SAME

v.

CENTRAL RAILROAD COMPANY OF
NEW JERSEY. (No. 567.)

SAME

v.

DELAWARE, LACKAWANNA, & WESTERN RAILROAD COMPANY. (No. 568.)

SAME

v.

PENNSYLVANIA RAILROAD COMPANY.
(No. 569.)

SAME

v.

LEHIGH VALLEY RAILROAD COMPANY.
NY. (No. 570.)

(See S. C. Reporter's ed. 366-419.)

Statutes — construction — favoring constitutionality.

1. In construing a statute reasonably susceptible of two interpretations, by one of which grave and doubtful constitutional questions arise, and by the other of which

such questions are avoided, it is the court's duty to adopt the latter interpretation.

[For other cases, see Statutes, 145-147, in Digest Sup. Ct. 1908.]

Carriers — governmental control — association with commodity carried.

2. The dissociation of railway companies prior to transportation from the articles or commodities transported, whether such association results from manufacture, mining, production, or ownership, or interest, direct or indirect, is the common purpose of the provisions of the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect." [Governmental control of carrier, see Carriers, III. in Digest Sup. Ct. 1908.]

Carriers — governmental control — association with commodity carried.

3. Transportation when the thing to be transported has been manufactured, mined, or produced by the carrier or under its authority, and at the time of transportation the carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the thing to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, is all that is forbidden by the provisions of the Hepburn act of June 29, 1906, making it unlawful for a railway carrier to transport in interstate commerce articles or commodities "manufactured, mined, or produced by it or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect."

[Governmental control of carrier, see Carriers, III. in Digest Sup. Ct. 1908.]

NOTE.—On statutes part valid and part invalid—see notes to *Titusville Iron Works v. Keystone Oil Co.* 1 L.R.A. 363, and *Fayette County v. People's & D. Bank*, 10 L.R.A. 196.

On construction of statutes, generally—see notes to *Riggs v. Palmer*, 5 L.R.A. 340; *United States v. Saunders*, 22 L. ed. U. S. 736; *Maillard v. Lawrence*, 14 L. ed. U. S. 925; and *Blake v. National City Bank* 23 L. ed. U. S. 119.

On the power of Congress to regulate commerce—see notes to *State ex rel. Corwin v. Indiana & O. Oil, Gas, & Min. Co.* 6 L.R.A. 579; *Bullard v. Northern P. R. Co.* 11 L.R.A. 246; *Re Wilson*, 12 L.R.A. 624; *Gibbons v. Ogden*, 6 L. ed. U. S. 23; *Brown v. Maryland*, 6 L. ed. U. S. 678; *Gloucester Ferry Co. v. Pennsylvania*, 29 L. ed. U. S. 158; *Ratterman v. Western U. Teleg. Co.* 32 L. ed. U. S. 229; *Harmon v. Chicago*, 37 L. ed. U. S. 216; and *Cleveland, C. C. & St. L. R. Co. v. Backus*, 38 L. ed. U. S. 1041.

Carriers — governmental control — interest in commodity carried — stock ownership.

4. The ownership by a railway carrier of stock in a bona fide corporation manufacturing, mining, producing, or owning the commodity carried is not the "interest, direct or indirect," in such commodity, forbidden to the carrier by the Hepburn act of June 29, 1906, but such words are to be taken as embracing only a legal or equitable interest in the commodities to which they refer.

[Governmental control of carrier, see Carriers, III. in Digest Sup. Ct. 1908.]

Commerce — regulation of interstate carrier — association with commodity carried.

5. Congress could properly enact, as a regulation of commerce, so much of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier, or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense, although, by existing state legislation, such carrier may have a lawful right of ownership of or association with the articles or commodities upon which these provisions operate.

[Prohibiting or restricting transportation, see Commerce, III. in Digest Sup. Ct. 1908.]

Constitutional law — due process of law — governmental regulation of carrier.

6. Railway companies enjoying the right, under existing state legislation, of ownership of or association with the articles or commodities carried, are not denied the due process of law guaranteed by U. S. Const. 5th Amend. by so much of the provisions of the Hepburn act of June 29, 1906, as forbids a railway carrier from transporting articles or commodities in interstate commerce when such article or commodity has been manufactured, mined, or produced by the carrier or under its authority, and, at the time of transportation, such carrier has not, in good faith, before the act of transportation, dissociated itself therefrom, or when the carrier owns the article or commodity to be transported, in whole or in part, or when the carrier, at the time of transportation, has an interest therein, direct or indirect, in a legal or equitable sense.

[For other cases, see Constitutional Law, IV. b, 7, in Digest Sup. Ct. 1908.]

Commerce — congressional regulation — discrimination.

7. The exception in favor of timber and manufactured products thereof, contained in the provisions of the Hepburn act of June 29, 1906, forbidding railway carriers

from transporting in interstate commerce articles or commodities with which they are associated, or in which they are interested, does not render the statute invalid for discrimination.

[Regulating carriage and transportation, see Commerce, III. in Digest Sup. Ct. 1908.]

Statutes — when validity may be assailed.

8. The Federal Supreme Court will not consider the question of the constitutionality of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated or in which they are interested, in an action seeking to enforce such provisions by injunction or mandamus, in which no recovery of penalties is sought.

[For other cases, see Statutes, I. d, 3, in Digest Sup. Ct. 1908.]

Statutes — invalid in part.

9. The possible invalidity of the clause of the Hepburn act of June 29, 1906, imposing penalties for violations of its provisions forbidding railway carriers from transporting in interstate commerce commodities with which they are associated, or in which they are interested cannot affect the validity of these provisions, since the penalty clause is wholly separable therefrom.

[For other cases, see Statutes, 61-88, in Digest Sup. Ct. 1908.]

Carriers — governmental regulation — what is a railway company.

10. The Delaware & Hudson company, chartered to secure coal lands and mine coal, and to construct a canal and railroad for the purpose of transporting the products of its mines, being also engaged as a carrier by rail in the transportation of coal in the channels of interstate commerce, is a "railroad company" within the meaning of the Hepburn act of June 29, 1906, prohibiting such companies from transporting in interstate commerce commodities with which they are associated, or in which they are interested.

[Governmental regulation of carrier, see Carriers, III. in Digest Sup. Ct. 1908.]

[Nos. 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570.]

Argued January 19, 20, 1909. Decided May 3, 1909.

SIX WRITS OF ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review judgments denying mandamus to compel certain railway carriers to refrain from interstate transportation of coal from the Pennsylvania anthracite regions. Reversed and remanded for further proceedings. Also SIX APPEALS from the Circuit Court of the United States for the Eastern District of Pennsylvania to review decrees dis-

missing bills in equity seeking to accomplish the same result by injunction. Reversed and remanded for further proceedings.

See same case below, 164 Fed. 215.

The facts are stated in the opinion.

Attorney General Bonaparte and Solicitor General Hoyt argued the cause, and, with Messrs. L. Allison Wilmer and Thomas C. Spelling, filed a brief for plaintiff in error and appellant:

An act of the Congress, duly passed, is presumed to be constitutional, and the burden of argument rests upon those who deny its constitutionality to show that, in fact, the legislative branch of the government has exceeded its powers.

Hylton v. United States, 3 Dall. 171, 175, 1 L. ed. 556, 558; *Fletcher v. Peck*, 6 Cranch, 87, 128, 3 L. ed. 162, 175; *United States v. Coombs*, 12 Pet. 72, 75, 76, 9 L. ed. 1004, 1005, 1006; *Legal Tender Cases*, 12 Wall. 457, 530, 531, 20 L. ed. 287, 305, 306; *Sinking Fund Cases*, 99 U. S. 700, 718, 25 L. ed. 496, 501; *Trade Mark Cases*, 100 U. S. 82, 96, 25 L. ed. 550, 552; *United States v. Gettysburg Electric R. Co.* 160 U. S. 668, 680, 40 L. ed. 576, 580, 16 Sup. Ct. Rep. 427; *Reid v. Colorado*, 187 U. S. 137, 153, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; *Nicol v. Ames*, 173 U. S. 509, 514, 515, 43 L. ed. 786, 791, 792, 19 Sup. Ct. Rep. 522; *Buttfield v. Stranahan*, 192 U. S. 470, 492, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; *Interstate Consol. Street R. Co. v. Massachusetts*, 207 U. S. 79, 88, 52 L. ed. 111, 116, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555.

All regulation involves partial and limited prohibition, and this court has repeatedly upheld regulations of interstate trade which involved partial and limited prohibitions of such trade.

Re Rahrer (Wilkerson v. Rahrer) 140 U. S. 545, 35 L. ed. 572, 11 Sup. Ct. Rep. 865; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321; *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92; *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *United States v. Trans-Missouri Freight Assn.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *St. Louis v. Western U. Teleg. Co.* 149 U. S. 465, 37 L. ed. 810, 13 Sup. Ct. Rep. 990; *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272.

The power to regulate commerce among the several states is given in the same words of the Constitution which confer power to regulate commerce with foreign nations and with the Indian tribes; and it has been held

that, with respect to the other two forms of commerce, the power to regulate implies a power absolutely to prohibit, in the discretion of the Congress.

United States v. Holliday, 3 Wall. 407, 18 L. ed. 182; *United States v. Marigold*, 9 How. 560, 566, 13 L. ed. 257, 260; *United States v. 43 Gallons of Whisky (United States v. Larriere)* 93 U. S. 188, 196, 23 L. ed. 846, 847; *United States v. Le Bris*, 121 U. S. 279, 30 L. ed. 946, 7 Sup. Ct. Rep. 894; *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349.

The same power of prohibition has been expressly held to extend to interstate commerce when exercised in the interest of the public morals or upon other sufficient grounds of public policy; and as to the sufficiency of such grounds to justify the enactment in any particular case, the judgment of the Congress is conclusive.

Re Rapiere, 143 U. S. 110, 134, 36 L. ed. 93, 102, 12 Sup. Ct. Rep. 374; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 352, 353, 47 L. ed. 492, 499, 500, 23 Sup. Ct. Rep. 321; *United States v. Joint Traffic Assn.* supra; *Scranton v. Wheeler*, 179 U. S. 141, 163, 45 L. ed. 126, 137, 21 Sup. Ct. Rep. 48; *Lone Wolf v. Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 Sup. Ct. Rep. 216; *Re Heff*, 197 U. S. 488, 49 L. ed. 848, 25 Sup. Ct. Rep. 506.

The moral or economic characteristics of the legislation involved in this case do not affect its constitutionality.

Ex parte Kearney, 7 Wheat. 38, 44, 5 L. ed. 391, 392; *Scott v. Sandford*, 19 How. 393, 405, 15 L. ed. 691, 700; *McCulloch v. Maryland*, 4 Wheat. 422, 4 L. ed. 605; *Osborn v. Bank of United States*, 9 Wheat. 738, 865, 6 L. ed. 204, 234; *Armour Packing Co. v. United States*, 209 U. S. 56, 82, 52 L. ed. 681, 695, 28 Sup. Ct. Rep. 428; *Newport & C. Bridge Co. v. United States*, 105 U. S. 470, 482, 26 L. ed. 1143, 1148; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Union Bridge Co. v. United States*, 204 U. S. 364, 388, 389, 51 L. ed. 523, 534, 535, 27 Sup. Ct. Rep. 367; *Gibson v. United States*, 166 U. S. 269, 271, 41 L. ed. 996, 998, 17 Sup. Ct. Rep. 578; *Cooley, Principles of Const. Law*, 332; *Cooley, Const. Lim.* 6th ed. 437, 438.

If the consequence of a legitimate exercise of the power to regulate interstate commerce, or any other constitutional power, by the Congress, is to make of little or no value large investments legally made, then it is one of the incidental hardships involved in having a Federal government, and which should have been foreseen by the defendants when they made the investment.

Newport & C. Bridge Co. v. United States, 105 U. S. 470, 479, 26 L. ed. 1143, 1147;

Willamette Iron Bridge Co. v. Hatch, 125 U. S. 1, 12, 31 L. ed. 629, 633, 8 Sup. Ct. Rep. 811; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *Fitzgerald v. Grand Trunk R. Co.* 63 Vt. 169, 13 L.R.A. 70, 3 Inters. Com. Rep. 633, 22 Atl. 76; *Harvard*, Law Rev. June, 1908, p. 615; *Cooley*, Const. Lim. 6th ed. 473.

The provision of an unconstitutional penalty in one clause would not invalidate a constitutional prohibition contained in another clause of the act, and which can be enforced by other remedies.

Reagan v. Farmers' Loan & T. Co. 154 U. S. 362, 395, 396, 38 L. ed. 1014, 1022, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047.

If the court finds that the railroad company has created a corporate agent under its absolute control to manufacture, mine, or produce the commodities in question, it will hold them manufactured, mined, or produced, for the purposes of this statute, by the railroad company.

United States v. Milwaukee Refrigerator Transit Co. 142 Fed. 247; *Northern Securities Co. v. United States*, 193 U. S. 290, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L.R.A. 97, 24 Atl. 964; *People v. North River Sugar Ref. Co.* 121 N. Y. 582, 615, 9 L.R.A. 33, 18 Am. St. Rep. 843, 24 N. E. 834.

It cannot be properly said that Congress meant a "legal" interest in the commodities clause when it said "any" interest, unless such a narrow construction will best subserve the purpose of the statute.

Burton v. United States, 202 U. S. 344, 50 L. ed. 1057, 26 Sup. Ct. Rep. 688, 6 A. & E. Ann. Cas. 362.

It will hardly be contended that a railroad company has no interest of any kind in a corporation or the property of a corporation whose stock it holds. It is true it is not such an interest as it can mortgage or assign (*Humphreys v. McKissock*, 140 U. S. 304, 312, 35 L. ed. 473, 475, 11 Sup. Ct. Rep. 779); it is not a "legal" interest, but it is, none the less, real and substantial.

Pullman's Palace Car Co. v. Missouri P. R. Co. 115 U. S. 587, 597, 29 L. ed. 499, 502, 6 Sup. Ct. Rep. 194.

Messrs. **John G. Johnson** and **Robert W. de Forest** argued the cause and filed a brief for defendants in error and appellees:

The commodities clause is not applicable in the case of carriers who do not own or mine coal, but simply own shares of stock in coal companies.

Com. v. Monongahela Bridge Co. 216 Pa. 114, 64 Atl. 909, 8 A. & E. Ann. Cas. 1073; *Shepard's Estate*, 170 Pa. 323, 32 Atl. 53 L. ed.

1040; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728; *Com. ex rel. Atty. Gen. v. New York, L. E. & W. R. Co.* 132 Pa. 591, 7 L.R.A. 634, 19 Atl. 291; *Buffalo Loan, Trust & S. D. Co. v. Medina Gas & Electric Light Co.* 162 N. Y. 76, 56 N. E. 505; *Saranac & L. P. R. Co. v. Arnold*, 167 N. Y. 374, 60 N. E. 647; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 588, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Peterson v. Chicago, R. I. & P. R. Co.* 205 U. S. 364, 51 L. ed. 841, 27 Sup. Ct. Rep. 513.

The commodities clause is unconstitutional because, making illegal discriminations, it is not due process of law.

Connolly v. Union Sewer Pipe Co. 184 U. S. 560, 46 L. ed. 690, 22 Sup. Ct. Rep. 431.

The commodities clause is unconstitutional because it forbids a railroad company, obeying every rule of transportation prescribed by Congress, to transport an article of commerce which not only is harmless, but is one of the necessities of life. The act is not a regulation, but a prohibition.

Northern Securities Co. v. United States, 193 U. S. 197, 199, 48 L. ed. 679, 24 Sup. Ct. Rep. 436; *Gibbons v. Ogden*, 9 Wheat. 1, 196, 6 L. ed. 23, 70; *Adair v. United States*, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 38 L. ed. 1047, 4 Inters. Com. Rep. 545, 14 Sup. Ct. Rep. 1125; *Ex parte Jackson*, 96 U. S. 727, 24 L. ed. 877; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 455, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Schollenberger v. Pennsylvania*, 171 U. S. 1, 14, 43 L. ed. 49, 54, 18 Sup. Ct. Rep. 757; *Buttfield v. Stranahan*, 192 U. S. 492, 48 L. ed. 534, 24 Sup. Ct. Rep. 349; *United States v. Joint Traffic Assn.* 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Union Bridge Co. v. United States*, 204 U. S. 364, 397, 51 L. ed. 523, 538, 27 Sup. Ct. Rep. 367; *Dubuque & S. C. R. Co. v. Richmond*, 19 Wall. 584, 22 L. ed. 173; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 20, 51 L. ed. 933, 942, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

The commodities clause is unconstitutional because, in violation of constitutional restrictions upon the exercise of the right to regulate commerce, it deprives of "liberty and property."

Carroll v. Greenwich Ins. Co. 199 U. S. 401, 410, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111

U. S. 746, 28 L. ed. 585, 4 Sup. Ct. Rep. 652; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Monongahela Nav. Co. v. United States*, 148 U. S. 336, 37 L. ed. 471, 13 Sup. Ct. Rep. 622; *Allgeyer v. Louisiana*, 165 U. S. 589, 41 L. ed. 835, 17 Sup. Ct. Rep. 427.

The commodities clause is unconstitutional because it is, in effect, a taking of private property for public use without just compensation.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

Mr. Walker D. Hines also argued the cause, and, with Messrs. William S. Opdyke and James M. Beck, filed a brief for defendant in error and appellee the Delaware & Hudson Company:

The court ought not to impute to Congress a design to defeat the policy of the state unless the language claimed to accomplish it is so clear and unmistakable that no other construction can be given to it.

Turner v. Turner, 108 Fed. 787.

Even if unconstitutionality were not clear, but were merely doubtful, it would be the duty of the court to avoid an unnecessary construction of the statute which would develop such constitutional doubts.

Harriman v. Interstate Commerce Commission, 211 U. S. 407, ante, 253, 29 Sup. Ct. Rep. 115; *Knights Templars' & M. Life Indemnity Co. v. Jarman*, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108.

The power to regulate commerce among the states is limited by the 5th Amendment.

Counselman v. Hitchcock, 142 U. S. 547, 35 L. ed. 1110, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; *Adair v. United States*, 208 U. S. 161, 180, 52 L. ed. 436, 445, 28 Sup. Ct. Rep. 277; *Carroll v. Greenwich Ins. Co.* 199 U. S. 401, 410, 50 L. ed. 246, 250, 26 Sup. Ct. Rep. 66.

It is the right and duty of the court to decide whether a statute of Congress exceeds authorized regulation, and arbitrarily interferes with liberty or property; and the question is frequently one of degree.

Lawton v. Steele, 152 U. S. 133, 137, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; *Dobbins v. Los Angeles*, 195 U. S. 223, 236, 49 L. ed. 169, 175, 25 Sup. Ct. Rep. 18; *Lochner v. New York*, 198 U. S. 45, 56, 57, 49 L. ed. 937, 941, 942, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 38 L. ed. 1014, 4 Inters. Com. Rep. 560,

14 Sup. Ct. Rep. 1047; *Wisconsin M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 301, 45 L. ed. 194, 201, 21 Sup. Ct. Rep. 115; *Martin v. District of Columbia*, 205 U. S. 135, 139, 51 L. ed. 143, 744, 27 Sup. Ct. Rep. 440; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529.

The same principles control the courts in determining whether congressional legislation violates the due process clause of the 5th Amendment as control in determining whether state legislation violates the due process clause of the 14th Amendment.

Carroll v. Greenwich Ins. Co. supra; *Twining v. New Jersey*, 211 U. S. 78, 101, ante, 97, 29 Sup. Ct. Rep. 14.

While Congress has a wide power of choice of means, it has no power to choose means which violate the 5th Amendment.

Union Bridge Co. v. United States, 204 U. S. 364, 397, 51 L. ed. 523, 538, 27 Sup. Ct. Rep. 367.

While the term "police power" is more frequently used with reference to state powers, it is equally applicable to Federal powers, so far as Federal powers exist. The police power embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, morals, or safety (*Chicago, B. & Q. R. Co. v. Illinois*, supra). The distinguishing characteristics of the police power are that it aims directly to secure and promote the public welfare, and it does so by restraint and compulsion (*Freund, Pol. Power*, § 3). By virtue of the enumerated powers of Congress the Federal government exercises the police power, much of it by virtue of the commerce clause (*Freund, Pol. Power*, §§ 65, 66).

Legislative regulations affecting railroads, and designed to protect the pecuniary interest of shippers, afford frequent occasions for judicial intervention, and require a careful weighing of the conflicting interests involved.

Reagan v. Farmers' Loan & T. Co. supra; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Chicago, M. & St. P. R. Co. v. Tompkins*, 176 U. S. 167, 44 L. ed. 417, 20 Sup. Ct. Rep. 336; *Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 20, 51 L. ed. 933, 942, 27 Sup. Ct. Rep. 585, 11 A. & E. Ann. Cas. 398.

There is a manifest distinction between all such legislation which is designed to protect or promote the pecuniary interest of shippers, and, on the other hand, legislation, either state or Federal, to protect the public health, safety, or morals; for legislation directed against things which are detrimental to the public health, safety, or mor-

als will prevail despite a very large degree of impairment of the rights of property or liberty.

Mugler v. Kansas, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Lottery Case (Champion v. Ames)* 188 U. S. 321, 47 L. ed. 492, 23 Sup. Ct. Rep. 321.

Messrs. George F. Brownell and Adelbert Moot filed a brief for defendant in error and appellee the Erie Railroad Company:

Congress is nowhere given the power to prohibit, impair, or destroy an innocent business of any of the people under pretense of its regulation.

Kansas v. Colorado, 206 U. S. 46, 89-91, 51 L. ed. 956, 971, 972, 27 Sup. Ct. Rep. 655; *Adair v. United States*, 208 U. S. 171, 172, 52 L. ed. 441, 442, 28 Sup. Ct. Rep. 277.

The states are supreme as to land, corporations, and domestic business within their own borders.

United States v. Fox, 94 U. S. 320, 24 L. ed. 192; *Hooper v. California*, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249.

For violating law, or for want of heirs, lands and corporative properties of state corporations or citizens escheat to the states, and not to the United States.

Hamilton v. Brown, 161 U. S. 263, 40 L. ed. 695, 16 Sup. Ct. Rep. 585; *American Loan & T. Co. v. Grand Rivers Co.* 159 Fed. 779.

The citizens of the different states, however, are upon an equal footing in doing business in a state. Subject to that condition, each state makes its own laws.

Corfield v. Coryell, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; *Blake v. McClung*, 172 U. S. 248, 249, 43 L. ed. 435, 436, 19 Sup. Ct. Rep. 165.

The extent to which Congress can go is to compel the railroad to carry other coal to market upon the same public terms and conditions upon which it carries its own coal. Congress has so required, and the courts have shown that requirement can be enforced, and other shippers can thus be put upon an equality with the railroad.

New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272; *Kansas v. Colorado*, 206 U. S. 46, 51 L. ed. 956, 27 Sup. Ct. Rep. 655.

Congress has no power over the right to hold or use lands in Pennsylvania, the laws of Pennsylvania being supreme as to such lands. Ownership of coal lands or interests therein, through Pennsyl-
53 L. ed.

vania corporations, therefore, cannot be made the ground for prohibiting the transportation of coal therefrom to purchasers thereof, while other coal may be transported to the same purchasers by the common carrier under the same conditions.

United States v. Fox, 94 U. S. 315, 24 L. ed. 192; *United States v. E. C. Knight Co.* supra; *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Kansas v. Colorado*, supra; *People v. O'Brien*, 111 N. Y. 1, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692.

One of the strongest reasons for creating the Constitution was to obtain freedom in interstate commerce. Madison shows this was so. *The Federalist*, No. 17; 7 Winsor, Crit. Hist. Am. p. 223; *The Federalist*, No. 11.

All "partial" laws are unconstitutional.

Vanzant v. Waddel, 2 Yerg. 270; *Taylor v. Porter*, 4 Hill, 146, 40 Am. Dec. 274; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Caldwell v. Texas*, 137 U. S. 692, 697, 34 L. ed. 816, 818, 11 Sup. Ct. Rep. 224; *State v. Starling*, 15 Rich. L. 120; *Hurtado v. California*, 110 U. S. 526, 527, 541, 542, 28 L. ed. 235, 236, 240, 241, 4 Sup. Ct. Rep. 111, 292; *Eames v. Savage*, 77 Me. 212, 52 Am. Rep. 751; *Broom, Const. Law*, 228; *Holden v. James*, 11 Mass. 404, 6 Am. Dec. 174.

Among the fundamental principles of our government are freedom, equality, right, and justice. Any act of Congress which seeks to sweep aside any one of these principles violates the fundamental ideas of our freedom of government, and deprives the citizens of an inherent right promised and guaranteed to be held intact and forever secure.

French v. Barber Asphalt Paving Co. 181 U. S. 324-329, 45 L. ed. 879-884, 21 Sup. Ct. Rep. 625; *Davidson v. New Orleans*, 96 U. S. 97, 103, 104, 24 L. ed. 616, 619, 620; *Twining v. New Jersey*, 211 U. S. 100, 101, ante, 97, 29 Sup. Ct. Rep. 14; *Yick Wo v. Hopkins*, 118 U. S. 356-370, 30 L. ed. 220-226, 6 Sup. Ct. Rep. 1064; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 554, 561, 46 L. ed. 679, 687, 690, 22 Sup. Ct. Rep. 431; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18.

Congress has no power to "regulate" persons or state corporations, within any state, so that harmless and necessary commodities, manufactured, mined, or produced by them, cannot enter into interstate commerce.

Allnutt v. Inglis, 12 East. 527; *Munn v. Illinois*, 94 U. S. 127, 128, 24 L. ed. 84, 85; *Sinking Fund Cases*, 99 U. S. 700-718, 25 L. ed. 496-501; *People v. O'Brien*, 111 N. Y.

35, 2 L.R.A. 255, 7 Am. St. Rep. 684, 18 N. E. 692; *Houston & T. C. R. Co. v. Texas*, 170 U. S. 243, 42 L. ed. 1023, 18 Sup. Ct. Rep. 610; 17 *Yalc*, Law Journal, Jan. 1908, pp. 144-150.

Mr. Justice White delivered the opinion of the court:†

We dismiss for the present a contention made by one of the corporations, that it is not a railroad company within the meaning of that term as used in the statute, which we shall have occasion to consider, because it is merely a coal company, whose transporting operations are but incidental to its mining operations. With this contention put aside, it is true to say, speaking in a general sense, that the corporations, parties to this record, by means of railroads owned and operated by them, were engaged in transporting coal from the anthracite coal fields in Pennsylvania to points of market for ultimate delivery in other states. With much of the coal so transported the corporations had been or were connected by some relation distinct from the association which was necessarily engendered by the transportation of the commodity by the corporations as common carriers in interstate commerce. While the business of the corporations, generally speaking, had these characteristics, there were differences between them. Some of the corporations owned and worked mines, and transported over their own rails in interstate commerce the coal so mined, either for their own account or for the account of those who had acquired title to the coal prior to the beginning of the transportation. Others, while operating railroads, not only owned but also leased and operated coal mines, and carried the coal produced from such mines in the same way. Again, others of the railroad companies, although not operating mines, were the owners of stock in corporations engaged in mining coal, the coal so produced by such corporations being carried in interstate commerce by the railroad companies holding the stock in the producing coal companies, either for account of the producing corporations or for 393] persons to whom the coal had been *sold at the point of production prior to the beginning of interstate commerce. This, moreover, was, additionally, the case as to some of the railroad companies who, as we have previously stated, were engaged both in the production of coal from mines owned by them and in interstate transportation of such product. All the attributes thus enjoyed by the corporations had been pos-

sessed by them for a long time, and were expressly conferred by the laws of Pennsylvania, and, in some instances, also by the laws of other states, in which the companies likewise, in part, carried on their business. We insert in the margin a summary which the court below made concerning the situation of the respective corporations, taken from the answer or return made by each corporation.†

*After the first day of May, 1908, [394 the government of the United States commenced these proceedings by bill in equity against each of the corporations, to enjoin each from carrying *in interstate com-[395 merce any coal produced under the circumstances which we have stated. At the same time a petition in mandamus was filed against each corporation, seeking to accomplish *the same result. Both the [396 equity causes and the mandamus proceedings were based upon the assumption that the 1st section of the act to regulate commerce, as amended* and re-enacted by [397 the law usually referred to as the Hepburn act, approved June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), contained a provision, generally known as the commodities clause which *caused it to be illegal for the [398 corporations after May 1, 1908, to transport in interstate commerce coal with which the railroad companies were or had been connected or associated in any of *the [399 modes above stated. Except as we have said, in the particular that one of the corporations claimed that it was not a railroad company within the meaning of the commodities *clause, they all defended substantially [400 upon the ground, that, when corrected interpreted, the commodities clause did not forbid the interstate commerce traffic in coal by them carried on. If it did, the clause was assailed as inherently repugnant to the Constitution, because the right to enact it was not embraced within the authority conferred upon Congress to regulate commerce. In addition it was contended that even if, ab-

†It is admitted, generally, by the defendants, that the allegations in the bills and petitions, as to their corporate existence, are true, and that they own or operate railroads engaged in the interstate transportation of coal from the anthracite region of Pennsylvania. They also admit that this transportation has been carried on by the several defendants long prior to the 8th day of May, 1906, and, in the case of some of them, for a period varying from a quarter to more than half a century prior thereto. In addition to these general admissions, detailed statements are made by the defendants, respectively, of the character and extent of the ownership or other interests possessed by them in the coal so transported, or in the lands or mines

†In announcing the decision on May 3, 1909, Mr. Justice White read a memorandum giving the gist of the opinion now published.

strictly considered, the clause might be embraced within the grant of power to regulate commerce, nevertheless its provisions were in conflict with the due process clause of the 5th Amendment to the Constitution, because of the destructive effect which the enforcement of its provisions would produce on the rights of property which the corporations possessed and had long enjoyed under the sanction of valid state laws. It was besides insisted that, in any event, the clause was repugnant to the Constitution because of the discrimination caused by the exception as to timber and the manufactured products thereof. The cases were submitted on the pleadings, and were heard and decided at one and the same time. Treating the clause as having the meaning which the government contended for, the court came to consider the alleged repugnancy of the enactment to the Constitution. In the principal opinion the subject *was at least formally approached, but for the purpose of deciding whether inherently the commodities clause was within the competency of Congress to enact as a regulation of commerce, but whether the provisions of that clause were repugnant to the Constitution because of the destructive effect of its prohibitions upon the vast sum of property rights which the corporations were found to enjoy as a result of valid state laws. In this aspect the issue which the court deemed it was called upon to determine was thus by it epitomized:

"The fundamental and underlying question, however, which presents itself at the threshold of all the cases for our consideration, is whether the so-called 'commodities clause' amendatory of the act to regulate commerce, passed June 29, 1906, so far as its

scope applies by the universality of its language to the cases here presented, is in excess of the legislative authority granted to Congress by the Constitution. This question must be considered with reference to the Constitution as a whole, and in relation to the concrete facts of the several cases. It is therefore necessary to keep in mind the situation as presented by these defendants, the facts set forth in their individual answers as above briefly summarized, and the relevant industrial conditions, *which, being matters of common knowledge, may be judicially noticed."

The situation which it was considered should be kept in mind for the purpose of passing upon the constitutional question was thus stated:

"The general situation is that for half a century or more it has been the policy of the state of Pennsylvania, as evidenced by her legislative acts, to promote the development of her natural resources, especially as regards coal, by encouraging railroad companies and canal companies to invest their funds in coal lands, so that the product of her mines might be conveniently and profitably conveyed to market in Pennsylvania and other states. Two of the defendant corporations, as appears from their answers, were created by the legislature of Pennsylvania, one of them three quarters of a century ago and the other half a century ago, for the expressed purpose that its coal lands might be developed and that coal might be transported to the people of Pennsylvania and of other states. It is not questioned that, pursuant to this general policy, investments were made by all the defendant companies in coal lands and mines and in the stock of coal-producing companies,

from which it is produced. It is only necessary to briefly summarize these statements:

(1) The Delaware & Hudson Company alleges that it directly owns its coal lands as it does its railroad; that it was incorporated by an act of the legislature of the state of New York, April 23, 1823 . . . and was "authorized to construct a canal or water navigation from the anthracite coal district in Pennsylvania to the Hudson river in New York; to purchase lands in Pennsylvania containing stone or anthracite coal; and to employ its capital in the business of transporting to market coal mined from such lands." That this authority was also expressly conferred by acts of the legislature of the state of Pennsylvania, between the years 1823 and 1871, and that these acts of the state of Pennsylvania resulted from the desire and policy of said state to create and foster the industry of mining such coal and developing the transportation thereof; that, under the authority of these statutes of Pennsylvania and of New York, the said defendant, beginning as early as the year 1825, invested its

capital in the purchase of a large quantity of coal lands in the state of Pennsylvania and in the construction of canal navigation in Pennsylvania from the Delaware river to the Hudson river; that later, under statutes of both states, it invested additional capital in the construction of railroads in the state of Pennsylvania, and in the construction and acquisition of railroads and leasehold estates in the state of New York, for the same general purpose of transporting coal from the coal lands owned by it; that it has invested large sums of money, not only in the acquisition of coal property, but in the erection of structures for mining and terminal facilities; that some of its coal properties were acquired under leases upon royalties payable to the lessors for each ton of coal mined, the leases fixing large minimum amounts by way of rent; that large fixed rentals are required to be paid, not only for those mining lands, but for railroads acquired for the purpose of transporting coal; that there are three coal companies whose shares are practically all owned by it; viz.,

and that coal production was enormously increased and its economics promoted by the facilities of transportation thus brought about. As appears from the answers filed, the entire distribution of anthracite coal in and into the different states of the Union and Canada for the year 1905 (the last year for which there are authoritative statistics) was 61,410,201 tons; that approximately four fifths of this entire production of anthracite coal was transported in interstate commerce over the defendant railroads, from Pennsylvania to markets and other states and Canada, and of this four fifths, from 70 to 75 per cent was produced either directly by the defendant companies or through the agency of their subsidiary coal companies.

"It also appears from the answers filed that enormous sums of money have been expended by these defendants to enable them to mine and prepare their coal and to transport it to any *point where there may[403 be a market for it. It is not denied that the situation thus generally described is not a new one, created since the passage of the act in question, but has existed for a long period of years prior thereto, and that the rights and property interests acquired by the said defendants in the premises have been acquired in conformity to the Constitution and laws of the state of Pennsylvania, and that their right to the enjoyment of the same has never been doubted or questioned by the courts or people of that common-

the Northern Coal & Iron Company, the Jackson Coal Company, and the Hudson Coal Company; that its mining lands thus owned and acquired are located upon or contiguous to the railroads of defendant; that said railroads are the only reasonable, practical, and conveniently available avenues of transportation whereby the coal by it produced can be transported in interstate commerce, and the coal mined by the defendant and by said coal companies upon its lines of railroad amounts approximately to 70 per cent of the entire transportation by it, or to about 4,300,000 gross tons, its daily shipments averaging about 12 trains of 37 coal cars each; that the coal lands so acquired by the defendant and by said three coal companies would have little, if any, value, except for the mining of coal therefrom and its sale as a commercial commodity, and that if it is deprived, by virtue of the said act of Congress, of the right to transport said coal, it will be deprived of the only possible enjoyment of its property. It further avers that it is not a "railroad company" within the meaning of the act of Congress, but that it is a coal company; and that since the year 1870 it has become, incidentally to its business as a coal mining company, a common carrier by railroad of passengers and property.

It is further averred, as a special ground of defense by the said Delaware & Hudson Company, that this said "commodities clause" does not apply to it, because all the coal mined by it upon its own lands, and upon the lands of the said three coal companies (except as to steam sizes, as thereafter stated), "is sold, before transportation thereof begins, by said company to third persons at the mines in Pennsylvania from which such coal has been produced, and that said company does not, at the time when the same is so transported by it in interstate commerce, own the same nor any interest therein, direct or indirect, apart from its obligation and rights as a common carrier in the transportation thereof, and that it carries said coal for the account of the purchaser thereof, who is the consignor and owner of said coal."

(2) The answer of the Erie Railroad Company states that it was originally organized under the laws of the state of New York in 1832 . . . that it has been reorganized from time to time under mortgage foreclosure; and finally, in November, 1895, under a foreclosure sale, it was reorganized under the statutes of New York, whereby it "became the lawful owner of the property, rights, privileges, immunities, and franchises of all its predecessors aforesaid, including the shares of capital stock of coal companies and of railroad companies, as well as the railroads theretofore held and possessed by said predecessor companies, the railroads so owned by it and its said subsidiary companies having an aggregate mileage of over 2,100 miles in the states of New York, Pennsylvania, New Jersey, Ohio, Indiana, and Illinois;" that the Pennsylvania Coal Company was created a corporation by the laws of Pennsylvania in 1838 . . . its charter giving it the right of "transacting the usual business of companies engaged in mining, transporting to market, and selling coal and the other products of coal mined;" and for that purpose it was given the power to purchase or lease coal lands in Pennsylvania; also the power to construct railroads with one or more tracks. In 1853 . . . the said Pennsylvania Coal Company was authorized to extend its railroad to connect with the New York & Erie Railroad. The right of said Pennsylvania Coal Company to buy coal lands and build railroad connections was continued by acts of the legislature of Pennsylvania in 1857 . . . 1864 . . . 1867 . . . and 1868 . . . ; that in pursuance of these various acts of the legislature, the Pennsylvania Coal Company obtained capital, issued stock therefor, acquired coal lands, developed coal mines, produced, transported to markets, and sold coal; built and operated railroads, made railway connections as authorized, and did other like acts to promote the business of supplying all persons needing the same with anthracite coal. The Hillside Coal & Iron Company was organized by an act of the legislature of the state of Pennsylvania in 1869 . . . for the purposes and with powers

wealth, but has been fully recognized and protected by both."

It was decided that, as applied to the defendants, the commodities clause was not within the power of Congress to enact as a regulation of commerce. 164 Fed. 215. A member of the court dissented and expressed his reasons in a written opinion. Without adverting to all the reasoning expounded in that opinion, we think it accurate to say that, in a large and ultimate sense, it proceeded upon the assumption that, as the commodities clause provided, to quote the summing up of the opinion, for "the divorce of the dual relation of public carrier and private transporter," it was a regulation of commerce, and as such was within the power of Congress to enact, and when

enacted was operative upon the defendants, and therefore required them to conform to the regulation, even although to do so might in some way indirectly affect valid rights derived from prior state legislation.

Judgments and decrees were entered denying the applications for mandamus and dismissing the bills of complaint.

The text of the commodities clause upon which the cases depend is as follows:

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any state, territory, or the District of Columbia to any other state, territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manu-

similar to those of the Pennsylvania Coal Company. Under authority of acts of the legislature of Pennsylvania the said Erie Railroad Company, long prior to the passage of the said amendment to the interstate commerce act, acquired substantially all the capital stock of said Pennsylvania Coal Company, the Hillside Coal & Iron Company, the Jefferson Railroad Company, and Erie & Wyoming Railroad Company, and a small minority of the stock of the Temple Iron Company; and has pledged the same under various mortgages, pursuant to which have been issued and are now outstanding bonds for large sums, aggregating many millions of dollars, which bonds are held by purchasers in good faith and for value throughout the world; that, for many years prior to May 1, 1908, it has been engaged in transporting the coal of said corporations to markets outside the state of Pennsylvania, many of which can only be reached from the railroad lines of this defendant; that the coal so transported amounts annually to several millions of tons and constitutes 22 per cent of the entire freight tonnage of this defendant, the Erie Company. It also denies that it is, by reason of the ownership of said stock in said companies, the owner in whole or in part of the coal transported by it in interstate commerce, or that it has or had any interest, direct or indirect, therein, and therefore has not violated or failed to comply with the so-called "commodities clause" of the interstate commerce act.

(3) The Central Railroad Company of New Jersey avers that it was organized under the laws of the state of New Jersey, and by these laws was authorized to purchase and hold the stock or securities of any other corporation, of New Jersey or elsewhere, and that it was also so authorized by two acts of assembly of the state of Pennsylvania, one of which, approved April 15th, 1869 . . . was entitled "An Act to Authorize Railroad and Canal Companies to Aid in the Development of Coal, Iron, Lumber, and Other Material Interests of This Commonwealth;" that, pursuant to the authority of these several acts, it had, long prior to the said act of Congress, become the owner of a majority of the shares

of the capital stock of the Honeybrook Coal Company and of the Wilkesbarre Coal & Iron Company, both companies now being merged into the Lehigh & Wilkesbarre Coal Company, a large majority of whose shares are owned by it; that it also owns a minority of the shares of the Temple Iron Company; that in 1871 it became the lessee of the Lehigh & Susquehanna Railroad, a Pennsylvania corporation, which it has ever since operated under an obligation to pay a yearly rental of not less than \$1,414,400, and not to exceed \$2,043,300 per annum; that its gross earnings from the transportation of coal amounted, for the year ending June 7th, 1907, to \$9,312,268.04, being 48 per cent of its entire freight receipts; and that a large part of its earnings from freight and miscellaneous passenger traffic is incident to and dependent upon the operation of the mines and collieries of said coal companies; and that the greater part of its earnings from transportation of coal comes from its carriage of the coal mined by the Lehigh & Wilkesbarre Coal Company; and that large sums of money have been expended by it in extending its lines and in constructions to enable it to transport said coal in interstate commerce.

(4) The Delaware, Lackawanna, & Western Railroad Company, like the Delaware & Hudson Company, admits that it is the owner of coal lands and mines coal which it sells; that it was organized under an act of the legislature of Pennsylvania in 1849 . . . that all the lines of railroad owned by it are wholly within the state of Pennsylvania, extending from the Delaware river, at the boundary line of the state of New Jersey, in a northwesterly direction across the state of Pennsylvania to the boundary line between the state of Pennsylvania and the state of New York, with a branch line extending from Scranton, in the state of Pennsylvania, to Northumberland, in said state. Said defendant also admits and alleges that, under express authority of acts of the legislature of the states of Pennsylvania, New Jersey, and New York, it, as lessee, now operates, and, long prior to May 1st 1908, has operated, various lines of rail-

factured, mined, or produced by it, or under its authority, or which it may own in 404]*whole or in part, or in which it may have any interest, direct or indirect, except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier."

The government insists that this provision prohibits railroad companies from transporting in interstate commerce articles or commodities other than the excepted class, which have been manufactured, mined, or produced by them or under their authority, or which they own or may have owned, in whole or in part, or in which they have or may have had any interest, direct or indirect. These prohibitions, it is further insisted, apply to the transportation by a rail-

road company in interstate commerce of a commodity which has been manufactured, mined, or produced by a corporation in which the transporting railroad company is a stockholder, irrespective of the extent of such stock ownership. This construction of the provision rests not only upon the meaning which the government insists should be given to its text, but on the significance of the text as illumined by what it is insisted was the result intended to be accomplished by the enactment of the clause. The purpose, it is contended, was not merely to compel railroad companies to dissociate themselves before transportation from articles or commodities manufactured, mined, produced, or owned by them, etc., but moreover to divorce the business of transporting

road in the two last-mentioned states, by which it has direct traffic connection with the city of Buffalo and other cities in the said states. Defendant also admits that for many years it has owned in fee extensive tracts of coal land in the state of Pennsylvania; that it has also leased large tracts of coal land in the said state, and is now engaged, and for many years last past has been engaged, in mining coal from the lands so owned and leased by it; that the holding of said lands, whether in fee or by lease, and the mining, manufacture, and interstate transportation of the coal therefrom, has been, and continues to be, under and by virtue of the authority of the laws of the state of Pennsylvania.

That, in addition to the foregoing, certain coal companies, organized from time to time under acts of assembly of the said state of Pennsylvania, have been merged into said defendant corporation; that, by an act of the general assembly of the state of Pennsylvania, approved April 15th, 1869, entitled, "An Act to Authorize Railroad and Canal Companies to Aid in the Development of the Coal, Iron, Lumber, and Other Material Interests of This Commonwealth," the defendant was authorized to aid corporations authorized by law to develop coal, iron, lumber, and other material interests of Pennsylvania, by the purchase of their capital stock or bonds, or either of them. The answer of said defendant also alleges that, by reason of its ownership of said coal lands and coal, and the revenues derived from the transportation of the same to market, it has been enabled to expend millions in the betterment of its general transportation facilities for both goods and passengers, and give to the public the benefits of a well constructed and equipped modern railroad.

That, by virtue of leases of railroads, to enable it to transport coal in interstate commerce, it has become bound to pay yearly, in interest charges, the sum of \$5,155,697, and for taxes, \$1,163,916. That out of a total of about 8,700,000 tons of coal produced by it in the year 1907 from its lands owned in fee and leased, upwards of 6,700,000 tons were transported over its lines of railroad in

interstate commerce; that from 40 per cent to 60 per cent of its annual transportation earnings, from the operation of leased lines, has been derived from the carriage of its own coal thereover.

That it uses, in the conduct of its business as a common carrier, approximately 1,700,000 tons of anthracite coal, of pea size or smaller, annually, and will require more for such use in the future; that to obtain this coal in these economic sizes it is necessary to break up coal, leaving the larger sizes, which must be disposed of otherwise; that great waste would result if it were forbidden to transport to market in interstate commerce these larger sizes thus resulting.

That defendant's rights to acquire its holding of coal land, its rights to own and mine coal and to transport the same to market in other states as well as in Pennsylvania, and its leases of other railroads, were acquired many years prior to the enactment of the so-called "interstate commerce act," and of the said amendment thereto known as the "commodities clause."

(5) The answer of the Pennsylvania Railroad Company avers that it was incorporated under the laws of the state of Pennsylvania April 13th, 1846 . . . that, as early as 1871, under authority of two general statutes of the state of Pennsylvania, it became the owner of all the shares of the Susquehanna Coal Company, of all the shares of the Summit Branch Mining Company, and of one third of the shares of the Mineral Railroad Mining Company, corporations of the state of Pennsylvania; that since the last-mentioned year, and up to the present time, it has carried the coal produced from the mines of the said coal companies, at lawfully established schedule rates, over its lines of railroad; that approximately 65 per cent of the coal so mined has been carried to destinations outside the state of Pennsylvania; that it mines no coal, but that the coal it carries is mined by the said coal companies, and that it has no interest therein within the meaning of the said act of Congress, either direct or indirect; that the most largely producing of the properties belonging to these coal companies are located either di-

commodities in interstate commerce from their manufacture, mining, production, ownership, etc., and thus to avoid the tendency to discrimination, forbidden by the act to regulate commerce, which, it is insisted, necessarily inheres in the carrying on by a railroad company of the business of manufacturing, mining, producing, or owning, in whole or in part, etc., commodities which are by it transported in interstate commerce.

The construction relied on is thus summed up in the argument of the government: "It (the clause) forbids the carrier who owns the mines and sells coal, to transport that coal in interstate commerce. . . . This is not trifling with the question. It states the exact fact and the reality." And, in

*accordance with this principle, the in-[405 sistence in argument is that it was the duty of the carriers who owned and worked coal mines, or who had stock in such mines, or who owned coal, in order to bring themselves within the law, to dispose absolutely of all their interest in coal-producing property, in whatever form enjoyed, and to cease absolutely from acquiring like rights in the future. It was, doubtless, because of the far-reaching effect of this construction upon the enormous property interests involved which caused the result of the provision to be thus stated in the argument for the government: "This is undoubtedly a searching and radical law, and was meant to be so." True, the government, in argument, suggests that the radical result of the statute may

rectly upon or so contiguous to the system of railroads operated by said defendant as to render transportation by any other railroads not reasonably practicable.

(6) The answer of the Lehigh Valley Railroad Company states that it was originally incorporated September 20th, 1847, under the laws of the state of Pennsylvania. Under the authority of various acts of assembly of the said state, other railroad and coal companies, prior to the year 1874, have been merged into it, some of which railroads were expressly authorized to construct railroads and to carry on the business of mining, transporting, and vending coal. It is also the lessee of railroads in Pennsylvania; that, by means of its own and of said leased lines of railroad, it conducts, and for many years had conducted, an interstate transportation of coal; that since 1872, pursuant to authority conferred by the laws of Pennsylvania, it has also owned the majority of the capital stock of the New York & Middle Coal Field Railroad & Coal Company, a corporation of the state of Pennsylvania; also the entire capital stock of Coxe Bros. & Company a corporation of said state; a minority interest in the capital stock of the Highland Coal Company; a majority of the stock of the Locust Mountain Coal & Iron Company; a minority interest of the capital stock of the Packer Coal Company and of the Temple Iron Company, all corporations of the state of Pennsylvania, organized for the purpose of mining coal, some of them more than a half century ago; that it has constructed lines of railroad and branch railroads and terminal facilities for the purpose of transporting to market, in interstate commerce, the coal of the company whose shares it owns, and this business has been conducted by it for many years; that practically said coal can be transported to market only by its railroads; that the capital stock of two of the coal companies owned by said defendant has been transferred to a trustee, to hold under a general mortgage executed by defendant, under which mortgage bonds to the amount of \$23,539,000 have been issued by said defendant and are now outstanding in the hands of the public; that the capital

stock of Coxe Bros. & Company, Incorporated, owned by this defendant as aforesaid, has been transferred and assigned to, and is now held by, a trustee under a collateral trust agreement executed by said defendant, dated November 1, 1905, for the purpose and upon the terms expressed in said agreement, a copy of which is annexed to said answer, and that bonds to the amount of \$18,000,000 have been issued under said agreement and are now outstanding in the hands of the public; that said defendant transports annually, in interstate commerce, upwards of 7,600,000 tons of anthracite coal, shipped by the said coal companies whose stock is owned by said defendant, in whole or in part as aforesaid, and transports annually for said coal companies, wholly within the state of Pennsylvania, upwards of 1,500,000 tons; that nearly 42 per cent of its gross annual earnings of \$36,068,431 for the last fiscal year, or \$15,110,899, were derived from coal freights, which represented over 51 per cent of its entire freight tonnage; that the greater part of its gross earnings from coal transportation was received from the coal companies whose shares are by it owned; that the mines and collieries of said coal companies are all so located in the portions of the coal fields tributary to its lines of railroad that no means of transporting their product can be made available, except by defendant's railroads; that the railroad lines of this defendant have been from time to time extended, the control of other railroads acquired, and its facilities and equipment increased at enormous expense, in reliance upon the rights and franchises conferred by the statutes of Pennsylvania aforesaid; that a very large part of defendant's earnings is derived from the freight and passenger traffic incidental to and dependent upon the operation of the mines and collieries of said coal companies, and that, if said defendant were deprived of the earnings derived from the transportation of the coal of said coal companies, its business could not be continued, except at a net loss of many millions of dollars per annum.

be assuaged, without violating its spirit, by limiting its prohibitions so as to cause them to apply only so long as the commodities to which it applies are in the hands of a carrier or its first vendee. But no such limitation is expressed in the statute, and to engraft it would be an act of pure judicial legislation. Besides, to do so would be repugnant to the asserted spirit and purpose of the statute which lies at the foundation of the construction upon which the government relies.

Let us, as a prelude to an analysis of the clause, for the purpose of fixing its true construction, and determining the constitutional power to enact it when its significance shall have been rightly defined, point out the questions of constitutional power which will require to be decided if the construction relied upon by the government is a correct one.

We at once summarily dismiss all the elaborate suggestions made in argument as to the alleged wrong to result from the enforcement of the clause, if it be susceptible of the construction which the government has placed upon it. We do this because, obviously, mere suggestions of inconvenience or harm are wholly irrelevant, as they cannot be allowed to influence us in determining the question of the constitutional power of Congress to enact the clause.

Let it be conceded at once that the power [406] to regulate commerce *possessed by Congress is, in the nature of things, ever-enduring, and therefore the right to exert it to-day, to-morrow, and at all times in its plentitude must remain free from restrictions and limitations arising or asserted to arise by state laws, whether enacted before or after Congress has chosen to exert and apply its lawful power to regulate. For our present purposes, moreover, although we may have occasion to examine the subject hereafter, we entirely put out of view all the contentions based upon the assumption that even, although the provisions of the clause be, in and of themselves, lawful regulations of commerce, if prospectively applied, nevertheless they cannot be so considered, because of their retroactive effect upon the rights of the defendants, alleged to have been secured by valid state laws. We further concede, for the purpose of the inquiry we are at present making, although we may also have occasion to examine the subject hereafter, that the power of Congress to regulate commerce can be constitutionally so exerted as to compel a railroad company engaged in interstate commerce to dissociate itself in interest from the commodities which it transports in interstate commerce, even although, by existing state laws, the railroad company may have a lawful right

of ownership or association with the commodity upon which the regulation operates.

With these concessions in mind, and despite their far-reaching effect, if the contentions of the government as to the meaning of the commodity clause be well founded, at least a majority of the court are of the opinion that we may not avoid determining the following grave constitutional questions:

1. Whether the power of Congress to regulate commerce embraces the authority to control or prohibit the mining, manufacturing, production, or ownership of an article or commodity, not because of some inherent quality of the commodity, but simply because it may become the subject of interstate commerce. 2. If the right to regulate commerce does not thus extend, can it be impliedly made to embrace subjects which it does not control, by forbidding a railroad company engaged in *interstate com-[407]merce from carrying lawful articles or commodities because, at some time prior to the transportation, it had manufactured, mined, produced, or owned them, etc.? And involved in the determination of the foregoing questions we shall necessarily be called upon to decide: (a) Did the adoption of the Constitution and the grant of power to Congress to regulate commerce have the effect of depriving the states of the authority to endow a carrier with the attribute of producing as well as transporting particular commodities, —a power which the states from the beginning have freely exercised, and by the exertion of which governmental power the resources of the several states have been developed, their enterprises fostered, and vast investments of capital have been made possible? (b) Although the government of the United States, both within its spheres of national and local legislative power, has in the past, for public purposes, either expressly or impliedly, authorized the manufacture, mining, production, and carriage of commodities by one and the same railway corporation, was the exertion of such power beyond the scope of the authority of Congress, or, what is equivalent thereto, was its exercise but a mere license, subject at any time to be revoked and completely destroyed by means of a regulation of commerce?

While the grave questions thus stated must necessarily, as we have said, arise for decision if the contention of the government, as to the meaning of the commodity clause be correct, we do not intend, by stating them, to decide them, or even in the slightest degree to presently intimate, in any respect whatever, an opinion upon them. It will be time enough to approach their consideration if we are compelled to do so hereafter, as the result of the further analy-

sis which we propose to make in order to ascertain the meaning of the commodities clause.

It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. **Knights Templars' & M. Life Indemnity Co. v. Jarman*, 187 U. S. 197, 205, 47 L. ed. 139, 145, 23 Sup. Ct. Rep. 108. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional, and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Commerce Commission*, 211 U. S. 407, ante, 253, 29 Sup. Ct. Rep. 115.

Recurring to the text of the commodities clause, it is apparent that it disjunctively applies four generic prohibitions; that is, it forbids a railroad carrier from transporting in interstate commerce articles or commodities, 1, which it has manufactured, mined, or produced; 2, which have been so mined, manufactured, or produced under its authority; 3, which it owns in whole or in part; and, 4, in which it has an interest, direct or indirect.

It is clear that the two prohibitions which relate to manufacturing, mining, etc., and the ownership resulting therefrom, are, if literally construed, not confined to the time when a carrier transports the commodities with which the prohibitions are concerned, and hence the prohibitions attach and operate upon the right to transport the commodity because of the antecedent acts of manufacture, mining, or production. Certain also is it that the two prohibitions concerning ownership, in whole or in part, and interest, direct or indirect, speak in the present, and not in the past; that is, they refer to the time of the transportation of the commodities. These last prohibitions, therefore, differing from the first two, do not control the commodities if, at the time of the transportation, they are not owned in whole or in part by the transporting carrier, or if it then has no interest, direct or indirect, in them. From this it follows that the construction which the government places upon the clause as a whole is in direct

conflict with the literal meaning *of[409 the prohibitions as to ownership and interest, direct or indirect. If the first two classes of prohibitions as to manufacturing, mining, or production be given their literal meaning, and therefore be held to prohibit, irrespective of the relation of the carrier to the commodity at the time of transportation, and a literal interpretation be applied to the remaining prohibitions as to ownership and interest, thus causing them only to apply if such ownership and interest exist at the time of transportation, the result would be to give to the statute a self-annihilative meaning. This is the case, since, in practical execution, it would come to pass that where a carrier had manufactured, mined, and produced commodities, and had sold them in good faith, it could not transport them; but, on the other hand, if the carrier had owned commodities and sold them it could carry them without violating the law. The consequence, therefore, would be that the statute, because of an immaterial distinction between the sources from which ownership arose, would prohibit transportation in one case and would permit it in another like case. An illustration will make this deduction quite clear: A carrier mines and produces and owns coal as a result thereof. It sells the coal to A. The carrier is impotent to move it for account of A in interstate commerce because of the prohibition of the statute. The same carrier at the same time becomes a dealer in coal, and buys and sells the coal thus bought to the same person, A. This coal the carrier would be competent to carry in interstate commerce. And this illustration not only serves to show the incongruity and conflict which would result from the statute if the rule of literal interpretation be applied to all its provisions, but also serves to point out that, as thus construed, it would lead to the conclusion that it was the intention, in the enactment of the statute, to prohibit manufacturing and production by a carrier, and, at the same time, to offer an incentive to a carrier to become the buyer and seller of commodities which it transported.

But it is said, on behalf of the government, in view of the purpose of Congress to prohibit railroad companies engaged in *interstate commerce from being, at the[410 same time, manufacturers, producers, owners, etc., of commodities which they carry, despite the literal sense of some of the prohibitions, they should all be construed so as to accomplish the result intended; and therefore their apparent divergence and conflict should be removed by construing them all as prohibiting the transportation because of the causes stated, irrespective of the particular relation of the railroad company to the

commodities at the time of transportation. This suggestion, however, simply invites us, under the assumption that Congress had a particular intention in enacting the clause, to so construe the clause as to cause it to be essential to decide the grave constitutional questions which we have hitherto pointed out. On the contrary, as the prohibitions concerning ownership in whole or in part, and interest, direct or indirect, are susceptible only of the construction that the dissociation of the carrier with the products which it transports was contemplated, our duty is, if possible, to treat the other and apparently conflicting prohibitions as embracing a like purpose, and thus harmonize the provisions of the clause and prevent the necessity of approaching and passing upon the grave constitutional questions which would necessarily arise from pursuing the contrary course. This, it is urged, cannot be done, since to do so would be in effect to expunge the prohibitions against manufacturing, mining, and production from the clause, as ownership in whole or in part or interest, direct or indirect, would embrace everything which could possibly have been intended to be expressed by the terms manufacturing, mining, and production, if the proposed reconciliation of the conflict between the prohibitions be brought about. We think, however, that a brief reference to a ruling of this court concerning the effect of the interstate commerce law prior to its amendment by the Hepburn act, will serve to make clear the unsoundness of the proposition. The case referred to is that of *New York, N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 361, 50 L. ed. 515, 26 Sup. Ct. Rep. 272. In that case, after much consideration, it was held that the prohibitions of the interstate commerce *act as to uniformity of rates and against rebates operated to prevent a carrier engaged in interstate commerce from buying and selling a commodity which it carried in such a way as to frustrate the provisions of the act, even if the effect of applying the act would be substantially to render buying and selling by an interstate carrier of a commodity which it transported practically impossible. In thus deciding, however, it became necessary (pp. 399, 400) to refer to rulings of the Interstate Commerce Commission construing the act to regulate commerce, made not long after the enactment of the statute, in which it was held that where interstate commerce carriers were engaged in manufacturing, mining, producing, and carrying commodities in virtue of state charters authorizing them so to do, granted prior to the enactment of the act to regulate commerce, that act could not be applied without confiscation, except in so

far as the requirement of reasonableness of rates was concerned. While referring to those administrative rulings, and declaring that, in view of their long standing, the construction which had been thus given to the act should not be departed from, "at least, until Congress has legislated on the subject" (p. 401), it was nevertheless plainly intimated that legislation which compelled a carrier, even although authorized by its charter before the passage of the act to regulate commerce to engage in the production as well as transportation of commodities, to dissociate itself before transportation from the products which it manufactured, mined, or produced, would not, when enforced by proper rules and regulations, amount to confiscation. When, therefore, the subject of ownership, in whole or in part, or the interest of a carrier, direct or indirect, in the product which it transported, came to be considered, and the duty to dissociate before transportation came to be legislatively imposed, it is quite natural, in view of the prior administrative rulings and the intimations of this court, conveyed in the opinion in the *New York, N. H. & H. R. Co. Case*, to assume that the provisions as to manufacturing, mining, and production, while they may be somewhat redundant, were nevertheless expressed *for the[412 purpose of leaving no possible room for the implication that it was not the intention to include ownership resulting from manufacture, mining, production, etc., even although the right to manufacture, mine, and produce was sanctioned by state charters prior to the enactment of the act to regulate commerce. Looking at the statute from another point of view the same result is compelled. Certain it is that we could not construe the statute literally without bringing about the irreconcilable conflict between its provisions which we had previously pointed out, and therefore some rule of construction is essential to be adopted in order that the statute may have a harmonious operation. Under these circumstances, in view of the far-reaching effect to arise from giving to the first two prohibitions a meaning wholly antagonistic to the remaining ones, we think our duty requires that we should treat the prohibitions as having a common purpose; that is, the dissociation of railroad companies, prior to transportation, from articles or commodities, whether the association resulted from manufacture, mining, production, or ownership, or interest, direct or indirect. In other words, in view of the ambiguity and confusion in the statute, we think the duty of interpreting should not be so exerted as to cause one portion of the statute which, as conceded by the government, is radical and far-reaching in

its operation if literally construed, to extend and enlarge another portion of the statute which seems reasonable and free from doubt if also literally interpreted. Rather it seems to us our duty is to restrain the wider, and, as we think, doubtful prohibitions, so as make them accord with the narrow and more reasonable provisions, and thus harmonize the statute.

Nor is there force in the contention that because the going into effect of the clause was postponed for a period of nearly two years, therefore the far-reaching and radical effects which the government attributes to the clause must have been contemplated by Congress. We think, on the contrary, it is reasonable to infer, in view of the facts disclosed in the statement which we have previously excerpted, that the delay accorded 413] is entirely consistent with the assumption that it was so granted to afford the time essential to make the changes which would be required to conform to the commands of the clause as we have interpreted it, such as providing the facilities for dissociation by sale at the point of production before transportation or segregation by means of the organization of bona fide manufacturing, mining, or producing corporations.

It remains to determine the nature and character of the interest embraced in the words "in which it is interested, directly or indirectly." The contention of the government that the clause forbids a railroad company to transport any commodity manufactured, mined, or produced, or owned in whole or in part, etc., by a bona fide corporation in which the transporting carrier holds a stock interest, however small, is based upon the assumption that such prohibition is embraced in the words we are considering. The opposing contention, however, is that interest, direct or indirect, includes only commodities in which a carrier has a legal interest, and therefore does not exclude the right to carry commodities which have been manufactured, mined, produced or owned by a separate and distinct corporation, simply because the transporting carrier may be interested in the producing, etc., corporation as an owner of stock therein. If the words in question are to be taken as embracing only a legal or equitable interest in the commodities to which they refer, they cannot be held to include commodities manufactured, mined, produced, or owned, etc., by a distinct corporation merely because of a stock ownership of the carrier. *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 588, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Conley v. Mathieson Alkali Works*, 190 U. S. 406, 47 L. ed. 1113, 23 Sup. Ct. Rep. 728. And that this is well settled also in the law of Pennsylvania is not questioned. 53 L. ed.

It is unnecessary to pursue the subject in more detail, since it is conceded in the argument for the government that, if the clause embraces only a legal interest in an article or commodity, it cannot be held to include a prohibition against carrying a commodity simply because it had been manufactured, mined, or produced, or is owned by a corporation in *which the carrier is a stock-[414 holder. The contention of the government substantially rests upon the assumption that, unless the words be given the meaning contended for, they are without significance. That this is clearly not the case is well illustrated by the *New York, N. H. & H. R. Co. Case*, supra. In that case the *Chesapeake & Ohio Railway Company* it was shown at one time not only directly engaged in buying, selling, and transporting coal, but subsequently, when a statute was passed in West Virginia prohibiting such dealings, it resorted to indirect methods for the continuance of its previous practice. It may well be that the very object of the provision was to reach and render impossible the successful employment of methods of the character referred to. Certain it is, however, that, in the legislative progress of the clause in the Senate, where the clause originated, an amendment in specific terms, causing the clause to embrace stock ownership, was rejected, and immediately upon such rejection an amendment, expressly declaring that interest, direct or indirect, was intended, among other things, to embrace the prohibition of carrying a commodity manufactured, mined, produced, or owned by a corporation in which a railroad company was interested as a stockholder, was also rejected. 40 Cong. Rec. pt. 7, pp. 7012-7014. And the considerations just stated, we think, completely dispose of the contention that stock ownership must have been in the mind of Congress, and therefore must be treated as though embraced within the evil intended to be remedied, since it cannot in reason be assumed that there is a duty to extend the meaning of a statute beyond its legal sense, upon the theory that a provision which was expressly excluded was intended to be included. If it be that the mind of Congress was fixed on the transportation by a carrier of any commodity produced by a corporation in which the carrier held stock, then we think the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it. At all events, in view of the far-reaching consequences of giving the statute such a construction as that contended for, as indicated by the *statement[415 taken from the answers and returns which we have previously inserted in the margin, and of the questions of constitutional power

which would arise if that construction was adopted, we hold the contention of the government not well founded.

We then construe the statute as prohibiting a railroad company engaged in interstate commerce from transporting in such commerce articles or commodities under the following circumstances and conditions: (a) When the article or commodity has been manufactured, mined, or produced by a carrier or under its authority, and, at the time of transportation, the carrier has not, in good faith, before the act of transportation, dissociated itself from such article or commodity; (b) When the carrier owns the article or commodity to be transported, in whole or in part; (c) When the carrier, at the time of transportation, has an interest, direct or indirect, in a legal or equitable sense, in the article or commodity, not including, therefore, articles or commodities manufactured, mined, produced, or owned, etc., by a bona fide corporation in which the railroad company is a stockholder.

The question then arises whether, as thus construed, the statute was inherently within the power of Congress to enact as a regulation of commerce. That it was, we think is apparent; and if reference to authority to so demonstrate is necessary, it is afforded by a consideration of the ruling in the New York, N. H. & H. R. Co. Case, to which we have previously referred. We do not say this upon the assumption that, by the grant of power to regulate commerce, the authority of the government of the United States has been unduly limited, on the one hand, and inordinately extended, on the other, nor do we rest it upon the hypothesis that the power conferred embraces the right to absolutely prohibit the movement between the states of lawful commodities, or to destroy the governmental power of the states as to subjects within their jurisdiction, however remotely and indirectly the exercise of such powers may touch interstate commerce. On the contrary, putting these considerations entirely ⁴¹⁶out of mind, the conclusion just previously stated rests upon what we deem to be the obvious result of the statute as we have interpreted it; that it merely and unequivocally is confined to a regulation which Congress had the power to adopt and to which all pre-existing rights of the railroad companies were subordinated. *Armour Packing Co. v. United States*, 209 U. S. 56, 52 L. ed. 681, 28 Sup. Ct. Rep. 428.

We think it unnecessary to consider at length the contentions based upon the due process clause of the 5th Amendment. In form of statement those contentions apparently rest upon the ruinous consequences which it is assumed would be operated upon the property rights of the carriers by the

enforcement of the clause, interpreted as the government construed it. For the purpose of our consideration of the subject it may be conceded, as insisted on behalf of the United States, that these contentions proceed upon the mistaken and baleful conception that inconvenience, not power, is the criterion by which to test the constitutionality of legislation. When, however, mere forms of statement are put aside and the real scope of the argument at bar is grasped, we think it becomes clear that, in substance and effect, the argument really asserts that the clause, as construed by the government, is not a regulation of commerce, since it transcends the limits of regulation and embraces absolute prohibitions, which, it is insisted, could not be exerted in virtue of the authority to regulate. The whole support upon which the propositions and the arguments rest hence disappears as a result of the construction which we have given the statute. Through abundance of caution we repeat that our ruling here made is confined to the question before us. Because, therefore, in pointing out and applying to the statute the true rule of construction, we have indicated the grave constitutional questions which would be presented if we departed from that rule, we must not be considered as having decided those questions. We have not entered into their consideration, as it was unnecessary for us to do so.

Without elaborating, we hold the contention that the clause *under considera-^[417]tion is void because of the exception as to timber, and the manufactured products thereof, is without merit. Deciding, as we do, that the clause, as construed was a lawful exercise by Congress of the power to regulate commerce, we know of no constitutional limitation requiring that such a regulation, when adopted, should be applied to all commodities alike. It follows that even if we gave heed to the many reasons of expedience which have been suggested in argument against the exception, and the injustice and favoritism which it is asserted will be operated thereby, that fact can have no weight in passing upon the question of power. And the same reasons also dispose of the contention that the clause is void as a discrimination between carriers.

With reference to the contention that the commodities clause is void because of the nature and character of the penalties which it imposes for violations of its provisions, within the ruling in *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441, we think it also suffices to say that even if the delay which the clause provided should elapse between its enactment and the going into effect of the same does not absolutely exclude the clause

from the ruling in *Ex parte Young*,—a question which we do not feel called upon to decide,—nevertheless the proposition is without merit, because (a) no penalties are sought to be recovered in these cases, and (b) the question of the constitutionality of the clause relating to penalties is wholly separable from the remainder of the clause, and, therefore, may be left to be determined should an effort to enforce such penalties be made.

There is a contention as to one of the defendants, the Delaware & Hudson Company, to which we, at the outset, referred, which requires to be particularly noticed. Under the charters granted to the company by the states of New York and Pennsylvania, it was authorized to secure coal lands and mine coal, and, without going into detail, was originally authorized to construct a canal, and, ultimately, a railroad for the purpose of transporting, for its own account, the products of its mines; and, undoubtedly, vast sums of money have been invested [418]*in carrying out these purposes. It is true also that the company is the owner of stock in various coal corporations. The claim now to be disposed of is that, by the true construction of its charters, the Delaware & Hudson Company is not a railroad company within the meaning of the term as used in the commodities clause, but is really a coal company. The contention, we think, is without merit. The facts stated in the excerpts from the answer and returns of the company, which we have previously placed in the margin, leave no doubt that the corporation was engaged as a common carrier by rail in the transportation of coal in the channels of interstate commerce, and as such we think it was a railroad company within the purview of the clause, and subject to the regulations which are embodied therein, as we have interpreted them.

As the court below held the statute wholly void for repugnancy to the Constitution, it follows from the views which we have expressed that the judgments and the decrees entered below must be reversed. As, however, it was conceded in the discussion at bar that, in view of the public and private interests which were concerned, the United States did not seek to enforce the penalties of the statute, but commenced these proceedings with the object and purpose of settling the differences between it and the defendants, concerning the meaning of the commodities clause and the power of Congress to enact it, as correctly interpreted, and upon this view the proceedings were heard below by submission upon the pleadings, we are of opinion that the ends of justice will be subserved not by reversing and remanding with particular directions as to each

of the defendants, but by reversing and remanding with directions for such further proceedings as may be necessary to apply and enforce the statute as we have interpreted it.

And it is so ordered.

Mr. Justice Harlan, dissenting:

As these cases have been determined wholly on the construction of those parts of the Hepburn act [34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892] which are here in question, *and as [419 Congress if it sees fit, may meet that construction by additional legislation, I deem it unnecessary to enter upon an extended discussion of the various questions arising upon the record, and will content myself simply with an expression of my nonconcurrence in the view taken by the court as to the meaning and scope of certain provisions of the act. In my judgment the act, reasonably and properly construed, according to its language, includes within its prohibitions a railroad company transporting coal, if, at the time, it is the owner, legally or equitably, of stock—certainly, if it owns a majority or all the stock—in the company which mined, manufactured, or produced, and then owns, the coal which is being transported by such railroad company. Any other view of the act will enable the transporting railroad company, by one device or another, to defeat altogether the purpose which Congress had in view, which was to divorce, in a real, substantial sense, production and transportation, and thereby to prevent the transporting company from doing injustice to other owners of coal.

ELEANOR ERICA STRONG and Richard P. Strong, Her Husband, Plffs. in Err. and Appts.,

v.

FRANCISCO GUTIERREZ REPIDE.

(See S. C. Reporter's ed. 419-435.)

Appcal and error — review of facts.

1. The facts, when the courts below differ, will be reviewed by the Federal Su-

NOTE.—On concealment as fraud—see note to *Cleaveland v. Smith*, 33 L. ed. U. S. 384.

Fraud in purchase of stock by corporate officer or director.

A sharp conflict exists over the question whether the relations between a director or officer of a corporation, on the one hand, and shareholders, on the other, are not of such a fiduciary relation as to make it the duty of the former to disclose the knowl-

preme Court under the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369), § 10, on appeal from or writ of error to the judgment of the supreme court of the Philippine Islands.

[For other cases, see Appeal and Error, 4889-4891, in Digest Sup. Ct. 1908.]

Fraud — concealment — purchase of stock by director.

2. A purchase of stock in a corporation by a director and owner of three fourths of the entire capital stock, who was also administrator general of the company, and engaged in the negotiations which finally led to the sale of the company's lands to the Philippine Islands government at a price which greatly enhanced the value of the stock, was fraudulent as procured by "insidious machinations" inducing the execution of the contract of sale, within the

edge which he possesses affecting the value of the stock before he purchases such stock from a shareholder.

The pioneer case on this precise question is *Tippecanoe County v. Reynolds*, 44 Ind. 509, where it was held that a director and officer of a corporation is not a trustee of the shareholders with respect to their stock, so as to make it his duty, when purchasing such stock, to pay an adequate and fair price for it, to take no advantage of the relation which he bears to the company or the knowledge acquired thereby, and to disclose to the shareholder all the material facts within his knowledge not known to such shareholder, which affect the value of the stock.

Other cases are to the same effect. Thus, it has been held that an officer of a corporation does not sustain a relation to a shareholder as requires him, when purchasing the latter's stock, to disclose its value. *O'Neil v. Ternes*, 32 Wash. 528, 73 Pac. 692.

So, in *Haarstick v. Fox*, 9 Utah, 110, 33 Pac. 251, it is held that there is no confidential relation between the president of a corporation and a stockholder, so far as a purchase of stock by the former from the latter is concerned; and so long as such officer remains silent, and does not actively mislead the stockholder, the transaction cannot be set aside.

And, in *Walsh v. Goulden*, 130 Mich. 531, 90 N. W. 406, the court said that, while directors stand in a fiduciary relation to the corporation itself, they do not stand in that relation when dealing with other stockholders for the purchase or sale of stock. In such transactions there must be some actual misrepresentation to constitute fraud. Mere silence is not sufficient.

So, in *Hooker v. Midland Steel Co.* 215 Ill. 444, 106 Am. St. Rep. 170, 74 N. E. 445, it was held that a director does not sustain a fiduciary relation to an individual stockholder with respect to his stock, and that a purchase of the latter's stock will not be set aside for the mere failure on the part of the director to disclose any information he may have, affecting the value of such stock,

meaning of P. I. Code, art. 1269, defining deceit, where he employed an agent to make the purchase, concealing both his own identity as the purchaser, and his knowledge of the state of the negotiations and their probable successful result.

[For other cases, see *Fraud and Deceit*, II. in Digest Sup. Ct. 1908.]

Fraud — concealment — purchase of stock.

3. The purchaser of corporate stock cannot escape liability for his fraud in concealing facts affecting its value which he was in good faith bound to disclose, on the theory that, because of the insistence of the seller that her agent was not authorized to make the sale, there had never been any consent on her part, obtained by fraud or otherwise, where the court finds that the agent's authority was sufficient, since,

And, so, officers and directors of a corporation have been held free to purchase stock from a shareholder on the same terms as others, and to avail themselves, in making such purchase, of their superior knowledge of the real value of the stock, or of their superior foresight as to its future value. *Deaderick v. Wilson*, 8 Baxt. 108.

In *Krumbhaar v. Griffiths*, 151 Pa. 223, 25 Atl. 64, the view of the master that no confidential relations exist between an officer of the corporation and one from whom such officer purchases stock is apparently approved, although the decision is actually based upon the master's finding that the director had no knowledge, at the time of the purchase, of any facts which would enhance the value of the stock.

And in *Fisher v. Budlong*, 10 R. I. 525, the court said that if an officer of a corporation goes to the shareholder, and, without making any representations, makes an offer of a certain sum, which the shareholder accepts, there is no ground for complaint. The very fact that a corporate officer, presumed to be acquainted fully with the condition of the corporation, offers a certain sum, should, though this court, put the seller on his guard, and lead him reasonably to suppose that he might obtain a better price.

The contrary view apparently first found expression in *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232, where the relation of a director to a shareholder was held to be such that, in making a purchase of the latter's stock, the former is bound to make a full disclosure of any fact within his knowledge and unknown to the shareholder, which is of a character calculated to affect the selling price, and can, without detriment to the interests of the corporation, be imparted to the shareholder, the sources of information not being equally accessible to both parties. And this principle was applied to invalidate a purchase of shares by a director at \$110 per share, where he concealed the fact that a sale of the entire plant was contemplated at a price which made the stock worth from \$140 to \$185 per share,

in legal effect, her consent will be deemed induced by the fraud.

[For other cases, see Fraud and Deceit, II. in Digest Sup. Ct. 1908.]

[No. 110.]

Argued March 10, 11, 1909. Decided May 3, 1909.

IN ERROR to and APPEAL from the Supreme Court of the Philippine Islands to review a judgment which, reversing the judgment of the Court of First Instance of the City of Manila, dismissed the complaint in an action to recover certain shares of corporate stock from the purchaser on the ground that such shares were sold by plaintiff's agent without authority,

"To say," declared Lamar, J., in the case last cited, "that a director who has been placed where he himself may raise or depress the value of the stock, or in a position where he first knows of facts which may produce that result, may take advantage thereof, and buy from or sell to one whom he is directly representing, without making a full disclosure, and putting the stockholder on an equality of knowledge as to these facts, would offer a premium for faithless silence, and give a reward for the suppression of truth."

This view has also found its supporters, and it has been held that a director or managing officer of a corporation, having knowledge of the condition of the affairs of such corporation, because of the trust relation and the superior opportunities afforded for acquiring information, must inform a shareholder not actively engaged in the corporate management, of the true condition of the affairs of the corporation, before he can rightfully purchase the stock of such shareholder. *Stewart v. Harris*, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 A. & E. Ann. Cas. 873.

And the law is said to make it the duty of an officer or director of a company, who is seeking to purchase from a shareholder the latter's holdings of stock, to disclose to the latter facts which have come to his knowledge by virtue of his relations to the company, and which are not known to the stockholder, and to disclose such plans and purposes as the corporation may have for the future which have a bearing upon the value of the stock. *Steinfeld v. Nielson* (Ariz.) 100 Pac. 1094.

In *Carpenter v. Danforth*, 19 Abb. Pr. 225, the court said that, although probably the relation of trustee and *cestui que trust* did not strictly exist between a trustee of a national bank and the administrator of a deceased cotrustee, yet, the relationship was such that where the former desired to buy the stock, he was bound to disclose to the administrator all the material facts within his knowledge which tended to enhance the value of the stock.

In another New York case the act of an

and that the purchaser had fraudulently concealed facts affecting the value of such stock. Reversed. The judgment of the Court of First Instance affirmed.

See same case below, 6 Philippine, 680.

Statement by Mr. Justice Peckham:

This action was commenced on the 12th day of January, 1904, in the court of first instance of the city of Manila, Philippine Islands, by the plaintiffs in error, Eleanor Erica Strong and Richard P. Strong her husband, against the defendant in error. It was brought by the plaintiff Mrs. Strong, as the owner of 800 shares of the capital stock of the Philippine Sugar Estates Development Company, Limited (the other plaintiff being added as her husband), to recover such

officer of a corporation in procuring a transfer of stock to himself for a nominal consideration by stating that it was worthless, when in fact it was valuable, was held not to be, as a matter of law, a breach of any fiduciary relation, and of itself not a ground for avoiding the sale. *Stark v. Soule*, 9 N. Y. S. R. 555. The court, however, qualified its statement that there was no legal embarrassment in the way of the purchase, by a director, of stock from a shareholder, by adding that, in view of the superior means of knowledge of its value, slight circumstances showing a purchase, and which have the effect, to mislead the seller, resulting in a purchase much below its real value, might afford occasion for redress.

The rule which forbids a director or officer of a corporation from taking advantage of the knowledge which comes to him by virtue of his position when making a purchase of stock from a shareholder applies to a person who, though not an officer or director, controls the affairs of the corporation as a majority stockholder, through the board of directors. *Steinfeld v. Nielson*, supra.

There can, of course, be no room for the application of this rule where the sources of information are equally accessible to both parties.

To defeat a sale by a shareholder to an officer or director of a corporation on this ground, the misrepresentation must be of some fact not within the knowledge of the shareholder, or readily ascertainable by him, which will reasonably have the effect to bring about the sale or the nondisclosure must be of some fact not known to the shareholder, or presumptively not readily ascertainable by him, which he is entitled to know, and the nondisclosure of which may have put him at a disadvantage in his dealing. *Steinfeld v. Nielson*, supra.

A shareholder who was himself a director and president of the corporation cannot rescind a sale of his stock to codirectors for fraudulently inducing him to part with the stock at a low figure, where he was as well acquainted with the affairs of the corporation as they, and dealt with them in the be-

shares from defendant (who was already the owner of 30,400 of the 42,030 shares issued by the company), on the ground that the shares had been sold and delivered by plaintiff's agent to the agent of defendant without authority from plaintiff; and also on the ground that defendant fraudulently concealed from plaintiff's agent, one F. Stuart Jones, facts affecting the value of the stock so sold and delivered. The stock was of the par value of \$100 per share, Mexican currency.

The plaintiff never had any negotiations for the sale of the stock herself, and was ignorant that it was sold until some time after the sale, the negotiations for which took place between an agent of the plaintiff and an agent of defendant, the name of the defendant being undisclosed.

In addition to his ownership of almost three fourths of the shares of the stock of the company, the defendant was one of the five directors of the company, and was elected by the board the agent and administrator general of such company, "with exclusive intervention in the management" of its general business.

The defendant put in issue the lack of authority of the agent of the plaintiff, denied all fraud, and alleged that the purchase of the stock from plaintiff's agent (which stock was payable to bearer and transferable by delivery) was made by one Albert

Kauffman, who afterwards sold and conveyed the same to the *defendant, and that[422 the defendant, prior to the commencement of the suit, and prior to any demand made upon him by the plaintiff in error herein, had sold, transferred, and delivered the stock to Luis Gutierrez, a citizen and resident of Spain. (He was a brother of the defendant.)

In April, 1904, the case came on for trial in the court of first instance, which, on the 29th of that month, duly decided it and stated certain facts in the cause upon which it based its opinion and judgment, among which were the facts that the agent of the plaintiff had no authority to sell or transfer the shares of stock in question, and also that the transaction resulting in the delivery of the stock to the agent of the defendant was fraudulent, because the defendant concealed from the plaintiff's agent facts affecting the value of the stock which the defendant was in good faith bound to reveal, by reason of which the sale of the stock to defendant was made for the total sum of \$16,000, Mexican currency, while within two months and a half the shares were worth \$76,256, United States currency. Upon the findings the court directed that the plaintiff recover from the defendant the sum found to be due by the court, which (after deducting the \$16,000, Mexican currency) amounted to \$138,352.71, Philippine currency, and the costs of suit, and it was ordered that the

lief that they were trying to force him to surrender his stock. *Perry v. Pearson*, 135 Ill. 218, 25 N. E. 636.

The secretary of a corporation, who was also a stockholder, cannot maintain an action against the others officers for fraudulent representations upon which he acted, and which were alleged to have been made to induce him to dispose of his stock to them at a loss where they amount merely to representations that the corporation was going down, that one had bought the other's shares, and was going to run the business as a family affair, and would depose the secretary, and that this was the last chance for him to get his money out; and the fact that he was not permitted to keep the books down to date, so that he did not know the actual state of the business, is immaterial. *Boulden v. Stilwell*, 100 Md. 543, 1 L.R.A. (N.S.) 258, 60 Atl. 609.

Financial distress of the shareholder does not make a purchase of his stock by a director or officer at an inadequate price a fraudulent one. *Steinfeld v. Nielson*, supra.

A sale of stock to a director is not so tainted with fraud as to be voidable because induced by an assessment upon the shareholder's subscription and threatened future assessments which may not be necessary for corporate purposes, and may not be enforced if the directors succeed in their efforts to purchase all the outstanding stock. *Grant v. Attrill*, 11 Fed. 469.

Concealing the purchaser's identity may, as in *STRONG v. REPIDE*, materially influence the court's decision.

A president of a corporation, who professes to aid a shareholder in selling his stock, and effects a sale thereof at a certain price, causing the transfer to be made to a third person whom the shareholder supposed to be the purchaser, but who really took it for the president, and afterwards transferred it to him, is liable to the shareholder for the difference between the real value of the stock and the price for which it was sold. *Fisher v. Budlong*, 10 R. I. 525.

So, a purchase of the stock of a corporation which was in process of voluntary dissolution and liquidation, by a former officer, who was also one of the trustees in the dissolution proceedings, and who was acting in such purchase through a third person, and as agent of his wife, was fraudulent, where he concealed the fact that, as such trustee, he had in his possession a dividend which had been declared upon such stock, and misrepresented the value of the corporate assets, and procured for \$1,200 property worth \$15,000. *Traer v. Clews*, 115 U. S. 528, 29 L. ed. 467, 6 Sup. Ct. Rep. 155.

No attempt has here been made to include cases where the question of fraud was considered entirely independently of the peculiar relation between officer and shareholder.

judgment might be satisfied by the delivery to the plaintiff, Mrs. Strong, of her 800 shares of stock within the time mentioned in the decree, in which event the plaintiff was to pay the defendant \$16,000, Mexican currency, or its equivalent in Philippine currency. Other particulars were stated in the decree.

On May 3, 1904, a motion was made by defendant for a new trial, which, on May 9, 1904 was overruled.

A bill of exceptions was then made and appeal filed. Subsequently and on January 18, 1906, the same was duly argued in the supreme court of the Philippine Islands and, on April 28, 1906, a decision was rendered by the court, holding that the agent of the plaintiff had no power to sell or deliver her stock, and it affirmed the decree of the court 423]of first instance *on that ground, but not on the second ground taken by that court, that the sale of the stock through the plaintiff's agent had been procured by fraud on the part of the defendant.

Subsequently to the affirmance of the judgment, the defendant, through his counsel, made a motion for a new trial on the ground of newly-discovered evidence, which consisted of a power of attorney (that had been mislaid and after the trial had been found) from Mrs. Strong to Mr. F. Stuart Jones and Mr. Robert H. Wood, which authorized both, or either of them, to sell or otherwise dispose of the property of the plaintiff as they or he might choose. After opposition this motion was granted and leave given to the parties to submit new evidence as to the nature of the authority delegated by the plaintiff in error to her agent Jones, and under that permission the newly-discovered power of attorney was put in evidence. Upon that piece of evidence the court held that the authority of the agent Jones was sufficient, and that the paper became absolutely decisive of the issues in the case, and the order affirming the judgment of the court below was therefore set aside, the judgment of the court of first instance reversed, and the action dismissed upon its merits. From that decree of reversal and dismissal the plaintiffs seek to bring the case here for review, and have sued out a writ of error and taken an appeal.

The facts out of which the controversy arises are in substance these:

In 1902 it was thought important for the government of the United States to secure title, if reasonably possible, to what were called the friar lands in the Philippine Islands. To that end various inquiries were made on the part of the government, from time to time, as to the possibility of obtaining title to all those lands, and what would be the probable expense. The lands were

not owned by the same people, but were divided among different and separate owners. The Philippine Sugar Estates Development Company, Limited, owned of these lands what are more particularly described as the Dominican lands, *and they were re-424 garded as nearly one half the value of all the friar lands.

On July 5, 1903, the governor of the Philippine Islands, on behalf of the Philippine government, made an offer of purchase for the total sum of \$6,043,219.47 in gold for all the friar lands, though owned by different owners. This offer, so far as concerned that portion of the lands owned by defendant's company, was rejected by defendant in his capacity as majority shareholder, without any consultation with the other shareholders. The representatives of all the different owners of all the lands, including defendant's company, in answer to the above offer, then fixed their selling price at \$13,700,000 for all such lands. During the negotiations consequent upon these different offers, which lasted for some time after the first offer was made, an offer was finally, and towards the end of October, 1903, made by the governor of \$7,535,000. All the owners of all these friar lands, with the exception of the defendant, who represented his company, were willing and anxious to accept this offer and to convey the lands to the government at that price. He alone held out for a better offer while all the other owners were endeavoring to persuade him to accept the offer of the government. The defendant continued his refusal to accept until the other owners consented to pay to his company \$335,000 of the purchase price for their land, and until the government consented that a thousand hectares should be excluded from the sale to it of the land of defendant's company. This being agreed to, the contract for the sale was finally signed by the defendant as attorney in fact for his company, December 21, 1903. The defendant, of course, as the negotiations progressed, knew that the decision of the question lay with him, and that if he should decide to accept the last offer of the government, his decision would be the decision of his company, as he owned three fourths of its shares, and the negotiations would then go through as all the owners of the balance of the land desired it. If the sale should not be consummated, and things should remain as they were, the defendant also knew that the *value of the lands and 425 of the shares in the company would be almost nothing. He himself says, in speaking of these lands owned by his company, that had the government "given the haciendas the protection which they ought to have received, they would have been worth \$6,000,000 gold; but, considering the abnormal con-

dition in which they were on account of the failure of the government to protect these haciendas, it is impossible to fix any value; they were worth nothing; they were a charge." Also, the company had paid no dividends, and only lived on its credit, and could not even pay taxes. The company had no other property of any substantial value than these lands. They were its one valuable asset.

While this state of things existed, and before the final offer had been made by the governor, the defendant, although still holding out for a higher price for the lands, took steps, about the middle or latter part of September, 1903, to purchase the 800 shares of stock in his company owned by Mrs. Strong, which he knew were in the possession of F. Stuart Jones, as her agent. The defendant, having decided to obtain these shares, instead of seeing Jones, who had an office next door, employed one Kauffman, a connection of his by marriage, and Kauffman employed a Mr. Sloan, a broker, who had an office some distance away, to purchase the stock for him, and told Sloan that the stock was for a member of his wife's family. Sloan communicated with the husband of Mrs. Strong, and asked if she desired to sell her stock. The husband referred him to Mr. Jones for consultation, who had the stock in his possession. Sloan did not know who wanted to buy the shares, nor did Jones when he was spoken to. Jones would not have sold at the price he did had he known it was the defendant who was purchasing, because, as he said, it would show increased value, as the defendant would not be likely to purchase more stock unless the price was going up. As the articles of incorporation, by subdivision 20, required a resolution of the general meeting of stockholders for the purpose of selling more than one hacienda, and as no such general meeting had been 426]called at *the time of the sale of the stock, Mr. Jones might well have supposed there was no immediate prospect of a sale of the lands being made, while, at the same time, defendant had knowledge of the probabilities thereof, which he had acquired by his conduct of the negotiations for their sale, as agent of all the shareholders, and while acting specially for them and himself.

The result of the negotiations was that Jones, on or about October 10, 1903, assuming that he had the power, and without consulting Mrs. Strong, sold the 800 shares of stock for \$16,000, Mexican currency, delivering the stock to Kauffman in Sloan's office, who paid for it with the check of Rueda Hermanos for \$18,000, the surplus \$2,000 being arranged for, and Kauffman being paid \$1,800 by defendant for his services. The defendant thus obtained the 800 shares for

about one tenth of the amount they became worth by the sale of the lands between two and three months thereafter. In all the negotiations in regard to the purchase of the stock from Mrs. Strong, through her agent Jones, not one word of the facts affecting the value of this stock was made known to plaintiff's agent by defendant, but, on the contrary, perfect silence was kept. The real state of the negotiations with the government was not mentioned, nor was the fact stated that it rested chiefly with the defendant to complete the sale. The probable value of the shares in the very near future was thus unknown to anyone but defendant, while the agent of the plaintiff had no knowledge or suspicion that defendant was the one seeking to purchase the shares. The agent sold because, as he testified, he wanted to invest the money in some kind of property that would pay dividends, and he was expecting nothing from this company, as negotiations for the sale of the lands had gone on so long, and there appeared no prospect of any sale being made; at any rate, not for a very long time.

It is undeniable that, during all this time, the subject of the sale of the friar lands was frequently mooted and its probabilities publicly discussed in a general way. Such discussion was founded upon rumors and gossip as to the condition of the *negotia- 427 tions. The public press referred to it not infrequently, but the actual state of the negotiations, the actual probabilities of the sale being consummated, and the particular position of power and influence which the defendant occupied in such negotiations, prior to the time of the purchase of plaintiff's stock, were not accurately known by plaintiff's agent or by anyone else outside those interested in the matter as negotiators.

Mr. Henry E. Davis argued the cause and filed a brief for plaintiffs in error and appellants:

The court below erred in not finding that, upon all the evidence, the defendant was guilty of the fraud alleged.

8 Manresa, p. 623; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232; *Stewart v. Harris*, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 A. & E. Ann. Cas. 873; *Miner v. Belle Isle Ice Co.* 93 Mich. 97, 17 L.R.A. 412, 53 N. W. 218; *Ervin v. Oregon R. & Nav. Co.* 23 Blatchf. 517, 27 Fed. 631; *Wheeler v. Abilene Nat. Bank Bldg. Co.* 16 L.R.A. (N.S.) 892, 89 C. C. A. 477, 159 Fed. 391; *Sidell v. Missouri P. R. Co.* 24 C. C. A. 216, 51 U. S. App. 1, 78 Fed. 724; *Ritchie v. McMullen*, 25 C. C. A. 50, 47 U. S. App. 470, 79 Fed. 522; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043; *Hunter v. Hunter*, 50 Mo. 449; *Stone v. Moody*, 41 Wash. 680,

5 L.R.A. (N.S.) 799, 84 Pac. 617, 85 Pac. 346; 1 Bigelow, Fr. pp. 231, 297, 312; 1 Domat, Civil Law, p. 574, No. 1457, p. 584, No. 1490, p. 510, Nos. 1259, 1260, p. 511, No. 1262.

Under the Spanish law, fraud is cheating. The essential element is deceit, and the fraud is the injury accomplished by means of the deceit.

Escriche, Fr.

Mr. George E. Hamilton argued the cause, and, with Messrs. John W. Yerkes, M. J. Colbert, and John J. Hamilton, filed a brief for defendant in error and appellee:

From the nature of the cause of action, the character of the pleadings and relief prayed for, the fact that the proof was taken and the hearing had before the court without the intervention of a jury, it would seem that it is, in all essential qualities, and even in form, a suit in equity; and therefore could come to this court only by appeal, and not by writ of error.

Walker v. Drevelle, 12 Wall. 440, 20 L. ed. 429; Sarchet v. United States, 12 Pet. 143, 9 L. ed. 1033; Wiscart v. Dauchy, 3 Dall. 321, 1 L. ed. 619.

The extreme rule that a director and stockholder must disclose his intention to another stockholder before buying stock from him has no application, even if that rule were the correct rule under the authorities controlling the question in this country; but it is submitted that such a rule is not supported by the current of American authority.

Hooker v. Midland Steel Co. 117 Ill. App. 441; Haarstick v. Fox, 9 Utah, 110, 33 Pac. 251; Walsh v. Goulden, 130 Mich. 531, 90 N. W. 406; Cook, Corp. 4th ed. § 320, p. 622; Taylor, Priv. Corp. 5th ed. § 698; Beach, Priv. Corp. § 614.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The court of first instance at Manila gave judgment in favor of the plaintiffs on two grounds discussed in the opinion, one ground being that the agent of plaintiff, by whom the sale was concluded, had no authority to make it, and hence the delivery of the stock by him to defendant's agent was illegal; the other ground was that the defendant had been guilty of fraud in concealing certain facts from the seller affecting the value of the stock at the time when its sale was concluded.

Upon appeal to the supreme court of the islands, the judgment was affirmed by a divided court, upon the ground of the "lack of authority of the plaintiff's agent to make the sale, but not upon the ground of the alleged fraud on the part of the defendant."

53 L. ed.

Two of the judges dissented, on the ground that there was authority to make the sale, although they agreed with the majority that there was no fraud.

One of the majority held not only that there was no authority to sell, but that there was fraud, and therefore only concurred in the result in affirming the judgment for the plaintiff.

When the motion for a new trial was subsequently granted on account of newly-discovered evidence, the majority of the court, on the authority of the second power of attorney (which was the newly-discovered evidence then received), held that it was sufficient to authorize the plaintiff's agent to make the sale he did in her behalf, and, as the majority held there was no fraud in the case, the judgment for plaintiff was reversed and the complaint was dismissed.

Mr. Justice Johnson dissented, and filed a dissenting opinion in favor of the affirmance of the judgment of the court of first instance on both the grounds taken by it.

We are now called upon to review the judgment of the supreme court dismissing the complaint of the plaintiff. If the purchase of the stock by the defendant was obtained by reason of his fraud or deceit, it is not material to inquire whether the agent of the plaintiff had power to sell the stock. If fraud or deceit existed, the sale cannot stand. We shall therefore determine the question whether or not there was evidence of such fraud or deceit as would avoid the sale.

Although there is no technical finding of facts by the court of first instance, yet, in its opinion, that court does state facts upon which it bases its judgment, and which may be referred to for the purpose of determining what the facts are. On appeal or writ of error from the judgment of the supreme court of the Philippine Islands the facts (when the courts below differ) will be reviewed by this court under the 10th section of the act of July 1, 1902 (32 Stat. at L. 691, chap. 1369). *De la Rama v. De la Rama*, 201 U. S. 303, 309, 50 L. ed. 765, 767, 26 Sup. Ct. Rep. 485.

*A careful perusal of the evidence[430 brings us to the conclusion that it was ample to sustain the judgment of the court of first instance, considered with reference to the law applicable to the Philippine Islands.

The Civil Code of that jurisdiction, after providing by article 1261 for the requisites of a contract, among which is the "consent of the contracting parties," says in article 1265 as follows: "Consent given by error, under violence, by intimidation or deceit, shall be void." Articles 1266 to 1268, inclusive, explain the meaning of the words as

used in article 1265, and describe what may be error, under violence, or by intimidation. It is then provided by article 1269 that "there is deceit when, by words or insidious machinations on the part of one of the contracting parties, the other is induced to execute a contract which, without them, he would not have made." The meaning of the words "insidious machinations" may be said to be a deceitful scheme or plot with an evil design, or, in other words, with a fraudulent purpose. Thus, the deceit which avoids the contract need not be by means of misrepresentations in words. It exists where the party who obtains the consent does so by means of concealing or omitting to state material facts, with intent to deceive, by reason of which omission or concealment the other party was induced to give a consent which he would not otherwise have given. Article 1269. This is the rule of the common law also; but, in both cases, it is based upon the proposition that, under all the circumstances of the case, it was the duty of the party who obtained the consent, acting in good faith, to have disclosed the facts which he concealed. *Stewart v. Wyoming Cattle Rancho Co.* 128 U. S. 383, 388, 32 L. ed. 439, 441, 9 Sup. Ct. Rep. 101. This was the Spanish law before the adoption of the Code. *Partidas* 5, *Titulo* 5, *Ley* 57; *Partidas* 7, *Titulo* 16, *Ley* 1. See also *Scaevola*, *Codigo Civil*, articles 1269, 1270. In such cases concealment is equivalent to misrepresentation.

The question in this case, therefore, is whether, under the circumstances above set forth, it was the duty of the defendant, acting in good faith, to disclose to the agent of 431] the plaintiff *the facts bearing upon or which might affect the value of the stock.

If it were conceded, for the purpose of the argument, that the ordinary relations between directors and shareholders in a business corporation are not of such a fiduciary nature as to make it the duty of a director to disclose to a shareholder the general knowledge which he may possess regarding the value of the shares of the company before he purchases any from a shareholder, yet there are cases where, by reason of the special facts, such duty exists. The supreme courts of Kansas and of Georgia have held the relationship existed in the cases before those courts because of the special facts which took them out of the general rule, and that, under those facts, the director could not purchase from the shareholder his shares without informing him of the facts which affected their value. *Stewart v. Harris*, 69 Kan. 498, 66 L.R.A. 261, 105 Am. St. Rep. 178, 77 Pac. 277, 2 A. & E. Ann. Cas. 873; *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232. The case before us is of the same gen-

eral character. On the other hand, there is the case of *Tippecanoe County v. Reynolds*, 44 Ind. 509-515, 15 Am. Rep. 245, where it was held (after referring to cases) that no relationship of a fiduciary nature exists between a director and a shareholder in a business corporation. Other cases are cited to that effect by counsel for defendant in error. These cases involved only the bare relationship between director and shareholder. It is here sought to make defendant responsible for his actions, not alone and simply in his character as a director, but because, in consideration of all the existing circumstances above detailed, it became the duty of the defendant, acting in good faith, to state the facts before making the purchase. That the defendant was a director of the corporation is but one of the facts upon which the liability is asserted, the existence of all the others in addition making such a combination as rendered it the plain duty of the defendant to speak. He was not only a director, but he owned three fourths of the shares of its stock, and was, at the time of the purchase of the stock, administrator general of the company, with large *pow-[432] ers, and engaged in the negotiations which finally led to the sale of the company's lands (together with all the other friar lands) to the government at a price which very greatly enhanced the value of the stock. He was the chief negotiator for the sale of all the lands, and was acting substantially as the agent of the shareholders of his company by reason of his ownership of the shares of stock in the corporation and by the acquiescence of all the other shareholders, and the negotiations were for the sale of the whole of the property of the company. By reason of such ownership and agency, and his participation as such owner and agent in the negotiations then going on, no one knew as well as he the exact condition of such negotiations. No one knew as well as he the probability of the sale of the lands to the government. No one knew as well as he the probable price that might be obtained on such sale. The lands were the only valuable asset owned by the company. Under these circumstances, and before the negotiations for the sale were completed, the defendant employs an agent to purchase the stock, and conceals from the plaintiff's agent his own identity and his knowledge of the state of the negotiations and their probable result, with which he was familiar as the agent of the shareholders, and much of which knowledge he obtained while acting as such agent, and by reason thereof. The inference is inevitable that, at this time, he had concluded to press the negotiations for a sale of the lands to a successful conclusion; else, why would he desire to purchase more

shares which, if no sale went through, were, in his opinion, worthless because of the failure of the government to properly protect the lands in the hands of their then owners? The agent of the plaintiff was ignorant in regard to the state of the negotiations for the sale of the land, which negotiations and their probable result were a most material fact affecting the value of the shares of stock of the company, and he would not have sold them at the price he did had he known the actual state of the negotiations as to the lands, and that it was the defendant who was seeking to purchase the stock. 433] Concealing his identity when *procuring the purchase of the stock, by his agent, was in itself strong evidence of fraud on the part of the defendant. Why did he not ask Jones, who occupied an adjoining office, if he would sell? But, by concealing his identity, he could, by such means, the more easily avoid any questions relative to the negotiations for the sale of the lands and their probable result, and could also avoid any actual misrepresentations on that subject, which he evidently thought were necessary in his case to constitute a fraud. He kept up the concealment as long as he could, by giving the check of a third person for the purchase money. Evidence that he did so was objected to on the ground that it could not possibly even tend to prove that the prior consent to sell had been procured by the subsequent check given in payment. That was not its purpose. Of course, the giving of the check could not have induced the prior consent, but it was proper evidence as tending to show that the concealment of identity was not a mere inadvertent omission, an omission without any fraudulent or deceitful intent, but was a studied and intentional omission, to be characterized as part of the deceitful machinations to obtain the purchase without giving any information whatever as to the state and probable result of the negotiations, to the vendor of the stock, and to, in that way, obtain the same at a lower price. After the purchase of the stock he continued his negotiations for the sale of the lands, and finally, he says, as administrator general of the company, under the special authority of the shareholders, and as attorney in fact, he entered into the contract of sale December 21, 1903. The whole transaction gives conclusive evidence of the overwhelming influence defendant had in the course of the negotiations as owner of a majority of the stock and as agent for the other owners, and it is clear that the final consummation was in his hands at all times. If, under all these facts, he purchased the stock from the plaintiff, the law would indeed be impotent if the sale could not be set aside

or the defendant cast in damages for his fraud.

The supreme court of the islands, in holding that there was *no fraud in the [434 purchase, said that the responsibility of the directors of a corporation to the individual stockholders did not extend beyond the corporate property actually under the control of the directors; that they did not owe any duty to the members in respect to their individual stock, which would prevent them from purchasing the same in the usual manner. While this may, in general, be true, we think it is not an accurate statement of the case, regard being had to the facts above mentioned.

It is said that, by the Code of Commerce of the Philippine Islands the directors are declared to be mandatories of the society, and that, by article 1459 of the Spanish Civil Code, they are prohibited from acquiring by purchase, even at public or judicial auction, the property the administration or sale of which may have been intrusted to them, and that this is the extent of the prohibition. This provision has no reference to the purchase for himself, under such facts as existed here, by an officer of a corporation, or stock in the corporation owned by another. The case before us seems a plain one for holding that, under the circumstances detailed, there was a legal obligation on the part of the defendant to make these disclosures.

It is further objected, however, that the plaintiff, Mrs. Strong, denied that she had ever authorized her agent to sell this stock, and therefore, by her own evidence, there had never been any consent by her, obtained by fraud or otherwise, because there had never been any consent at all. There is nothing in this objection. Mrs. Strong contended that such authority as she had given never authorized her agent to sell this stock. That had nothing to do with the obligation of the defendant to make the disclosure of the facts already adverted to before the purchase of the stock from plaintiff's agent, and if, by reason of such failure, the defendant was guilty of a fraud in procuring the purchase from the plaintiff's agent, it was a fraud for which he became liable to the plaintiff, even though the plaintiff maintained that her agent was not authorized to sell. The court held that he was authorized, and therefore, if he sold by *reason of [435 the fraud committed by defendant, the plaintiff was thereby injured and the defendant became liable. In legal effect her consent was obtained by the fraud.

We have not overlooked the objections made in regard to the form of the judgment in the court of first instance, but are of opinion that such objections are not of a

material nature, and we are disposed to follow the course pursued by that court in this case.

Other objections made by the defendant's counsel we have examined, but do not regard them as important. We therefore reverse the judgment of the Supreme Court, dismissing the complaint, and affirm that of the Court of First Instance, and it is so ordered.

DELAWARE & HUDSON COMPANY
v.
ALBANY & SUSQUEHANNA RAILROAD
COMPANY et al.

(See S. C. Reporter's ed. 435-453.)

Corporations — action by stockholders — effort to procure corporate action.

Effort to secure action by a corporation, its directors or shareholders, need not be made and set forth with the particularity required by equity rule 94, in order to sustain a bill filed by shareholders against the corporation and its corporate lessee to obtain an accounting for unpaid rentals, where a majority of the directorate of the former corporation, to whose interest it was to assert the right to payment and demand it, were, and had been for many years, officers, directors, and employees of the other company, to whose interest it was to deny indebtedness and resist payment, and the latter company and its directors and officers controlled a working majority of the stock vote of the other corporation.

[For other cases, see Corporations, 518-529, in Digest Sup. Ct. 1908.]

[No. 416.]

Argued February 23, 24, 1909. Decided May 3, 1909.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Second Circuit presenting questions as to the necessity of attempting to secure action by a corporation, its directors and stockholders, in order to sustain a bill filed by stockholders of such corporation against it and its corporate lessee to compel an accounting for unpaid rents. Answered in the negative.

The facts are stated in the opinion.

Mr. James M. Beck argued the cause, and, with Mr. Alfred Opdyke, filed a brief for the Delaware & Hudson Company:

Before a shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain within the

corporation itself the redress of his grievances or action in conformity to his wishes. He must make an earnest, not a simulated, effort with the managing body of the corporation to induce remedial action on their part, and this must be made apparent to the court.

Hawes v. Oakland (Hawes v. Contra Costa Water Co.) 104 U. S. 450, 26 L. ed. 827; Foss v. Harbottle, 2 Hare, 461; Macdougall v. Gardiner, L. R. 1 Ch. Div. 13.

The stockholder of a corporation cannot, on his individual responsibility, commence an action for the benefit of the corporation against another corporation, without first applying to the managing body of his corporation to do so; and the fact that a majority of such managing body are also officers, directors, or employees of the corporation against which the suit is sought to be brought will not, in the absence of fraud, excuse the failure of the stockholder to make such application.

Corbus v. Alaska Treadwell Gold Min. Co. 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; Detroit v. Dean, 106 U. S. 537, 27 L. ed. 300, 1 Sup. Ct. Rep. 500; Dimpfell v. Ohio & M. R. Co. 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; Quincy v. Steel, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; Taylor v. Holmes, 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; Wolf v. Pennsylvania R. Co. 195 Pa. 95, 45 Atl. 936; Siegman v. Maloney, 65 N. J. Eq. 372, 54 Atl. 405; Brewer v. Boston Theater, 104 Mass. 378; Dunphy v. Traveller Newspaper Asso. 146 Mass. 495, 16 N. E. 426; O'Connor v. Virginia Pass. & Power Co. 184 N. Y. 53, 76 N. E. 1082.

A consideration of the few cases in which stockholders' bills have been sustained will show even more strikingly the rule as above stated.

Dodge v. Woolsey, 18 How. 331, 15 L. ed. 401; Greenwood v. Union Freight R. Co. 105 U. S. 13, 26 L. ed. 961; Doctor v. Harrington, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; Chicago v. Mills, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; Ex parte Young, 209 U. S. 123, 143, 52 L. ed. 714, 722, 13 L.R.A.(N.S.) 932, 28 Sup. Ct. Rep. 441.

Rule 94 itself assumes, in the language of this court, that the directors are presumed to act honestly and according to their best judgment for the interests of all; and this presumption cannot be overcome by the mere assertion of futility, or by the pleader's license in the use of adjectives or adverbs. The fraud charged and proven must be actual, and not constructive. Epithets do not make out fraud.

Kent v. Lake Superior Ship Canal R. & Iron Co. 144 U. S. 91, 36 L. ed. 358, 12

Sup. Ct. Rep. 650; *Fogg v. Blair*, 139 U. S. 127, 35 L. ed. 107, 11 Sup. Ct. Rep. 476.

If the complainants were excused, under the facts certified, from making any preliminary demand upon the directors, they nevertheless must show, in order to maintain their suit, that they could not have secured corporate action by an appeal to the stockholders of the Susquehanna Company.

Hawes v. Oakland and Foss v. Harbottle, supra; *Huntington v. Palmer*, 104 U. S. 482, 26 L. ed. 833; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; *Dickinson v. Consolidated Traction Co.* 114 Fed. 232.

Mr. E. Parmelee Prentice argued the cause, and, with Messrs. George Welwood Murray and Charles P. Howland, filed a brief for the Albany & Susquehanna Railroad Company et al.

The present case is not within the purpose of equity rule 94. The purpose of the rule is to prevent the maintenance of suits in Federal courts by collusion between complainants and the defendant corporation whose rights they assert.

Hawes v. Oakland (*Hawes v. Contra Costa Water Co.* 104 U. S. 450, 26 L. ed. 827; *Citizens' Sav. & T. Co. v. Illinois C. R. Co.* 205 U. S. 46, 47, 51 L. ed. 703, 704, 27 Sup. Ct. Rep. 425; *Doctor v. Harrington*, 196 U. S. 579, 588, 49 L. ed. 606, 610, 25 Sup. Ct. Rep. 355; *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; *Young v. Alhambra Min. Co.* 71 Fed. 810; *Eldred v. American Palace Car Co.* 99 Fed. 168.

The present case is not within the requirements of equity rule 94 as to demand upon directors. The bill shows, under oath, that the directors were hostile; that demand upon them would be "idle and nugatory;" that this is not a collusive suit, etc. Equity will not permit double directors, by contracts made with themselves in other capacities, to bind shareholders or the corporation.

Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509; *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, 23 L. ed. 328.

A court will not entertain litigation in which both sides are controlled by one *dominus litis*.

South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co. 145 U. S. 300, 36 L. ed. 712, 12 Sup. Ct. Rep. 921; *Mills v. Green*, 159 U. S. 651, 654, 40 L. ed. 293, 294, 16 Sup. Ct. Rep. 132; *East Tennessee, V. & G. R. Co. v. Southern Teleg. Co.* 125 U. S. 695, 31 L. ed. 853, 8 Sup. Ct. Rep. 1391.

No decree entered under those circumstances should be permitted to stand.

Hatfield v. King, 184 U. S. 162, 46 L. ed. 481, 22 Sup. Ct. Rep. 477.
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And parties who bring such litigation without disclosing the relationship of parties are guilty of punishable contempt of court.

Lord v. Veazie, 8 How. 251, 12 L. ed. 1067; *Little v. Bowers*, 134 U. S. 547, 557, 33 L. ed. 1016, 1020, 10 Sup. Ct. Rep. 620; *Hatfield v. King*, 184 U. S. 162, 46 L. ed. 481, 22 Sup. Ct. Rep. 477.

When directors are under adverse control, stockholders may sue without demand for relief from a hostile board.

Citizens' Sav. & T. Co. v. Illinois C. R. Co. 205 U. S. 46, 51 L. ed. 703, 27 Sup. Ct. Rep. 425; *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355; *Corbus v. Alaska Treadwell Gold Min. Co.* 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157; *Heath v. Erie R. Co.* 8 Blatchf. 409, Fed. Cas. No. 6,306; *Bill v. Western U. Teleg. Co.* 16 Fed. 19; *Columbia Nat. Sand Dredging Co. v. Washed Bar Sand Dredging Co.* 136 Fed. 710; *Bigelow v. Calumet & H. Min. Co.* 155 Fed. 869; *Dickinson v. Consolidated Traction Co.* 114 Fed. 232; *Eldred v. American Palace Car Co.* 99 Fed. 168; *Berwind v. Canadian P. R. Co.* 98 Fed. 158; *Ball v. Rutland R. Co.* 93 Fed. 513; *Weir v. Bay State Gas Co.* 91 Fed. 940; *Rogers v. Nashville, C. & St. L. R. Co.* 33 C. C. A. 517, 62 U. S. App. 49, 697, 91 Fed. 299; *De Neufville v. New York & N. R. Co.* 26 C. C. A. 306, 51 U. S. App. 374, 81 Fed. 10.

Demand on stockholders was not necessary in this case, because, under the Susquehanna charter, stockholders could not grant relief.

Denver & R. G. R. Co. v. Alling, 99 U. S. 463, 472, 25 L. ed. 438, 442; *Pullman's Palace Car Co. v. Missouri P. R. Co.* 115 U. S. 587, 29 L. ed. 499, 6 Sup. Ct. Rep. 194; *Beveridge v. New York Elev. R. Co.* 112 N. Y. 21, 2 L.R.A. 648, 19 N. E. 489; *Robinson v. Smith*, 3 Paige, 222, 24 Am. Dec. 212; *McCullough v. Moss*, 5 Denio, 567; *Conro v. Port Henry Iron Co.* 12 Barb. 27; *Morawetz, Priv. Corp.* 2d ed. §§ 283, 510; *Cook, Corp.* 5th ed. §§ 684, 750.

• Even if stockholders could, by resolution, require directors to institute litigation against the Delaware Company, they could not oust directors from office before expiration of their terms.

And no court would entertain a suit against the Delaware Company conducted by the Delaware administration of the Susquehanna Company.

South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co. supra; *Mills v. Green*, 159 U. S. 651, 40 L. ed. 293, 16 Sup. Ct. Rep. 132; *East Tennessee, V. & G. R. Co. v. Southern Teleg. Co.* supra.

Suits are regularly maintained in Federal

courts without demand upon stockholders for a resolution directing litigation.

Ex parte Young, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441; *Cotting v. Kansas City Stock Yards Co.* (Cotting v. Godard) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Dinsmore v. Southern Exp. Co.* 183 U. S. 115, 46 L. ed. 111, 22 Sup. Ct. Rep. 45; *Smyth v. Ames*, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 39 L. ed. 759, 15 Sup. Ct. Rep. 673; *Greenwood v. Union Freight R. Co.* 105 U. S. 13, 26 L. ed. 961; *Schultz v. Highland Gold Mines Co.* 158 Fed. 337; *Perkins v. Northern P. R. Co.* 155 Fed. 445; *Monmouth Invest Co. v. Means*, 80 C. C. A. 527, 151 Fed. 159; *Weir v. Bay State Gas Co.* 91 Fed. 940; *Ball v. Rutland R. Co.* 93 Fed. 513; *Dinsmore v. Southern Exp. Co.* 92 Fed. 714.

The facts of this case show neither (a) anything which could be submitted to stockholders for ratification; nor (b) anything stockholders could ratify.

(a) There was nothing to submit to stockholders. When a stockholders' vote makes a voidable act valid or void, it acts upon something which directors have done. In this case, directors have done nothing, and stockholders cannot control their course.

(b) Stockholders cannot, by anything short of a unanimous vote, authorize or ratify gifts of corporate property.

Brewer v. Boston Theater, 104 Mass. 378; *Jackson v. Ludeling*, 21 Wall. 616, 22 L. ed. 492; *Ervin v. Oregon R. & Nav. Co.* 23 Blatchf. 517, 27 Fed. 631; *Mumford v. Ecuador Development Co.* 111 Fed. 639; *Menier v. Hooper's Teleg. Works*, L. R. 9 Ch. 350; *Gamble v. Queens County Water Co.* 123 N. Y. 91, 9 L.R.A. 527, 25 N. E. 201; *Farmers' Loan & T. Co. v. New York & N. R. Co.* 150 N. Y. 410, 34 L.R.A. 76, 55 Am. St. Rep. 689, 44 N. E. 1043.

The Delaware Company has, in respect to corporate rights of the Susquehanna Company, entered into privity of contract with every Susquehanna stockholder, concerning division of the entire rent.

Hawes v. Oakland, supra.

An action to divide corporate income among stockholders must be brought in equity; otherwise the lessee's right of offset would be defeated and unequal division of income made among stockholders.

Barr v. New York, L. E. & W. R. Co. 96 N. Y. 444.

442] *Mr. Justice McKenna delivered the opinion of the court:

The certificate of the court is as follows:

"This cause comes here upon appeal from a final decree of the circuit court, southern

district of New York, which directs that the defendant, Delaware & Hudson Company (hereinafter called the Delaware Company) pay to the defendant the Albany & Susquehanna Railroad Company (hereinafter called the Susquehanna Company) the amount of \$1,107,923.24.

"The case was fully argued and submitted on briefs. It thereupon developed that there was a question presented whether the bill could be maintained under the 94th equity rule. That question is a preliminary one, it has been held to be jurisdictional in character. *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286; *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355), and this court desires the instruction of the Supreme Court for its proper decision.

Statement of facts.

"The facts upon which the question arises are as follows:

"The defendant corporations are both citizens of the state of New York; the complainants are citizens of the states of Connecticut and Rhode Island. The bill was brought to obtain an accounting for various sums of money which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental or in the nature of rental under a lease made in 1870. For the convenience of all, a copy of the pleadings is hereto annexed, marked Exhibit 'A,' which may be referred to for a more detailed statement of the cause of action. The bill does not 'set forth with particularity the efforts of the plaintiffs to secure such action as they desire on the part of the managing directors or trustees.' Nor did the proofs show any such efforts. Nor does the bill set forth any efforts to secure 'such action on the part of the shareholders.' Nor did the proofs show any such efforts. Nor did the bill set forth, or the proof show, 'the *causes of their failure to obtain[443 such action' otherwise than is hereinafter disclosed.

"The complaint was filed on June 12, 1906. The Susquehanna Company was organized under the act of April 2, 1850, which provides that 'there shall be a board of thirteen directors . . . to manage its affairs,' and for many years before this suit was brought a majority of the board of directors of the Susquehanna Company consisted of persons who were officers, directors, or employees of the Delaware Company. At the time this suit was instituted the directors and officers of the Susquehanna Company the dates of their election as such, and their relations to the Delaware Com-

pany, with dates of election, were as shown on the following statement:

bill, controlled 6,688 shares. The entire 35,000 shares were held by 546 different

Names of directors of Susquehanna Company and dates of election as directors and officers.

Position in Delaware & Hudson Company and dates.

Robert M. Olyphant, 1878.

Director since 1872.

President from 1884 to 1903.

Chairman of the board since 1903.

Director since 1901.

General counsel, 1894 to 1903.

Director since 1899.

President since 1903.

Director since 1886.

Director since 1902.

General counsel since 1903.

Director since 1905.

A vice president since 1903.

Treasurer, 1892.

Son of Robert M. Olyphant.

George I. Wilber, 1883.

David Wilcox, 1894 (vice president, May 9, 1906).

R. Suydam Grant, 1901.

Charles A. Peabody, 1902.

William S. Opdyke, 1903.

Abel I. Culver, 1903.

Charles A. Walker, 1892.

Robert Olyphant, 1887 (president since 1889).

William L. M. Phelps, 1873 (secretary since 1870).

Secretary of the Albany & Susquehanna Company, elected by the board of directors.

Nominees of the Delaware Company, as stated in the Delaware Company's answer.

Robert C. Pruyn, 1890.

James H. Manning, 1890.

444] *Of these, Robert M. Olyphant, R. Suydam Grant, Charles A. Peabody, William S. Opdyke, Abel I. Culver, and Robert C. Pruyn, at the time this suit was begun, did not own or hold, in their own right, any shares of stock in the Susquehanna Company, but shares of stock of that company owned by the Delaware Company were transferred to each of them on the books of the Susquehanna Company by the Delaware Company for the purpose of qualifying them as such directors. Charles A. Walker owned five shares of Susquehanna stock from 1901 to 1906; it does not appear that he owned any stock in the Susquehanna Company during the year 1906.

"So far as appears from anything shown in this record, none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity, the payment of which was to be resisted.

"On June 12, 1906, and for thirty years prior thereto, the capital stock of the Susquehanna Company had been fixed at and limited to 35,000 shares. Of this capital stock on June 12, 1906, the Delaware Company owned 4,500 shares and its directors or officers owned or controlled 4,340 shares; the complainants owned 1,312 shares, and a so-called 'protective committee' who, from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this

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persons, of whom 423 owned 50 shares or less, and of whom 383 resided in the state of New York.

"An annual meeting of the Susquehanna Company was held subsequent to the beginning of this suit, on October 16, 1906. At that meeting the nominees of the protective committee were elected, receiving 15,501 ballots, the nominees of the former management receiving 15,441 ballots. About two weeks before such annual meeting the Susquehanna Company, being then controlled by the directorate above named, filed a demurrer to the bill, which is hereto annexed as Exhibit 'B.' Copies of *such[445 demurrer were sent by stockholders opposed to the existing control to all stockholders, and thereafter and before the meeting proxies for several thousand shares were received by the persons who voted for the nominees then elected.

Questions certified.

"Upon the facts above set forth, the questions of law concerning which this court desires the instruction of the Supreme Court are:

"First. 'Does the fact that, before institution of this suit, complainants made no demand for relief upon the board of directors of the Susquehanna Company, prevent them from maintaining this bill?'

"Second. 'Does the fact that, before institution of this suit, complainants made no effort to obtain relief at a stockholders'

meeting, prevent them from maintaining this bill?"

The questions in connection with the 94th equity rule present the issue in the case. The rule is as follows:

"94. Every bill brought by one or more stockholders in a corporation against the corporation and other parties, formed upon rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. *It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.*"

Do the facts show a compliance with the rule, or rather that part of it which we have expressed in italics? The other parts of it are not involved.

It is the contention of appellant that the averments in the bill, as exhibited in the certificate, do not satisfy either the language of the rule or its substance. The argument is that (1) a shareholder, as a condition of his suit, must show that he has exhausted all the means within his reach to obtain within the corporation itself the redress of his grievances; that his efforts must be earnest, not simulated, and this must be made apparent to the court; (2) his failure to apply to the managing body of the corporation will not, in the absence of fraud, be excused by the fact that such managing body are also officers, directors, or employees of the corporation against which the suit is brought; (3) if the facts of this case excused from a preliminary demand upon the directors, the complainants were required to show "that they could not have secured appropriate action by an appeal to the stockholders of the Susquehanna Company." The appellees counter these contentions by asserting that (1) the case is not within the requirements of rule 94. "The bill shows, under oath," it is said, "that the directors were hostile, and that demands upon them would be 'idle and nugatory.' . . ." (2) Complainants (appellees here) were not required to appeal to the stockholders of the Susquehanna Company because (a) the stockholders, under the charter of the company, could not grant relief; (b) even if such power existed, the stockholders "could not oust directors from office before expiration of their terms." And

it is further contended that, at the time the suit was instituted, "the Delaware Company controlled the stock vote of the Susquehanna Company."

These opposing contentions present a not unusual case where the rule or principle of law is clear enough, but its application to a particular case is not so clear, and there is a contest of plausible constructions between which it is not always easy to decide. The purpose of rule No. 94 hardly needs explanation. It is intended to secure the Federal courts from imposition upon their jurisdiction, and recognizes the right of the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have indicated such right. But the directory may be derelict and the interests of stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercise of such right, but emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with; or, it is more accurate to say, do not apply. There are cases which illustrate these contingencies. As a typical case of the first kind, that is, which enforces the doctrine that the rights of the corporation must be asserted through the corporation. *Hawes v. Oakland* (*Hawes v. Contra Costa Water Co.*) 104 U. S. 450, 26 L. ed. 827, is cited. In that case *Dodge v. Woolsey*, 18 How. 331, 15 L. ed. 401, was declared to be the leading case on the subject in this country, and, examining the latter case, it was said that it did not establish, nor was it intended to establish, a doctrine different in any material respect from that found in the other American cases and the English cases. And the doctrine was said to be that, to enable a stockholder in a corporation to sustain in a court of equity a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as a foundation for the suit some action or threatened action of the managing board of directors which is beyond their authority; a fraudulent transaction, completed or contemplated, which will result in serious injury to the corporation or stockholders; where the board of directors, or a majority of them, are acting for their own interest in a manner destructive of the corporation itself or of the rights of other stockholders; or where a majority of the stockholders themselves are oppressively and illegally pursuing a course inimical to the corpo-

ration or to the rights of the other stockholders. The court expressed the possibility that other cases might arise, but said "the foregoing may be regarded as an outline of the principles which govern this class of cases."

Determined by the principles enumerated, the court affirmed a decree sustaining a demurrer to a bill by a stockholder of the 448]**Contra Costa Waterworks Company*, filed in behalf of himself and other stockholders against the company, its directors, and the city of Oakland, to enjoin the city from taking, and the directors from permitting it to take, water from the works of the company without compensation. The bill alleged a request of the directors to take proceedings, and that they declined to do so. The bill also alleged injury to the corporation, diminution of dividends of the complainant and other stockholders, and a decrease of the value of their stock. Appellant adduces, as repeating and illustrating the doctrine of *Hawes v. Oakland*, the following cases: *Dimpfell v. Ohio & M. R. Co.* 110 U. S. 209, 28 L. ed. 121, 3 Sup. Ct. Rep. 573; *Quincy v. Steel*, 120 U. S. 241, 30 L. ed. 624, 7 Sup. Ct. Rep. 520; *Taylor v. Holmes*, 127 U. S. 489, 32 L. ed. 179, 8 Sup. Ct. Rep. 1192; *Corbus v. Alaska Treadwell Gold Min. Co.* 187 U. S. 455, 47 L. ed. 256, 23 Sup. Ct. Rep. 157. The latter case is quoted by appellant as putting unmistakable emphasis on rule 94, and that the facts of the case at bar do not satisfy its requirements. The object of the suit was to enjoin the board of directors of the corporation from paying a license tax levied upon the corporation under the provisions of an act of Congress. *Corbus*, the complainant in the suit, was a stockholder of the corporation, and alleged, as the reason of the suit by him, that he was unable to request the directors of the company to refuse to pay the tax or apply for the license required by reason of their great distance from him; but that he had made such request of the officers of the company residing in Alaska, and that they had refused to comply with the request. Of this allegation the court said that it showed no compliance with rule 94, and that complainant simply relied on the distance of the directors from where he resided as an excuse for not applying to them. "We are of opinion," it was said, "that the excuse is not sufficient. He should, at least, have shown some effort. If he had made an effort and obtained no satisfactory result, either by reason of the distance of the directors or by their dilatoriness or unwillingness to act, a different case would have been presented; but to do nothing is not sufficient."

A case sustaining the second proposition 449]*which we have *mentioned, to wit, 53 L. ed.

where the circumstances take the cases out of the rule, is *Doctor v. Harrington*, 196 U. S. 579, 49 L. ed. 606, 25 Sup. Ct. Rep. 355. The suit was brought by Doctor and others as stockholders of a corporation called the *Sal Sayles Company* to set aside a judgment obtained by the Harringtons against that company. The bill alleged that the suit was not collusive; that complainants were unable to obtain redress from the company or "at the hands" of its stockholders. It further alleged that the board of directors of the corporation was "under the absolute control and domination of the defendant, John J. Harrington, and that said Harrington, by reason of having the possession of a majority of the capital stock of said corporation," likewise controlled "the action of the stockholders." It was further alleged that he refused to give any information with regard thereto, and declined to redress the wrongs of which complaint was made, or give complainants any opportunity to lay before the board of directors or the stockholders of the company the facts set forth.

It will be observed, therefore, that there was no compliance with the requirements of rule 94, as expressed in its letter. The efforts that were made to secure the action of the managing directors or trustees were not "set forth with particularity." Nothing was alleged but the domination of John J. Harrington and his control of the directors. What he did, in what way he exerted control, was not alleged. In other words, the bill seemed to show a case, not of compliance with the requirements of rule 94, but circumstances which excused from such compliance.

Coming to consider the effect of those allegations, we said that rule 94 contemplates that there may be, and provides for, a suit by the stockholder in a corporation, founded on rights which may be properly asserted by the corporation. And we further said that "the ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in any way detrimental to his interest. In other words, his interests and the interests of the *corporation may be subservient[450 to some illegal purpose." And we decided that these principles were satisfied by the allegations of the bill, and that such antagonism existed between the complainants in the suit and the directors of the corporation that they would "suffer irremediable loss if not permitted to sue." In other words, the complainants were in such a situation by reason of the power which Harrington possessed over those who

managed the corporation—directors and stockholders—that appeals to them for action would have been futile. Prior cases were considered, including *Dodge v. Woolsey* and *Hawes v. Oakland*, and the conclusion reached was pronounced to be in accordance with their doctrine.

Do the facts in the case at bar present the same situation that was passed on in *Doctor v. Harrington*? The certificate shows the following facts: The complaint was filed June 12, 1906. The suit was brought to obtain an accounting for various sums of money, which it was alleged became due at intervals during a series of years from the Delaware Company to the Susquehanna Company as rental, or in the nature of rental, under a lease made in 1870. The Susquehanna Company was organized in 1850, and, under the law, its board of directors consisted of thirteen members, a majority of whom for many years before this suit was brought were also "officers, directors, or employees of the Delaware Company." Indeed, they served as its president, vice president, treasurer, secretary, directors, and general counsel,—officers of dominating influence, it must be said. It appears that certain of the persons occupying those offices did not, at the time the suit was brought, own or hold, in their own right, any shares of stock in the Susquehanna Company, but shares of stock in that company owned by the Delaware Company were transferred to each of them on the books of the former company by the latter company for the purpose of qualifying them as directors. The number of shares of the capital stock of the Susquehanna Company, and how held or owned, and the attitude of the owners thereof to the Delaware Company, appear in the certificate and need not be repeated.

451] *The certificate recites the following: "So far as appears from anything shown in the record, none of the directors or officers of the Delaware Company ever, before or after the bringing of this suit, treated the claim therein set forth otherwise than as one of doubtful validity, the payment of which was to be resisted."

The situation was unique. The company whose interest it was to assert the right to payment and to demand it was under the control or could be influenced by the company whose interest it was to deny indebtedness and resist payment. And though there are allegations in the bill of contrary import, the good faith of the directors need not be questioned. They might, notwithstanding, be firm in their views,—firm to resist appeals against them. Their views seemed to persist through many years. At any rate, a situation was presented fully as

formidable to the interest of stockholders in the Susquehanna Company as that presented in the *Harrington* Case. And it may be well doubted whether the directors of the Susquehanna Company, so being directors of the Delaware Company, and who, either from an apathy that endured through many years, could discern no right in that company to assert, or, through conviction of the absence of right, were the best agents to begin or conduct a litigation of such right. It was certainly natural enough that a stockholder should seek more earnest representatives, and consider that the directors "occupied," to use the language of *Dodge v. Woolsey*, "antagonistic grounds in respect to the controversy" as to him. The attitude of the directors need not be sinister. It may be sincere. It was so in *Chicago v. Mills*, 204 U. S. 321, 51 L. ed. 504, 27 Sup. Ct. Rep. 286, and *Ex parte Young*, 209 U. S. 123, 52 L. ed. 714, 13 L.R.A. (N.S.) 932, 28 Sup. Ct. Rep. 441, and other cases. In this case it was certainly determined. It continued until after this suit was brought. Both the Delaware Company and the Susquehanna Company, then under "the administration of the Delaware Company," to quote from the circuit court of appeals, demurred to the bill.

But it is contended that efforts should have been made and alleged to move the corporation to action through a stockholders' *meeting. In this contention there is again similarity to the *Harrington* Case. It was there alleged that *Harrington* controlled the action of the stockholders "by reason of having possession of a majority" of the capital stock of the corporation. The control in the case at bar, therefore, may not have been as direct as in *Doctor v. Harrington*, but it was practically efficient. The stock of the Susquehanna Company consisted of 35,000 shares, of which the Delaware Company and its directors and officers held 8,840. The complainants and a so-called protective committee, a committee which, the certificate states, "from and after December, 1905, had been opposing the administration of the Delaware Company upon the questions involved in this bill," controlled 8,000 shares. The certificate also states that the "entire 35,000 shares were held by 546 different persons, of whom 423 owned 50 shares or less, and of whom 383 resided in New York." The proposition then is, that notwithstanding the power of 8,840 shares, held by the managers of both corporations, against 8,000 held by complainants and the protective committee, complainants were required by rule 94 to engage and organize all other stockholders, or enough of them to direct or change the corporate management; in other words, struggle for

the control of the corporation with an adverse board of directors. And such struggle, appellant contends, "could not be regarded as presumptively futile," as there would be an appeal to "the self-interest of the remaining stockholders;" and, it is pointed out, that the certificate recites that control through the stockholders was subsequently obtained. But it was obtained after the suit was begun and the antagonism of the directors was more clearly exhibited. The circumstances of this case preclude, therefore, an acceptance of appellant's proposition. Rule 94 is intended to have practical operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases. Therefore, considering that this case, by reason of its facts, falls within the principle of *Doctor v. Harrington*, we do not review the cases cited by appellees, wherein, it is concluded, suits were *justified by demand on the directors alone, nor consider whether stockholders have the power to compel directors to institute suits to which the directors are opposed.

We answer both questions certified in the negative.

JOHN W. MANSON et al., Trustees of Estate of Henry Hudson, Appts.,
v.

JOHN S. WILLIAMS, Trustee in Bankruptcy of Estate of Hudson Clothing Company.

(See S. C. Reporter's ed. 453-457.)

Bankruptcy — conclusiveness of adjudication.

1. An adjudication in bankruptcy against two brothers as partners is not conclusive as to the existence of the partnership and the title to the assets as against the trustees in bankruptcy of one of the brothers, who were not heard on that question, although they had filed a denial and answer. [For other cases, see *Bankruptcy*, 86a-89, in *Digest Sup. Ct. 1908.*]

Appeal — review of facts — concurrent findings — partnership.

2. Concurrent findings of the two courts below that two brothers were partners, and that the stock in trade belonged to the firm, are not so clearly erroneous as to call for reversal, where there was evidence that one brother, with the original intention of forming a corporation, furnished the capital, and the other his personal services in disposing of it, and that the latter was interested

in the profits, if any, and at the same time was not a debtor of the former, and there was some evidence that he also contributed to the assets.

[For other cases, see *Appeal and Error*, 4931-4944, in *Digest Sup. Ct. 1908.*]

[No. 169.]

Argued April 20, 21, 1909. Decided May 3, 1909.

APPEAL from the United States Circuit Court of Appeals for the First Circuit to review a decree which affirmed a decree of the District Court for the District of Maine, directing the trustees of a bankrupt to pay over to the trustee in bankruptcy of an alleged partnership the proceeds of the stock of goods alleged to have belonged to the firm. Affirmed.

See same case below, 82 C. C. A. 475, 153 Fed. 525.

The facts are stated in the opinion.

Mr. John W. Manson argued the cause, and, with Mr. Harry R. Coolidge, filed a brief for appellants:

This is a controversy arising in bankruptcy proceedings under § 24a of the bankrupt act, and an appeal lies to this court by § 6 of the act of March 3, 1891.

Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690; *Security Warehousing Co. v. Hand*, 74 C. C. A. 186, 143 Fed. 32, 16 Am. Bankr. Rep. 49, affirmed in 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789; *Mason v. Wolkowich*, 10 L.R.A.(N.S.) 765, 80 C. C. A. 435, 150 Fed. 699; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; *Gazlay v. Williams*, 210 U. S. 41, 52 L. ed. 950, 28 Sup. Ct. Rep. 687.

The bankrupt act allows only the bankrupt or a creditor to plead. The trustees were neither, so their answers were properly disregarded.

Re Columbia Real Estate Co. 50 C. C. A. 406, 112 Fed. 643, 7 Am. Bankr. Rep. 441.

The appellants were, therefore, not parties to the adjudication.

Bates v. Ruddick, 2 Iowa, 423, 65 Am. Dec. 774; *Pendleton v. Russell*, 144 U. S. 640, 36 L. ed. 574, 12 Sup. Ct. Rep. 743.

Though the same attorneys who acted for Henry and James also acted for appellants, this did not make appellants parties.

Pepperdine v. Bank of Seymour, 100 Mo. App. 387, 73 S. W. 890; *Litchfield v. Goodnow* (*Litchfield v. Crane*) 123 U. S. 549, 31 L. ed. 199, 8 Sup. Ct. Rep. 210.

If the appellants had been allowed to become parties in opposition to the adjudication, they would not now be concluded.

Pepperdine v. Bank of Seymour, supra;

NOTE. — On the effect of adjudication of bankruptcy of partnership to subject the separate estates of the partners to administration in bankruptcy—see case note to *Dickas v. Barnes*, 5 L.R.A.(N.S.) 654, 53 L. ed.

Harmanson v. Bain, 1 Hughes, 188, Fed. Cas. No. 6,072.

The adjudication was not for the purpose of determining what the assets were, but rather to put the assets, if there were any, in control of the court for equal distribution among the creditors.

Whitney v. Wenman, 14 Am. Bankr. Rep. 591; Re Continental Corp. 14 Am. Bankr. Rep. 538.

A judgment, to be conclusive, even between the same parties, must be for the same purpose.

Aspden v. Nixon, 4 How. 467, 498, 11 L. ed. 1059, 1074.

To allow an adjudication to change the title to property would amount to confiscation.

Silvey v. Tift, 123 Ga. 804, 1 L.R.A. (N.S.) 386, 51 S. E. 748.

The intention to form a corporation is of no effect to prove a partnership, and would have had no effect had it not slumbered.

Fay v. Noble, 7 Cush. 188; First Nat. Bank v. Almy, 117 Mass. 476; Ward v. Brigham, 127 Mass. 24.

The word "company," especially in combination with other words, and not preceded by the word "and," signifies a corporation rather than a partnership.

Goddard v. Chicago & N. W. R. Co. 202 Ill. 362, 66 N. E. 1068; Mattox v. State, 115 Ga. 212, 41 S. E. 712; Com. v. Reinoehl, 163 Pa. 291, 25 L.R.A. 247, 29 Atl. 896; Broome v. Galena, D. D. & M. Packet Co. 9 Minn. 243, Gil. 225.

A holding out imposes a partnership liability only in favor of those creditors who have known of the holding out, and have been deceived thereby.

Thompson v. First Nat. Bank, 111 U. S. 529, 28 L. ed. 507, 4 Sup. Ct. Rep. 689.

A holding out does not constitute a partnership in fact, and a partnership in fact must be shown.

Collier, Bankr. 6th ed. p. 75; Re Beckwith, 130 Fed. 475, 12 Am. Bankr. Rep. 453; Wood v. Pennell, 51 Me. 61; Case v. Beauregard, 99 U. S. 119, 25 L. ed. 370; Fitzpatrick v. Flannagan, 106 U. S. 648, 27 L. ed. 211, 1 Sup. Ct. Rep. 369; Huiskamp v. Moline Wagon Co. 121 U. S. 310, 30 L. ed. 971, 7 Sup. Ct. Rep. 899.

In order for the alleged partnership creditors to be entitled to the property as against the individual creditors of Henry, it must be proven that James had a joint interest in the property at the time of adjudication; or, in other words, that there was a partnership estate; and to prove this it must be shown that James and Henry were actual partners.

Glenn v. Gill, 2 Md. 1; Swann v. Sanborn, 4 Woods, 625, Fed. Cas. No. 13,675; Broad-

way Nat. Bank v. Wood, 165 Mass. 312, 43 N. E. 100; Bixler v. Kresge, 169 Pa. 405, 47 Am. St. Rep. 920, 32 Atl. 414; Deavitt v. Hooker, 73 Vt. 143, 50 Atl. 800; York County Bank's Appeal, 32 Pa. 446.

The basis of all partnerships is an agreement to share the profits.

1. Lindley, Partn. chap. 1; Frost v. Walker, 60 Me. 470; 22 Am. & Eng. Enc. Law, 2d ed. p. 14; Brotherton v. Gilchrist, 144 Mich. 274, 115 Am. St. Rep. 397, 107 N. W. 890; Walker v. Tupper, 152 Pa. 1, 25 Atl. 172; Sikes v. Work, 6 Gray, 433.

Henry was a mere security holder throughout. He could, in no event, participate in the profits as a principal trader in the management of the business, which is essential to a partnership.

Fish v. Thompson, 68 Vt. 273, 35 Atl. 174; Hunt v. Oliver, 118 U. S. 211, 30 L. ed. 128, 6 Sup. Ct. Rep. 1083.

Furthermore, there can be no partnership without an intention of the parties to become partners.

Shaeffer v. Blair, 149 U. S. 258, 37 L. ed. 725, 13 Sup. Ct. Rep. 856; London Assur. Co. v. Drennen, 116 U. S. 461, 29 L. ed. 688, 6 Sup. Ct. Rep. 442; Case note to Clark v. Emery, 5 L.R.A. (N.S.) 503.

Mr. John S. Williams argued the cause, and, with Mr. Albert S. Woodman, filed a brief for appellee:

Appeal is not the proper process.

First Nat. Bank v. Chicago Title & T. Co. 198 U. S. 281, 49 L. ed. 1051, 25 Sup. Ct. Rep. 693.

An adjudication in bankruptcy is in the nature of a decree *in rem*, so far as it fixes the status of the bankrupt. The adjudication determines the status of the bankrupt, and all persons are bound by the adjudication, even if they were not parties to the bankruptcy proceedings, and even if they had not actual notice of the proceeding. If the court rendering the decree had jurisdiction, such decree cannot be attacked collaterally, but only by direct proceeding in a competent court.

Hanover Nat. Bank v. Moyses, 186 U. S. 181, 46 L. ed. 1113, 22 Sup. Ct. Rep. 857; Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799; New Lamp Chimney Co. v. Ansonia Brass & Copper Co. 91 U. S. 656, 23 L. ed. 336; Michaels v. Post, 21 Wall. 426, 22 L. ed. 525; Shawhan v. Wherritt, 7 How. 643, 12 L. ed. 854; Re Billing, 17 Am. Bankr. Rep. 84; Bank of United States v. Beverly, 1 How. 134, 11 L. ed. 75; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Mitchell v. First Nat. Bank, 180 U. S. 471, 45 L. ed. 627, 21 Sup. Ct. Rep. 418; Lander v. Mercantile Nat. Bank, 186 U. S. 458, 46

L. ed. 1247, 22 Sup. Ct. Rep. 908; Foster v. Posson, 105 Wis. 99, 81 N. W. 123; Jeter v. Hewitt, 22 How. 352, 16 L. ed. 345; Trevivan v. Lawrence, 2 Smith, Lead. Cas. 7th ed. 622, note; Freeman, Judgm. 2d ed. § 606; Hampton v. McConnel, 3 Wheat. 234, 4 L. ed. 378; Gelston v. Hoyt, 3 Wheat. 312, 4 L. ed. 398; Slocum v. Mayberry, 2 Wheat. 10, 4 L. ed. 171; Nations v. Johnson, 24 How. 203, 16 L. ed. 631; D'Arcy v. Ketchum, 11 How. 166, 13 L. ed. 648; Webster v. Reid, 11 How. 437, 13 L. ed. 761.

It is well settled that one who openly defends a suit brought against another, or who assists in the defense of such suit, for the purpose of aiding his own interests, which would be directly affected by the judgment in the suit, is, in a later action involving the same issues, as much bound by the judgment in the first suit as he would be if he had been a party to the record. In such case the person so participating in the suit is a party.

Lovejoy v. Murray, 3 Wall. 19, 18 L. ed. 134; Tilton v. Cofield, 93 U. S. 163, 23 L. ed. 858; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Brooklyn City & N. R. Co. v. National Bank, 102 U. S. 14, 26 L. ed. 61; Hauke v. Cooper, 48 C. C. A. 144, 108 Fed. 925; Tootle v. Coleman, 57 L.R.A. 120, 46 C. C. A. 132, 107 Fed. 41; James v. Germania Iron Co. 46 C. C. A. 476, 107 Fed. 597; Theller v. Hershey, 89 Fed. 575; Carey v. Roosevelt, 83 Fed. 243; Sanders v. Peck, 30 C. C. A. 530, 59 U. S. App. 248, 87 Fed. 61; Bailey v. Sundberg, 1 C. C. A. 387, 1 U. S. App. 101, 49 Fed. 583; David Bradley Mfg. Co. v. Eagle Mfg. Co. 6 C. C. A. 661, 18 U. S. App. 349, 57 Fed. 980; 1 Herman, Estoppel & Res Judicata, §§ 156, 182, 186; 24 Am. & Eng. Enc. Law, 2d ed. p. 737; Aurora v. West, 7 Wall. 102, 19 L. ed. 49; Florida C. R. Co. v. Schutte, 103 U. S. 118, 26 L. ed. 327; New Orleans v. Citizens' Bank, 167 U. S. 371, 42 L. ed. 202, 17 Sup. Ct. Rep. 905; Oglesby v. Attrill, 20 Fed. 570.

When a second suit is upon a different cause of action from the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was raised and actually litigated and determined in the first action.

National Foundry & Pipe Works v. Oconto Water Supply Co. 183 U. S. 216, 46 L. ed. 157, 22 Sup. Ct. Rep. 111; Southern P. R. Co. v. United States, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18; Campbell v. Rankin, 99 U. S. 261, 25 L. ed. 435; Nesbit v. Independent Dist. 144 U. S. 610, 36 L. ed. 562, 12 Sup. Ct. Rep. 746; Franklin County v. German Sav. Bank, 142 U. S. 93-100, 35 L. ed. 948-950, 12 Sup. Ct. Rep. 147; Cromwell v. Sac County, 94 U. S. 351, 24 L. ed. 195; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 53 L. ed.

129; Robbins v. Chicago, 4 Wall. 657, 18 L. ed. 427; Aetna L. Ins. Co. v. Hamilton County, 54 C. C. A. 468, 117 Fed. 82; Geer v. Ouray County, 38 C. C. A. 250, 97 Fed. 435; New Dunderberg Min. Co. v. Old, 38 C. C. A. 89, 97 Fed. 150; St. Joseph Union Depot Co. v. Chicago, R. I. & P. R. Co. 32 C. C. A. 284, 60 U. S. App. 675, 89 Fed. 648; O'Hara v. Mobile & O. R. Co. 75 Fed. 130; 1 Van Fleet, Former Adjudication, § 277; 24 Am. & Eng. Enc. Law, p. 765; Sly v. Hunt, 159 Mass. 151, 21 L.R.A. 680, 38 Am. St. Rep. 403, 34 N. E. 187; Doglioni v. Crispin, L. R. 1 H. L. 311; Trafford v. Blanc, L. R. 36 Ch. Div. 600; Green v. Bogue, 158 U. S. 478, 39 L. ed. 1061, 15 Sup. Ct. Rep. 975; Goodrich v. Chicago, 5 Wall. 566, 18 L. ed. 511.

The finding of the district court that the Hudson Clothing Company was a partnership, composed of James and Henry Hudson, was correct.

Berthold v. Goldsmith, 24 How. 536, 541, 16 L. ed. 762, 764; Frost v. Walker, 60 Me. 470; Chapman v. Barney, 129 U. S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; Seiffert v. Irving, 15 Ont. Rep. 173; Wigmore, Ev. § 1249; Earle v. Art Library Pub. Co. 95 Fed. 544; Claflin v. Bennett, 51 Fed. 693; 30 Cyc. Law & Proc. p. 353; Dwinel v. Stone, 30 Me. 384; Porter v. Graves, 104 U. S. 171, 26 L. ed. 691; Blair v. Harrison, 6 C. C. A. 326, 18 U. S. App. 27, 57 Fed. 257; 22 Am. & Eng. Enc. Law, 2d ed. p. 26; Woolworth v. McPherson, 55 Fed. 558; Bigelow v. Elliot, 1 Cliff. 28, Fed. Cas. No. 1,399; Paul v. Cullom, 132 U. S. 539, 550, 33 L. ed. 430, 432, 10 Sup. Ct. Rep. 151; Blair v. Shaeffer, 33 Fed. 218; Bancroft v. Hambly, 36 C. C. A. 601, 94 Fed. 975; McMurtrie v. Guiler, 183 Mass. 454, 67 N. E. 358.

Mr. Justice Holmes delivered the opinion of the court:

This is a petition by the appellee the trustee in bankruptcy of the Hudson Clothing Company, that the appellants, the trustees in bankruptcy of Henry Hudson, pay over to the appellee the proceeds of a stock of goods alleged to have belonged to the company. The referee in bankruptcy made an order as prayed, which was sustained on the principal matter by the district court, 148 Fed. 305; and the decree of that Court was affirmed by the circuit court of appeals. 82 C. C. A. 475, 153 Fed. 525. A further appeal has been taken to this court. Hewit v. Berlin Mach. Works, 194 U. S. 296, 48 L. ed. 986, 24 Sup. Ct. Rep. 690.

The facts to be gathered from the opinion of the circuit court of appeals and admitted are these: Henry Hudson became the owner of a stock of goods, and desired to

sell them. He also wished to help his brother James, and therefore put him in to do the selling. In the beginning he contemplated forming a corporation, turning the goods over to it, and taking most of the stock as security, but letting James take the profits. This plan, however, was allowed to slumber, and the business was carried on by James for over two years. From an early moment James adopted the name of Hudson Clothing Company, using it as a sign and in advertisements and on billheads. This was known to Henry, and when he advanced money to the business, as he did, he charged it on his books to the company. The bank account was kept with James, the bank book having the name Hudson Clothing Company above. Some of the exhibits in evidence have, besides the name of the company, the words "Henry Hudson, Pres." and "James Hudson, Treas. and Mgr." There was no act of transfer on the part of Henry, but, when he took goods from the shop, he paid for them in the same way as 455]if he had bought *them elsewhere. Both the district court and the circuit court of appeals have found as a fact that the brothers were partners, and that the goods belonged to the firm. In such cases this court, as a rule, will not disturb the findings, but it has done so in some instances (*Darlington v. Turner*, 202 U. S. 195, 220, 50 L. ed. 992, 1003, 26 Sup. Ct. Rep. 630); and in the case at bar the appellants contend that there really was no evidence to justify the result reached.

The appellee says that the question is concluded by the adjudication putting the company into bankruptcy, that being an adjudication against the two brothers. On the other hand, the record shows that the trustees of Henry, although they had filed a denial and answer, were not heard on that question. The principle of law is plain. The adjudication put the two brothers into bankruptcy for the purpose of administering whatever property there might be, as against all the world. But it did not establish the facts upon which it was founded, no matter how necessary the connection, except as against parties entitled to be heard. *Tilt v. Kelsey*, 207 U. S. 43, 52, 52 L. ed. 95, 99, 28 Sup. Ct. Rep. 1. If the trustees of Henry were not entitled to be heard, it is because they had no concern with whether the alleged firm was wound up in bankruptcy or not, but only with the facts upon which creditors sought to wind it up,—that is to say, the existence of the partnership and the title to the partnership assets,—and these facts would remain open to dispute. As the trustees of Henry were not heard, it would come with bad grace from one who might have urged the foregoing

considerations, to argue here that they are bound to admit anything except that Henry and his brother are in bankruptcy as partners. Furthermore, we gather from the opinion of the district judge that all parties requested him to examine the evidence, and that the defense of *res judicata* really was waived. But, as the partnership might have been a partnership in profits only, leaving the title to the capital in Henry alone, the adjudication, even if it established that there had been a partnership, could not conclude anything as to the title to the assets, the matter with which we now are concerned.

*We come back, then, to the question[456 whether the findings of the two courts below are so clearly unwarranted as to call upon us to reconsider the evidence and to reverse the decree. In the first place, we may lay on one side the fact that the parties began with the intent to form a corporation. They did not understand that they were acting as a corporation, nor did their dealings so far purport to be dealings of a corporation as to preclude the finding that was made. Now suppose that we take nothing more than the facts that one man furnishes capital and another his personal service in disposing of it, and that the latter is admitted to be interested in the profits, if any, and, at the same time, not to be a debtor of the former. We have a right to infer that, if a man furnishes capital, he expects some gain from it. But as, in the case supposed, he is not a creditor, and will not get interest, his gain must come from profits of the business. Some kind of joint interest, therefore, may be inferred, and the circuit court of appeals would have had some warrant from these facts alone for concluding that Henry would have had a right to share the profits equally with James.

We are aware that there is evidence looking the other way, but that is not the question. On the other hand, the inference is strengthened by the facts that we have mentioned. Henry Hudson knew the name under which the business was done, and is likely to have known that his name sometimes was exhibited as president. It is true that the terms suggest a corporation, but, under our usages, not necessarily, and he, at least, knew that there was no corporation. He paid for the goods he bought, as if other interests were concerned. We mention these facts as admissions by conduct. Apart from the findings of the two courts, it is unlikely that, if great profits had been realized, he would not have demanded a share. As to James, not only is it admitted that he was interested in profits, but there is some evidence that he

contributed to the assets, as we shall explain.

If we take it as established that both 457]brothers were interested *in the business, it is not a difficult step to infer that the capital of the business was firm capital. Whether capital shall be attributed to the firm or to a partner is a matter that often escapes the attention of the members. For if there is a joint liability for debts, it does not matter very much to the party furnishing the capital whether he owns it or whether he charges it to the firm. In a case where two partners contributed capital and two partners contributed time, it was held that the capital belonged to the firm, and that those who contributed time were bound to make good their proportion of the loss. *Whitcomb v. Converse*, 119 Mass. 38, 20 Am. Rep. 311. Moreover, when James went into the business, a thousand dollars belonging to him were deposited in his name, undistinguished from the deposits on the business account. The money or a part of it was used to pay liabilities of Henry in connection with the stock in trade. It is true that ultimately more than that sum was used in paying James's outstanding debts, but the mingling of funds tends to show a common interest. The facts that we have mentioned seem to us to constitute some evidence that the relation between the brothers was a partnership by implied understanding until a corporation should be formed. It does not matter that it was not formally recognized, or that they may not have used the name to themselves, if that is the fair result of what they did understand and intend. We do not say that we necessarily should have come to this conclusion if the case had been tried before us in the first instance, but, upon a pure question of fact, the error, if there was one, is not so plain as to call upon us to depart from our usual rule.

Decree affirmed.

458] *RE FRANK D. WINN?

(See S. C. Reporter's ed. 458-469.)

Removal of causes — showing jurisdictional facts — Federal question.

1. Allegations in the petition for the

NOTE. — On removal of causes where the Federal Constitution, statute, or treaty comes in question—see notes to *Little York Gold Washing & Water Co. v. Keyes*, 24 L. ed. U. S. 656; *Ferguson v. Ross*, 3 L.R.A. 322; *Austin v. Gagan*, 5 L.R.A. 476; *Butler v. National Home*, 36 L. ed. U. S. 346; and *Torrence v. Shedd*, 36 L. ed. U. S. 528. 53 L. ed.

removal to a Federal circuit court of a suit against an interstate express company for damages resulting from negligent transportation, that the defendant was subject to the Federal laws to regulate commerce and, under those laws, had a defense to the cause of action, will not justify removal on the ground that the cause is one arising under the Federal Constitution and laws, where the cause of action itself is not based upon the interstate commerce act or any other Federal law.

[For other cases, see *Removal of Causes*, 323-334, in *Digest Sup. Ct. 1908.*]

Mandamus — to court — remanding case to state court.

2. Mandamus will lie to compel a Federal circuit court to remand a cause to the state court whence it was removed, where it is apparent as a matter of law from the record itself that the Federal court was without jurisdiction.

[For other cases, see *Mandamus*, 61-66, in *Digest Sup. Ct. 1908.*]

Courts — jurisdiction — acquiring by consent — removal case.

3. A general appearance by the plaintiff in a Federal circuit court after the cause has been removed from a state court does not waive an objection to the jurisdiction founded upon the total lack of any controversy of a Federal nature, since in such cases consent of both parties cannot confer jurisdiction.

[For other cases, see *Courts, V. c. 12*, in *Digest Sup. Ct. 1908.*]

[No. 12, Original.]

Argued April 5, 1909. Decided May 3, 1909.

ORIGINAL application for a Writ of Mandamus to compel the District Judge of the United States for the Southern District of Iowa, Central Division, acting as Circuit Judge, to remand the case to the State Court in which it was originally brought. Granted.

The facts are stated in the opinion.

Mr. Guy A. Miller argued the cause, and, with Mr. W. H. Bremner, filed a brief for petitioner:

Mandamus does not lie to control judicial discretion, except when that discretion has been abused; but it is a remedy when the case is outside of the exercise of this discretion, and outside the jurisdiction of the court or officer to which or to whom the writ is addressed. One of its peculiar and

As to when mandamus is the proper remedy—see notes to *United States v. Lamont*, 39 L. ed. U. S. 160; *McCluney v. Silliman*, 4 L. ed. U. S. 263; *Fleming v. Guthrie*, 3 L.R.A. 54; *Burnsville Turnp. Co. v. State*, 3 L.R.A. 265; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 777; and *Ex parte Hurn*, 13 L.R.A. 120.

more common uses is to restrain inferior courts, and to keep them within their lawful bounds.

Virginia v. Rives, 100 U. S. 316, 25 L. ed. 668.

Where a circuit court has no jurisdiction over a cause removed by a defendant from a state court, and refuses to remand it upon proper motion, mandamus is plaintiff's remedy.

Ex parte Wisner, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150.

The difference between the case at bar and *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581, and *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729, is that, in the latter cases, the court was called upon to decide, in a judicial capacity, and to use his discretion therein, a question outside the jurisdictional one; to wit, whether or not there was a separable controversy between citizens wholly of different states, to the determination of which the state was or was not a necessary party. Had the matter to have been decided therein been upon the question of diverse citizenship, or whether or not the plaintiff's original petition presented a Federal question, then there had not been such a discretion as to have defeated the issuance of the writ. In other words the discretionary powers necessary to defeat the issuance of the writ of mandamus must be such discretionary powers exercised in connection with matters outside the record.

Want of jurisdiction from any cause, appearing on the face of the record, entitles plaintiff to a writ of mandamus, where the Federal court refuses to perform the duty to remand, as these cases are outside the discretion and jurisdiction of the court.

Virginia v. Paul, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; *Virginia v. Rives*, and *Ex parte Wisner*, *supra*.

An action commenced in the state court, by a citizen of another state, against a non-resident defendant, who is a citizen of a state other than that of plaintiff, cannot be removed by the defendant into the circuit court of the United States, on the ground of diverse citizenship; at least, where the plaintiff resists the removal.

Ex parte Wisner, *supra*.

A case cannot be removed to the circuit court of the United States from a state court, on the ground that it arises under the laws of the United States, unless that fact appears from the plaintiff's statement of his own claim; and if it does not so appear, the want cannot be supplied by any statement in the petition for removal or in any subsequent pleadings. *Metcalf v. Watertown*, 128 U. S. 586, 32 L. ed. 543, 9 Sup. Ct. Rep. 173; *Minnesota v. Northern Securi-*

ties Co. 194 U. S. 48, 48 L. ed. 870, 24 Sup. Ct. Rep. 598; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654.

The suggestion on the part of the defendant that he will set up a defense or claim under the laws of the United States does not make the suit one arising under those laws.

Tennessee v. Union & Planters' Bank, *supra*; *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 47 L. ed. 626, 23 Sup. Ct. Rep. 434.

The defendant has lost the distinction between a case that arises under the laws of the United States, and a case that the plaintiff has no right to maintain, by reason of some Federal law. Were the plaintiff to admit all the allegations in the petition for removal, relative to the act to regulate commerce, it would only show that the plaintiff was unable to recover, and not that this case arises under any law of the United States.

Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 46 L. ed. 144, 22 Sup. Ct. Rep. 47.

The settled interpretation of the words, "arising under the laws of the United States," is that a suit arises under such laws only when the plaintiff's statement of his own claim shows that it is based upon those laws. It is not enough that, in the progress of litigation, a question under those laws would arise, since that does not show that plaintiff's action derived its life from those laws.

Louisville & N. R. Co. v. Mottley, 211 U. S. 149, ante, 126, 29 Sup. Ct. Rep. 42.

The question whether or not a shipper is entitled to recover more than the declared value of stock in a contract for interstate shipment does not present a Federal question.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132.

Mr. Nathaniel T. Guernsey argued the cause, and Messrs. Alonzo C. Parker and William E. Miller filed a brief for respondent:

The contention that the case is ruled by *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150, is unsound, because both parties waived any objection which might have been urged to the maintenance of the suit in the southern district of Iowa. The defendant did this by its petition for removal and otherwise. The plaintiff did it by a general appearance, by a stipulation for a cost bond and for time to plead, and by filing a cost bond in conformity to this stipulation.

Interior Constr. & Improv. Co. v. Gibney, 160 U. S. 217-220, 40 L. ed. 401, 402, 16 Sup. Ct. Rep. 272; *Re Moore*, 209 U. S.

490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706.

The character of a case is determined by the questions involved; and if it appears that the claim will be defeated by one construction of a law of the United States or sustained by the opposite construction, it is a case arising under the laws of the United States.

Starin v. New York, 115 U. S. 248-257, 29 L. ed. 388-390, 6 Sup. Ct. Rep. 28; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 38 L. ed. 511, 14 Sup. Ct. Rep. 654; *Bankers' Mut. Casualty Co. v. Minneapolis*, St. P. & S. Ste. M. R. Co. 192 U. S. 371-380, 48 L. ed. 484-488, 24 Sup. Ct. Rep. 325.

The determination of the motion to remand involved an exercise of judicial judgment and discretion which must be reviewed, if at all, by appeal.

Re Pollitz, 206 U. S. 330, 51 L. ed. 1083, 27 Sup. Ct. Rep. 729; *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581.

Mr. Justice Moody delivered the opinion of the court:

This is an application for a writ of mandamus to the district judge of the United States, acting as circuit judge for the southern district of Iowa, central division. The prayer of the petition was for a rule to show cause why a writ of mandamus should not issue, commanding the judge to remand the case to the state court in which it was originally brought. The rule was issued and cause was shown by a return. From the petition and the return the following state of facts appears: The petitioner as assignee of the right of action of a shipper, brought, in a state court of Iowa, an action at law against the American Express Company for the negligent transportation of a boar, whereby the animal was killed, to the damage, it was alleged, to the owner of \$8,000. The transportation was under a written contract between the owner and the defendant, which was annexed to the declaration as an exhibit. The shipment was from a point in Iowa to a point in Nebraska. The citizenship of the plaintiff or his assignor was not alleged, but the defendant was alleged to be a citizen of New York. The defendant seasonably filed in the state court a petition for removal to the circuit court of the United States, with accompanying bond in proper form. The petition having been denied in the state court, the defendant duly filed a copy of the record in the circuit court of the United States, and it was there docketed, whereupon plaintiff moved to remand the case, and the motion was denied by the circuit judge. The plaintiff thereupon, with-

out further action in the circuit court, began this proceeding.

*The petition for removal alleged[463 that the plaintiff was a citizen of Missouri and the defendant "a joint stock association organized under the laws of the state of New York," but contained no allegation of the citizenship of the members of the association. It was agreed at the argument that the defendant was not a corporation, but a joint stock association. Therefore the diversity of citizenship required to warrant a removal on that ground does not appear. The petition for removal, which is printed in the margin,† was not based upon diversity *of citizenship, but upon the[464 ground that the suit was one arising under the laws of the United States.

It is well settled that no cause can be removed from the state court to the circuit court of the United States unless it could originally have been brought in the latter court. *Boston & M. Consol. Copper & S. Min. Co. v. Montana Ore Purchasing Co.* 188 U. S. 632, 640, 47 L. ed. 626, 632, 23 Sup. Ct. Rep. 434; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150.

The only ground of jurisdiction which is or can be suggested *is that the suit was[465 one arising under the Constitution and the laws of the United States. 25 Stat. at L. 433, 434, chap. 866, U. S. Comp. Stat. 1901, pp. 508, 509. It is the settled interpretation of these words, as used in this statute conferring jurisdiction, that a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution. It is not enough, as the law now exists, that it appears that the defendant may find in the Constitution or laws of the United States some ground of defense. *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, ante, 126, 29 Sup. Ct. Rep. 42, and cases cited. If the defendant has any such defense to the plaintiff's claim, it may be set up in the state courts, and, if properly set up, and denied by the highest court of the state, may ultimately be brought to this court for decision.

†Your petitioner, the American Express Company, respectfully shows that it is the defendant in the above-entitled suit, and that the matter and amount in dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars (\$2,000).

That your said petitioner was, at the time of the bringing of this suit, and still is, a joint stock association, organized under the laws of the state of New York, in such cases made and provided, and that the plaintiff was then and still is a citizen of the state of Missouri.

Tested by these principles, the record, including the petition for removal, shows affirmatively that the case was not one arising under the laws of the United States. In substance, the allegations of the petition for removal are, that the defendant was subject to the Federal laws to regulate commerce, and that, under those laws, the defendant had a defense in whole or in part to the cause of action stated in the declaration. But the cause of action itself is not based upon the interstate commerce law or upon any other law of the United States. The case could not have been brought originally in the circuit court of the United States, and was therefore not removable thereto. In holding otherwise we think the learned judge of the circuit court erred.

It is, however, argued that mandamus is not the remedy for the correction of such an error as we have pointed out, and that the aggrieved party should be left to his writ

of error,—a remedy which he undoubtedly has.

Authority to issue writs of mandamus to any courts appointed under the authority of the United States was given to this court by a provision in the original judiciary act, which now appears in § 688 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 565). A writ of mandamus issued under this provision is for the purpose of revising *and [466 correcting proceedings in a case already instituted in the courts, and is deemed a part of the appellate jurisdiction of this court, which is subject to such regulations as the Congress shall make. *Marbury v. Madison*, 1 Cranch, 137, 2 L. ed. 60; *Ex parte Yerger*, 8 Wall. 85, 97, 19 L. ed. 332, 336; *Re Green*, 141 U. S. 325, 326, 35 L. ed. 765, 12 Sup. Ct. Rep. 11.

In *Ex parte Crane*, 5 Pet. 190, 8 L. ed. 92, the court, of its own motion, considered and sustained its authority to issue mandamus to inferior courts, and in that case

Your petitioner further shows that the said suit is one of a civil nature, in which the plaintiff seeks to recover from the defendant the sum of eight thousand dollars (\$8,000) as damages on account of an alleged failure on the part of the defendant to comply with its obligations as a common carrier in the shipment and transportation of a hog, which the assignor of plaintiff offered to the defendant and which the defendant received from the assignor of plaintiff on or about the 30th day of August, A. D. 1907, for transportation from the State Fair Grounds at Des Moines, in the state of Iowa, to the city of Lincoln, in the state of Nebraska.

That the defendant denies that it failed in any respect to perform its obligations with reference to the transportation of the said hog, and denies that it is liable upon the claim set up in the said suit, in any amount, and denies that, in any event, its liability could exceed the sum or value of fifty dollars (\$50).

That the said suit is one arising under the laws of the United States. That your petitioner is, and was, at all the times mentioned in the petition in this suit, a common carrier engaged in trade and commerce between the several states of the United States, and between the territories thereof, and between the territories and the several states.

That, at the date of the shipment in question, your petitioner was, and ever since that time has been, subject to the provisions of the act of Congress entitled, "An Act to Regulate Commerce," approved February 4, 1887 [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154], and of the acts of Congress amendatory thereof and supplementary thereto, and that the alleged cause of action set up in said suit is based upon, grows out of, and necessarily involves, the construction of said acts of Congress. That

among the questions arising under said acts and necessarily involved in said suit are—

(a) Whether the contract on which said suit is based is legal and enforceable by the shipper or the plaintiff as his assignee, in view of the fact that it appears on the face of this contract that, if the claim made in the petition as to the value of the hog in question is true, the shipper, by means of its undervaluation, violated the penal provisions of the act to regulate commerce, as amended.

(b) Whether, under the act to regulate commerce, as amended, the plaintiff may assert a claim for damages in an amount in excess of the value declared by the shipper to be the true value, and, upon this declaration, made the basis of the rate for the interstate transportation in question.

(c) Whether, under the act to regulate commerce, as amended, the provisions of the contract in suit, limiting the liability of the defendant to the sum declared by the shipper in said contract to be the actual value of the animal in question, are valid and enforceable.

(d) Whether, under the act to regulate commerce, as amended, the plaintiff, as assignee of the shipper, is estopped to set up in this suit that the hog in question was a greater value than the value declared to be its true value in the contract sued upon.

(e) Whether the undervaluation of the hog in question by the shipper, in order to obtain a rate for its interstate transportation lower than the published established rate, constituted a violation by the shipper of the penal provisions of the act to regulate commerce, as amended.

(f) Whether, if said penal provisions were so violated, the plaintiff's suit is founded upon what in law is his own wrong, so as to preclude a recovery by him.

(g) Other questions arising under said act to regulate commerce, as amended.

directed by mandamus a judge of an inferior court to sign a bill of exceptions duly presented. Since that time writs of mandamus to inferior courts have been issued in all proper cases.

In *Ex parte Bradley*, 7 Wall. 364, 19 L. ed. 214, it was held that a mandamus from this court would lie to an inferior court of the United States, directing it to restore an attorney to the rolls, who had been disbarred, where the court was without jurisdiction in that regard. And it was said, page 377: "The ground of our decision . . . is, that the court below had no jurisdiction to disbar the relator. . . . No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case. The subject-matter is not before it; the proceeding is *coram non jure* and void."

A specific application of the general principle announced in *Ex parte Bradley* has been made to cases where circuit courts of the United States have, without authority, assumed jurisdiction of a case originally brought in a state court, and it has frequently been held that mandamus from this court would lie to compel a circuit court to remand a case to the state court where it is apparent from the record that the circuit court has no jurisdiction whatever of the case. *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387, 5 A. & E. Ann. Cas. 692; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150. And see *Re Dunn*, 212 U. S. 374, ante, 558, 29 Sup. Ct. Rep. 299. In such a situation the remedy by mandamus is available although the aggrieved party may also be entitled to a writ of error or an appeal. Mandamus, it is true, never lies where the party praying for it has another adequate remedy. The 467] writ of mandamus *was introduced to supplement the existing jurisdiction of the courts and to afford relief in extraordinary cases where the law presents no adequate remedy. High, Extr. Legal Rem. 3d ed. § 15. But where, without any right, a court of the United States has wrested from a state court the control of a suit pending in it, an appeal or writ of error, at the end of long proceedings, which must go for naught, is not an adequate remedy.

In *Virginia v. Rives*, supra, the state, after the cause had been removed to the circuit court, filed its petition in this court for mandamus, without having made a motion to remand in the circuit court; but, in the opinion, nothing turned on the absence of a motion to remand, and the remedy by mandamus was held to exist "when the case

is outside of the exercise of . . . [judicial] discretion, and outside the jurisdiction of the court . . . to which . . . the writ is addressed. One of its peculiar and more common uses is to restrain inferior courts and to keep them within their lawful bounds." P. 323. *Ex parte Bradley* is then referred to and its discussion approved. Then followed *Ex parte Hoard*, 105 U. S. 578, 26 L. ed. 1176, where it is held that, if the circuit court had denied a motion to remand to the state court, the party aggrieved must resort to his writ of error, and that mandamus would be denied, without determining whether the case was properly removed or not. In the three following cases, however (*Virginia v. Paul*, *Kentucky v. Powers*, and *Ex parte Wisner*,—supra), the circuit court had denied motions to remand (the denial of the motion in *Kentucky v. Powers* appearing in the judgment of the court below, 139 Fed. 452) before the petition for mandamus was filed. Nevertheless, the writ of mandamus was issued upon the ground that it was plain as matter of law from the record itself that the circuit court was without jurisdiction. This must now be regarded as the settled law.

The respondent, however, insists that mandamus will not lie to control the judgment or judicial discretion of the court to which the writ is proposed to be directed. This is true *where the judgment or [468 judicial discretion is within the limits of jurisdiction, but not otherwise. Wherever the record, including the petition for removal, shows that there are questions of fact upon whose determination the right of removal depends, and upon which it is the duty of the circuit court to pass judicially, then there is jurisdiction to decide those questions. Their decision is the exercise of judicial discretion; and, if that discretion is erroneously exercised, it can be corrected only by a writ of error or appeal. In these cases writs of mandamus must not be permitted to usurp the functions of writs of error or appeals, or take their place where they offer an adequate remedy to the aggrieved party. It is only in cases where the record makes it clear, as matter of law, that the circuit court was without jurisdiction to take any action whatever that the writ of mandamus lies. This distinction has been acted on many times by this court, and it is enough to refer to two very recent cases. Thus, where the removability of a case turned upon the question whether there was a separable controversy, to the trial of which certain of the defendants were not indispensable or necessary parties, it was held that the circuit court had jurisdiction to determine the question of separability;

that its decision in that respect was the exercise of judicial discretion, and could not be controlled by a writ of mandamus. *Re Pollitz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729. The same point was decided in *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581. In each of these cases a distinction was made between it and a case where, on the face of the record, absolutely no jurisdiction has attached, and the right to a writ of mandamus in the latter case was affirmed.

As we have shown, the want of jurisdiction of the circuit court appears clearly on the record in the case at bar, and does not, as in *Re Pollitz* and *Ex parte Nebraska*, depend upon findings of fact which the circuit court had jurisdiction to make. We think, therefore, it is clear that the writ of mandamus ought to issue.

A subordinate question must receive some attention. It is said that the petitioner in 469]this case appeared generally in the *circuit court after the removal of the case, and thereby waived his right to object to the

jurisdiction, and *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706, is cited in support of the position. But that case simply held that where there was a diversity of citizenship, which gave jurisdiction to some circuit court, the objection that there was no jurisdiction in a particular district might be waived by appearing and pleading to the merits; and anything to the contrary said in *Ex parte Wisner* was overruled, though the *Wisner* Case was otherwise left untouched. See *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 369, 52 L. ed. 1101, 1102, 28 Sup. Ct. Rep. 720. Here, however, is a case where, upon its face, no circuit court of the United States had jurisdiction of the controversy, originally or by removal. In such a case the consent of the parties cannot confer jurisdiction. *Louisville & N. R. Co. v. Mottley*, 211 U. S. 149, ante, 126, 29 Sup. Ct. Rep. 42, and cases cited.

The rule is made absolute and the writ of mandamus awarded.

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ARGUED AND DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES

AT

“

OCTOBER TERM, 1908.

Vol. 214.

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THE DECISIONS
OF THE
Supreme Court of the United States

AT
OCTOBER TERM, 1908.

1] *J. D. COMPTON, Plff. in Err.,
v.
STATE OF ALABAMA.

(See S. C. Reporter's ed. 1-8.)

Extradition — necessity of indictment or affidavit.

1. The executive of a state upon whom demand is made for the arrest and extradition of a fugitive criminal has no power to issue his warrant of arrest for a crime committed in another state, so far as any authority has been conferred upon him by the Federal statutes, unless he is furnished with a copy of the indictment or affidavit required by the provisions of U. S. Rev. Stat. § 5278, U. S. Comp. Stat. 1901, p. 3597, governing interstate extradition. [For other cases, see Extradition, IV. b, in Digest Sup. Ct. 1908.]

Extradition — affidavit — notary public as magistrate.

2. An affidavit made before a notary public who, under Ga. Code 1895, vol. 2, pp. 93, 982, is *ex officio* a justice of the peace, must be regarded as satisfying the requirement of the provisions of U. S. Rev. Stat. § 5278, governing interstate extradition, that such affidavit be made before a magistrate, where the governor of Georgia has based his requisition upon such affidavit, and a warrant of arrest has been issued thereon by the governor of the state upon whom the demand for arrest and extradition was made.

[For other cases, see Extradition, IV. b, in Digest Sup. Ct. 1908.]

[No. 175.]

Submitted April 20, 1909. Decided May 17, 1909.

NOTE.—As to what papers are necessary to obtain the surrender of a fugitive from another state—see note to *Ex parte Hart* (C. C. App. 4th C.) 28 L.R.A. 801. 53 L. ed.

IN ERROR to the Supreme Court of the State of Alabama to review a judgment which affirmed a judgment of the City Court of Montgomery in that state, denying habeas corpus sought on behalf of a person arrested pursuant to an extradition requisition. Affirmed.

See same case below, 152 Ala. 68, 44 So. 685.

The facts are stated in the opinion.

Mr. John M. Chilton submitted the cause for plaintiff in error.

Mr. Alexander M. Garber submitted the cause for defendant in error. Mr. Thomas W. Martin was on the brief.

Mr. Justice Harlan delivered the opinion of the court:

By an affidavit, proper in form and substantially sufficient in its statement of facts, made before a notary public of Fulton county, Georgia, Compton, the plaintiff in error, was charged with having committed the offense of being a common cheat and swindler. The solicitor of the criminal court of Atlanta officially notified the governor that the accused had been so charged and had fled to Alabama, and a requisition on the governor of Alabama was asked for the extradition of Compton, to the end that he might be brought back to Georgia, to be tried according to law for the offense charged.

The governor of Georgia thereupon made a requisition on the governor of Alabama, who, having received the requisition, issued his warrant for the arrest of Compton, if to be found in Alabama, and his delivery into the custody of the agent of Georgia. Having been arrested under that warrant by a sheriff, the accused sued out a writ of habeas corpus before the judge of the city court of Montgomery, Alabama, and sought discharge from custody upon the ground that he was illegally restrained of his

liberty. The return by the sheriff to the writ justified the detention of Compton under the requisition of the governor of Georgia and the warrant of arrest issued by the governor of Alabama.

Upon the hearing of the case before the judge of the Montgomery city court, the accused demurred to the return, and the demurrer having been overruled, he was ordered into the custody of the agent of Georgia for extradition pursuant to law. From that order Compton prosecuted an appeal to the supreme court of Alabama, and that court affirmed the order of the Montgomery city court.

It is contended that the affidavit upon which the governor of Georgia based his requisition, although certified by him to *be authentic, was not in compliance with the Revised Statutes of the United States; that the proceedings in Georgia were not sufficient to authorize the governor of Alabama to issue his warrant of arrest; and that the proceedings on the hearing of the petition for habeas corpus did not show that there had been an indictment against Compton or such an affidavit before a magistrate of Georgia, charging the accused with crime, as is required by the statutes of the United States.

In our judgment the only material question not substantially covered by the former decisions of this court is that raised by the objection that the affidavit in Georgia on which the governor of that state based his requisition was made before a notary public, and not before a "magistrate," as required by the Revised Statutes of the United States, enacted in the execution of the constitutional provision relating to fugitives from justice. This specific objection was raised by the assignments of error for the supreme court of the state, but that court did not seem to have regarded it as of sufficient gravity to be specially noticed in its opinion. But, as the objection is covered by the assignment of errors for this court, and as it asserts a right under the laws of the United States, we deem it appropriate to meet and dispose of it.

The proceedings against Compton were had under § 5278 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3597), as follows: "Whenever the executive authority of any state or territory demands any person, as a fugitive from justice, of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the state

or territory from whence the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, and to cause notice of the arrest to be given to the executive authority making such demand, or to *the agent of such authority appointed [6 to receive the fugitive, and to cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within six months from the time of the arrest, the prisoner may be discharged. All costs or expenses incurred in the apprehending, securing, and transmitting such fugitive to the state or territory making such demand, shall be paid by such state or territory."

Undoubtedly, the statute does not make it the duty of a governor to issue a warrant for the arrest of an alleged fugitive from justice unless the executive of the demanding state produces to him either a copy of an indictment against the accused in the demanding state, or an affidavit before a *magistrate* of such state, charging the fugitive with the commission of crime in the state making the demand. It is, we think, equally clear, that the executive of the state in which the fugitive is at the time may decline to honor the requisition of the governor of the demanding state if the latter fails to furnish a copy of an indictment against the accused, or of any affidavit before a magistrate. But, has the executive of the state upon whom the demand is made for the arrest and extradition of the fugitive, the power to issue his warrant of arrest for a crime committed in another state, unless he is furnished with a copy of the required indictment or affidavit? We are of opinion that he has not, so far as any authority in respect to fugitives from justice has been conferred upon him *by the statute of the United States*. The statute, we think, makes it essential to the right to arrest the alleged fugitive under a warrant of the executive of the state where the alleged fugitive is found that such executive be furnished, before issuing his warrant, with a copy of an indictment or an affidavit before a magistrate in the demanding state, and charging the fugitive with crime committed by him in such state. It is therefore material under this interpretation to inquire whether the affidavit made the basis in this case of the requisition by the governor of Georgia, and which is certified to be authentic, was such an affidavit as the Revised Statutes of the United States required (in the *absence of an indictment) to be produced to the governor of Alabama as the basis of any warrant of arrest that he might issue.

The record shows that the affidavit, a copy of which accompanied the requisition of the governor of Georgia, was made, as we have already said, before a notary public. Was that sufficient under § 5278 of the Revised Statutes, requiring an affidavit to be made before a "magistrate," that is, before one who could properly be deemed a magistrate within the meaning of the law of the state under whose authority he acts as notary public, and in which his duties are discharged? In a general sense a magistrate is a public civil officer, possessing such power—legislative, executive, or judicial—as the government appointing him may ordain. In a narrow sense, a magistrate is regarded—perhaps, commonly regarded—as an inferior judicial officer, such as a justice of the peace. 2 Bouvier's Law Dict. 92. But the appellation of magistrate "is not confined to justices of the peace, and other persons, *ejusdem generis*, who exercise general judicial powers; but it includes others whose duties are strictly executive." Anderson's Law Dict. 643, 644. In *Gordon v. Hobart*, 2 Sumn. 401, 405, Fed. Cas. No. 5,609, the question was whether an alderman of Philadelphia, who was invested by law with all the powers and authority of a justice of the peace, was not to be deemed, in the strictest sense, a magistrate, within the meaning of a statute relating to the acknowledgment of deeds "before a justice of the peace or magistrate." Mr. Justice Story said that the alderman was to be deemed a magistrate within the statute referred to; "for," said he, "I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer,"—citing 1 Bl. Com. 146.

Could a notary public be deemed a magistrate in Georgia? If so, § 5278 of the Revised Statutes was satisfied; for that statute must be held to mean that a person may be regarded as a magistrate, before whom the required affidavit can be made, if he is so regarded under the law of the state 8]where the *alleged crime was committed. Upon looking into the Code of Georgia we find that provision is made for the appointment of notaries public by the judges of the superior courts, on the recommendation of the grand juries of the several counties. Their term of office is four years, and they are commissioned by the governor, and are "*ex officio* justices of the peace, and shall be removable on condition for malpractice in office." Georgia Code, vol. 2, § 4052, p. 982. They are designated as commissioned notaries public. And it is further provided that "justices, and notaries public who are *ex officio* justices of the peace shall keep separate dockets of all civil and criminal causes disposed of by them," and "lay their

dockets before the grand juries of their respective counties on the first day of each term of the superior court for inspection." Id. 1895, p. 93.

In view of these provisions of the Code of Georgia, we hold that the notary public before whom the affidavit in that state was made may be regarded as a magistrate within the meaning of § 5278 of the Revised Statutes of the United States. Such, it must be assumed, was the view of the governor of Alabama when issuing his warrant of arrest under the authority of that statute. When it appears, as it does here, that the affidavit in question was regarded by the executive authority of the respective states concerned as a sufficient basis, in law, for their acting,—the one in making a requisition, the other in issuing a warrant for the arrest of the alleged fugitive,—the judiciary should not interfere, on habeas corpus, and discharge the accused upon technical grounds, and unless it be clear that what was done was in plain contravention of law.

No question other than the one herein disposed of is of such importance or difficulty as to require notice at our hands, and we adjudge that, as the Supreme Court of Alabama did not, by its final order, deny any right secured to the plaintiff in error by the Constitution or laws of the United States, its judgment must be affirmed.

It is so ordered.

*RE MARY HATCH RIGGS. [9

(See S. C. Reporter's ed. 9-15.)

Mandamus — to bankruptcy court — substitute for writ of error.

An adjudication of bankruptcy against a tunnel company on a petition alleging that such company was "engaged in the business of building and contracting" calls for a decision of a question of fact, or of mixed law and fact, as to whether the principal business of such company was that of manufacturing, and contracting for such manufacturing, so as to be within the purview of the bankrupt act of July 1, 1898 (30 Stat. at L. 547, chap. 541, U. S. Comp. Stat. 1901, p. 3423), as amended by the act of

NOTE.—As to when mandamus is the proper remedy—see notes to *United States v. Lamont*, 39 L. ed. U. S. 160; *McCluny v. Silliman*, 4 L. ed. U. S. 263; *Fleming v. Guthrie*, 3 L.R.A. 54; *Burnsville Turnp. Co. v. State*, 3 L.R.A. 265; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 777; and *Ex parte Hurn*, 13 L.R.A. 120.

On mandamus as substitute for appeal—see note to *James v. Central Trust Co.* 47 C. C. A. 376.

February 5, 1903 (32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1025), which decision cannot be reviewed by mandamus.

[For other cases, see *Mandamus*, II. c. 3, in *Digest Sup. Ct.* 1908.]

[No. 11, Original.]

Argued April 12, 1909. Decided May 17, 1909.

APPPLICATION for mandamus to the Judges of the District Court of the United States for the Southern District of New York and to the District Court of that District to review an adjudication of bankruptcy. Denied.

The facts are stated in the opinion.

Mr. Benjamin S. Catchings argued the cause and filed a brief for petitioner:

This proceeding is justified by the practice of this court.

Ex parte Bradley, 7 Wall. 364, 19 L. ed. 214; *Virginia v. Rives*, 100 U. S. 313, 25 L. ed. 667; *Virginia v. Paul*, 148 U. S. 107, 37 L. ed. 386, 13 Sup. Ct. Rep. 536; *Kentucky v. Powers*, 201 U. S. 1, 50 L. ed. 633, 26 Sup. Ct. Rep. 387; 5 A. & E. Ann. Cas. 692; *Ex parte Wisner*, 203 U. S. 449, 51 L. ed. 264, 27 Sup. Ct. Rep. 150; *Pom. Eq. Jur.* § 109.

The writ will issue from this court to a subordinate court of the United States:

(a) When the lower court has jurisdiction of a case but refuses to hear and decide it (*Ex parte Schollenberger*, 96 U. S. 369, 24 L. ed. 853; *Re Connaway*, 178 U. S. 421, 44 L. ed. 1134, 20 Sup. Ct. Rep. 951), unless its right to issue the writ in such a case has been expressly or impliedly taken away by statute (*Re Pennsylvania Co.* 137 U. S. 451, 34 L. ed. 738, 11 Sup. Ct. Rep. 141).

(b) When the lower court, having heard the case, refuses to enter a judgment or decree, or refuses to perform some purely ministerial act, like signing a bill of exceptions (*Life & Fire Ins. Co. v. Wilson*, 8 Pet. 291, 8 L. ed. 949).

(c) When the lower court, after an appeal to this court, has, through misconstruction, mistake, or otherwise, failed to execute directions of this court according to what appears to this court to be the manifest meaning of such directions (*Gaines v. Rugg* [*Gaines v. Caldwell*] 148 U. S. 228, 37 L. ed. 432, 13 Sup. Ct. Rep. 611; *Re Potts*, 166 U. S. 263, 41 L. ed. 994, 17 Sup. Ct. Rep. 520).

(d) When the lower court, on the face of the record, has no power to act (*Ex parte Bradley*; *Virginia v. Rives*; *Virginia v. Paul*; *Kentucky v. Powers*; and *Ex parte Wisner*,—*supra*).

The equities demand the relief prayed for. *Anderson, Receivers*, p. 414.

Mr. Charles K. Beckman argued the cause and filed a brief for respondents:

Mandamus will not lie where its purpose is to perform the office of appeal or writ of error, even if no appeal or writ of error is allowed by law.

American Constr. Co. v. Jacksonville, T. & K. W. R. Co. 148 U. S. 372, 379, 37 L. ed. 486, 489, 13 Sup. Ct. Rep. 758; *Re Politz*, 206 U. S. 323, 51 L. ed. 1081, 27 Sup. Ct. Rep. 729; *Ex parte Newman*, 14 Wall. 152, 20 L. ed. 877; *Ex parte Nebraska*, 209 U. S. 436, 52 L. ed. 876, 28 Sup. Ct. Rep. 581; *Re Key*, 189 U. S. 84, 47 L. ed. 720, 23 Sup. Ct. Rep. 624; *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706; *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720.

Mr. Justice Brewer delivered the opinion of the court:

This is an application by the petitioner for mandamus against Judges Holt and Hough of the district court of the United States for the southern district of New York and the *district court of that district, [13 commanding them and each of them to dismiss all proceedings in bankruptcy against the New York Tunnell Company, or, in the alternative, to reopen the adjudication in bankruptcy, and allow the petitioner or any party in interest to appear and be heard in opposition to the petition and adjudication thereof; or, in still further alternative, forbidding them from taking any further proceedings in the matter of the tunnel company, its property, assets, and effects.

The facts, briefly stated, are that the tunnel company was engaged in constructing a tunnel from New York to Brooklyn, to be used for the purpose of a railroad between the boroughs of Manhattan and Brooklyn. On May 23, 1907, certain creditors of the tunnel company filed a petition in bankruptcy in the district court of the southern district of New York, upon which petition, on May 29, 1907, Judge Holt entered an order adjudicating it a bankrupt, and appointing a receiver. By direction of the bankruptcy court the receiver proceeded with the construction of the tunnel, and successfully completed the work. At the time of the petition in bankruptcy this applicant had an action pending in the state court to recover damages on account of the death of her husband, resulting, as charged, from the negligence of the tunnel company. On May 31, 1907, Judge Holt issued an order to show cause why that action should not be restrained, and proof of the claim be made before a special master. An order

of restraint was granted upon this application, which was afterwards set aside by the court of appeals, and the applicant, on May 25, 1908, reduced her claim to judgment.

It is contended by the applicant that, although the petition in bankruptcy alleged that the tunnel company was "engaged in the business of building and contracting," it failed to show that the principal business of the company was "manufacturing, trading, printing, publishing, mining, or mercantile pursuits," that being the language of the bankruptcy act of 1898 [30 Stat. at L. 547, chap. 541, U. S. Comp. Stat. 1901, p. 3423], as amended. [32 Stat. at L. 797, chap. 487, U. S. Comp. Stat. Supp. 1907, p. 1025.]

14] *We have recently given full consideration to the circumstances under which mandamus will be issued by this court to restrain the action of inferior tribunals. *Re Winn*, 213 U. S. 458, ante, 873, 29 Sup. Ct. Rep. 515. Hence we deem it unnecessary to go into other details of the proceedings in the bankruptcy or the state courts, nor to consider the many questions fully and elaborately presented in briefs and argued by counsel. Obviously, this application is largely in the nature of a writ of error to review the action of the district court of the southern district of New York and its judges, and a writ of mandamus is no proper substitute for a writ of error.

The allegation in the petition in bankruptcy is general in its terms, that the tunnel company is engaged in the business of building and contracting, but it fails to disclose the particular kind of work for which it is contracting, or which it is engaged in building. It might be inferred from the work which it was shown it was doing in this particular case, as well as from its name, that its principal business was that of contracting for the construction of tunnels; but that would be only an inference, and not conclusive. Its principal business may have been that of manufacturing, and contracting for such manufacturing, and this particular work only a small part of that which it was generally engaged in. What evidence was presented to the district court to sustain the application for an adjudication in bankruptcy is not disclosed. We may not assume that it was insufficient, or that it failed to make certain or probable that the principal business of the company was that of manufacturing, and contracting for such manufacturing. We do not deem it necessary to decide the question which is argued by counsel, whether the adjudication of the bankruptcy court can be challenged collaterally, or whether, indeed, this is only a collateral attack. *Manson v. Williams*, 213 U. S. 453, ante, 869, 29 Sup. Ct. Rep. 515, 2d ed.

Ct. Rep. 519. We rest our conclusion upon the proposition that the district court, in adjudicating the tunnel company a bankrupt, was called upon to decide, and did decide, a question of fact or of mixed law and fact, and that such adjudication cannot be reviewed *by proceedings in mandamus. [15 Re Pollitz, 206 U. S. 323, 331, 51 L. ed. 1081, 1083, 27 Sup. Ct. Rep. 729; *Re Winn*, supra.]

The rule is discharged and the writ of mandamus denied.

JOHN B. WHITCOMB, Surviving Partner of the Firm of Moses P. Whitcomb and John B. Whitcomb, Copartners as Whitcomb Brothers, et al., Plffs. in Err.,
v.

JOHN E. WHITE and Roberta B. White.

(See S. C. Reporter's ed. 15-19.)

Courts—relation to Land Department — conclusiveness of departmental findings.

A finding of the Land Department in favor of a homestead entry in a contest with persons claiming to have been occupants of the premises as a town site, which rests, not solely upon the fact that the application for the homestead entry was filed a few hours before that of the trustee for the occupants of the town site, but rather chiefly on the priority of the homesteader's equitable rights, must be regarded as conclusive by the Federal Supreme Court,—especially where such finding is reinforced by the judgments of the state courts,—unless there is the clearest and most convincing evidence of mistake or injustice. [For other cases, see *Courts*, 260a-285, in *Digest Sup. Ct.* 1908.]

[No. 185.]

Argued April 28, 29, 1909. Decided May 17, 1909.

IN ERROR to the Supreme Court of the State of Idaho to review a judgment setting aside an award of damages by the District Court of the First Judicial District of that state in and for the County of Kootenai in an action to recover possession of real property, but affirming the judgment below in favor of plaintiffs for the recovery of possession. Affirmed.

See same case below, 13 Idaho, 490, 90 Pac. 1080.

NOTE.—On the conclusiveness and effect of the decisions of Land Department—see notes to *Hartman v. Warren*, 22 C. C. A. 38; *Carson City Gold & S. Min. Co. v. North Star Min. Co.* 28 C. C. A. 344; and *Uinta Tunnel Min. & Transp. Co. v. Greede & C. C. Min. & Mill. Co.* 57 C. C. A. 207.

Statement by Mr. Justice Brewer:

This was an action brought by John E. White and Roberta B. White, his wife, in the district court of the first judicial district of the state of Idaho, in and for the county of Kootenai, to recover the possession of the "northwest quarter of the southwest quarter and lots five (5), six (6), and seven (7), of section two (2), township fifty-five (55) north of range two (2) east, Boise meridian."

The defendants' answer was in the nature of a cross bill in equity, admitting that the legal title to the premises was in the plaintiffs, and seeking to charge them as holders of that title in trust for the use and benefit of the defendants. A trial before the court without a jury resulted in a judgment for the plaintiffs for the recovery of 16]possession, and damages *for the detention. On appeal to the supreme court of the state, the award of damages was set aside, but the judgment for the recovery of possession was affirmed. Thereupon the case was brought here on error.

The plaintiffs' title was a patent from the United States to plaintiff John E. White, based upon a homestead entry. The defendants claimed to have been occupants of the premises as a town site, and that therefore the land was not subject to entry as a homestead. The application for the homestead entry was formally made at the land office a few hours before that of the probate judge of the county, acting under the statutes as trustee for the occupants of the town site. A contest was had in the local land office, which resulted in a finding in favor of the plaintiff John E. White. This decision was sustained by the Commissioner of the General Land Office and affirmed by the Secretary of the Interior.

Mr. Albert Allen argued the cause and filed a brief for plaintiffs in error:

The plaintiff is a trustee for the benefit of the occupants of the land occupied by the defendants.

Starr v. Starr, 6 Wall. 402, 419, 18 L. ed. 925, 930; *Garland v. Wynn*, 20 How. 6, 15 L. ed. 801; *Lindsey v. Hawes*, 2 Black, 554, 17 L. ed. 265; *Johnson v. Towsley*, 13 Wall. 72, 85, 20 L. ed. 485, 487; *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 41 L. ed. 175, 16 Sup. Ct. Rep. 1018.

Mr. George H. Lamar argued the cause, and, with Mr. H. M. Stephens, filed a brief for defendants in error:

Findings of fact by the lower Federal courts are conclusive.

Saulet v. Shepherd, 4 Wall. 502, 18 L. ed. 442; *Copelin v. Phoenix Ins. Co.* 9 Wall. 461, 467, 19 L. ed. 739, 741; *Mercantile*

Mut. Ins. Co. v. Folsom, 18 Wall. 237, 249, 21 L. ed. 827, 833; *United States v. Dawson*, 101 U. S. 569, 25 L. ed. 791; *Tyng v. Grinnell*, 92 U. S. 467, 23 L. ed. 733; *Quinby v. Conlan*, 104 U. S. 420, 425, 26 L. ed. 800, 802.

The same rule obtains in actions at law on a writ of error to the state courts.

Atchison, T. & S. F. R. Co. v. Matthews, 174 U. S. 96, 43 L. ed. 909, 19 Sup. Ct. Rep. 609; *Re Buchanan*, 158 U. S. 31, 39 L. ed. 884, 15 Sup. Ct. Rep. 723; *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 41 L. ed. 979, 17 Sup. Ct. Rep. 581; *Lewis v. Campau*, 3 Wall. 106, 18 L. ed. 211; *Martin v. Marks*, 97 U. S. 345, 348, 24 L. ed. 940, 941.

Also in equity cases, on writ of error from the Supreme Court, the prevailing practice of the higher court of the United States seems to be for that court to refuse to go into questions of fact.

Dower v. Richards, 151 U. S. 658, 38 L. ed. 305, 14 Sup. Ct. Rep. 452; *Hedrick v. Atchison, T. & S. F. R. Co.* 167 U. S. 673, 42 L. ed. 320, 17 Sup. Ct. Rep. 922; *Egan v. Hunt*, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; *Eastern Bldg. & L. Asso. v. Ebaugh*, 185 U. S. 114, 122, 46 L. ed. 830, 833, 22 Sup. Ct. Rep. 566; *Adams v. Church*, 193 U. S. 510, 513, 48 L. ed. 769, 770, 24 Sup. Ct. Rep. 512.

Findings of fact and mixed questions of fact and law by the Land Department are conclusive on the courts.

De Cambra v. Rogers, 189 U. S. 119, 122, 47 L. ed. 734, 735, 23 Sup. Ct. Rep. 519; *Potter v. Hall*, 189 U. S. 292, 47 L. ed. 817, 23 Sup. Ct. Rep. 545; *Burfenning v. Chicago, St. P. M. & O. R. Co.* 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; *Stewart v. McHarry*, 159 U. S. 643, 40 L. ed. 290, 16 Sup. Ct. Rep. 117; *Sanford v. Sanford*, 139 U. S. 647, 35 L. ed. 291, 11 Sup. Ct. Rep. 666; *Lee v. Johnson*, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; *Baldwin v. Stark*, 107 U. S. 463, 27 L. ed. 526, 2 Sup. Ct. Rep. 473; *Steel v. St. Louis Smelting & Ref. Co.* 106 U. S. 451, 27 L. ed. 228, 1 Sup. Ct. Rep. 389; *Quinby v. Conlan*, 104 U. S. 420, 423, 425, 426, 26 L. ed. 800-802; *United States v. Atherton*, 102 U. S. 372, 374, 26 L. ed. 213, 214; *Marquez v. Frisbie*, 101 U. S. 476-478, 25 L. ed. 801, 802; *Vance v. Burbank*, 101 U. S. 514, 519, 520, 25 L. ed. 929, 931; *United States v. Throckmorton*, 98 U. S. 61, 65, 66, 69, 25 L. ed. 93, 95, 96; *French v. Fyan*, 93 U. S. 171, 172, 23 L. ed. 813, 814; *Shepley v. Cowan*, 91 U. S. 330, 339, 340, 23 L. ed. 424, 427, 428.

It is not permissible to introduce evidence in the courts upon any question that was raised or could have been raised in the Interior Department.

Vance v. Burbank, 101 U. S. 520, 25 L. ed. 931; Lee v. Johnson, 116 U. S. 48, 29 L. ed. 570, 6 Sup. Ct. Rep. 249; United States v. Northern P. R. Co. 37 C. C. A. 290, 95 Fed. 864; Wiseman v. Eastman, 21 Wash. 163, 57 Pac. 398; De Cambra v. Rogers, 189 U. S. 119, 47 L. ed. 734, 23 Sup. Ct. Rep. 519; St. Louis Smelting & Ref. Co. v. Kemp, 104 U. S. 641, 26 L. ed. 876.

Mr. Justice Brewer delivered the opinion of the court:

The decision of the Land Department was not rested solely upon the fact that White's formal application was filed a few hours before that of the trustee for the occupants of the town site, but rather chiefly upon the priority of the former's equitable rights. So far as such decision involves questions of fact, it is conclusive upon the courts. Johnson v. Towsley, 13 Wall. 72, 86, 20 L. ed. 485, 487; Shepley v. Cowan, 91 U. S. 330, 340, 23 L. ed. 424, 427; Marquez v. Frisbie, 101 U. S. 473, 476, 25 L. ed. 800, 801; Quinby v. Conlan, 104 U. S. 420, 425, 426, 26 L. ed. 800, 802; Burfenning v. Chicago, St. P. M. & O. R. Co. 163 U. S. 321, 323, 41 L. ed. 175, 176, 16 Sup. Ct. Rep. 1018; De Cambra v. Rogers, 189 U. S. 119, 120, 47 L. ed. 734, 23 Sup. Ct. Rep. 519.

And this rule is applied in cases where 17] there is a mixed *question of law and fact, unless the court is able to so separate the question as to see clearly what and where the mistake of law is. As said by Mr. Justice Miller in Marquez v. Frisbie, supra, p. 476:

"This means, and it is a sound principle, that where there is a mixed question of law and of fact, and the court cannot so separate it as to see clearly where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive." Quinby v. Conlan, supra, 426.

Further, the 38th and 39th findings of the trial court, which were not disturbed by the supreme court in its opinion, were:

"38. That the officers of the Interior Department did not exclude any testimony, and there was in said Land Office and said Department a full, fair, and complete hearing.

"39. That the officers of said Interior Department, of said Land Office, or any or either of them, were not guilty of any fraud or any unlawful conduct."

Clearly, the findings of the Land Department cannot be disregarded, especially since they are reinforced by the judgment of the state courts. This court ought not to reverse such judgment except upon the clearest and most convincing evidence of mistake or injustice.

These are among the matters shown by 53 L. ed.

the testimony and upon which the decisions of the Land Department and the state court were based: While the entire quarter section was public land, and before settlement by any individual, the Northern Pacific constructed its road, crossing Clark's fork of the Columbia river near the tract. At that time the public surveys had not been extended over this region; indeed, were not so extended until 1893, and the approved plat of the township was not filed in the local land office until November 27, 1895, the day the formal applications of these parties were made. Between 1884 and 1890 some four or five persons settled on the tract, who, with others, at the time of the application for the town site entry, in 1895, claimed to be then occupying *it for the purposes of [18 trade and business, and to have established a town, which they called Clark's Fork. The right of way of the Northern Pacific was 400 feet in width (13 Stat. at L. 365, chap. 217), and, at first, the houses were upon this right of way, the settlers believing that it was only 200 feet in width. The original occupants were not seeking to establish a town, but to enter the land as a homestead. The first attempt to obtain title to the tract in controversy under the town site laws was made on October 29, 1895, when a petition signed by ten persons was filed with the probate judge of the county, asking him to secure the tract as a town site. Melder v. White, 28 Land Dec. 412, 415. In 1890 the plaintiff White was the station agent of the Northern Pacific at that place, and in 1891 settled upon the land, making his home outside the right of way, and intending to enter it as a homestead. There was talk between him and some of the other occupants in reference to an apportionment of the quarter section between them, but no agreement was reached. In other words, the occupation at first was with no thought of a town, but by parties contemplating securing homes under the homestead law. After it had been ascertained that the railroad right of way was 400 feet in width, and in 1893, the settlers were notified by the railroad company of its title. Thereupon some leased from the company while others moved their houses off the company's ground. Under those circumstances questions of fact arose as to the first occupant, and for what purpose he occupied it. In deciding the contest, the Secretary of the Interior held (28 Land Dec. 412, 421):

"In the case at bar, at the time of the survey in the field, White was the only settler on this subdivision except Whitcomb, the other parties at that time being located on the right of way, and as to them White's right, as a prior settler, attached to the en-

tire tract from such time. Any right Whitcomb may have had as a homestead settler by reason of his settlement before survey in the field is lost by his failure to assert the same under the homestead law.

"The evidence shows that, after the survey in the field, *White made claim to the entire tract, and exercised rights of ownership over the same. It was necessary for him to adjust his settlement claim to the lines of the public survey, and, in so doing, to include the legal subdivision on which his improvements were placed."

Notwithstanding some conflict in the testimony, there was abundant to support the findings of the Secretary of the Interior, and, as heretofore stated, such findings of facts are to be regarded as conclusive in any controversy in the courts.

There was no error in the decisions of the Supreme Court of Idaho, and its judgment is affirmed.

SMITHSONIAN INSTITUTION and Melville W. Fuller, as Chancellor of said Smithsonian Institution, Plffs. in Err.,
v.

GAMALIEL C. ST. JOHN, as Executor and Trustee under the Last Will and Testament of Wallace C. Andrews, Deceased, et al.

(See S. C. Reporter's ed. 19-33.)

Error to state court—Federal question—raising on rehearing.

1. An affidavit in support of a petition for rehearing in the highest state court, stating that, in the brief as well as upon oral argument, a specified Federal question had been presented and discussed, will not support a writ of error from the Federal Supreme Court, where the state court denied the petition, with the statement that no Federal question had been raised in that court, which may be construed as denying

NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to Apex Transp. Co. v. Garbade, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to Mutual L. Ins. Co. v. McGrew, 63 L.R.A. 33.

As to when Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to Chicago, I. & L. R. Co. v. McGuire, 49 L. ed. U. S. 414.

On the review of decisions of state courts presenting the question of full faith and credit—see note to Allen v. Alleghany Co. 49 L. ed. U. S. 551.

that any such matter was brought to its attention, as stated in the affidavit, or as holding that it presented no Federal question.

[For other cases, see Appeal and Error, 1298-1310, in Digest Sup. Ct. 1908.]

Error to state court—decision of Federal question—full faith and credit.

2. A decision of a state court sustaining the validity of a statute of another state, which is asserted to violate the Constitution of that state, does not necessarily involve a decision respecting the full faith and credit to be given such Constitution, so as to sustain a writ of error from the Federal Supreme Court, where the state court did not question the validity of the state Constitution, but, rightly or wrongly, held that the statute was not repugnant to it.

[For other cases, see Appeal and Error, 1423-1427, in Digest Sup. Ct. 1908.]

[No. 613.]

Argued April 5, 6, 1909. Decided May 17, 1909.

IN ERROR to the Supreme Court of the State of New York in and for the County of New York to review a judgment entered pursuant to a judgment of the Court of Appeals of that state, which, with a slight modification, had affirmed a judgment of the Appellate Division of the Supreme Court of that state, First Department, affirming a judgment of the Special Term of the Supreme Court of the County of New York, sustaining the validity of a charitable bequest. Dismissed for want of jurisdiction.

See same case below, Appellate Division, 117 App. Div. 698, 102 N. Y. Supp. 808; Court of Appeals, 191 N. Y. 254, 83 N. E. 981.

Statement by Mr. Justice Brewer:

This is in effect a controversy between the Smithsonian Institution of Washington, District of Columbia, and the Andrews Institute for Girls, a corporation of the state of Ohio, concerning a will made by Wallace C. Andrews, a resident of the city, county, and state of New York, who died in that city on April 7, 1899. Both Mr. Andrews and his wife perished on that day in a fire in their dwelling house in New York city. Whether husband or wife died first is not known. She was twelve years younger than he. They had no children. The will was executed on November 12, 1891. After some special gifts, which need not be noticed, the will provides:

"Fourth: Upon the death of my said wife, I devise and bequeath to the corporation hereinafter directed to be formed, all the excess and residue of my estate over the

sum of \$500,000 specified in the third paragraph hereof.

"Fifth: I direct my executor and executrix as soon as practicable after my decease and during the lives of my said wife and her said brother or the life of the long-21]est liver of them, to *procure under the laws of the state of Ohio, an incorporation to be formed with proper powers, for the purpose of establishing an institution on the farm known as the Williams farm, formerly owned by me and now owned by my wife, fronting on Erie street, in the town of Willoughby, Lake county, Ohio, or if said farm be for any cause not available, then on other suitable premises in the said town of Willoughby, for the free education of girls and for their support in proper cases during education, with a special view toward rendering them self-supporting.

"Said institution shall contain, among others, a sewing department, cooking department, designing department and departments of phonography and typewriting and other useful work that would afford the pupils employment in life, including such new discoveries and inventions as may be made from time to time tending to enlarge the opportunities for useful and honorable employment for women, and such as will aid them in obtaining honorable and independent positions in life. Such school to be open only to girls between the ages of ten and sixteen, both inclusive.

"Not exceeding one tenth of the sum devoted to the said institution by the fourth paragraph hereof may be used for the erection of suitable buildings therefor on the said farm, or in the contingency above specified, for the purchase of suitable premises in said town and the erection of such buildings thereon, and the income of the remaining nine tenths shall be devoted to the support and maintenance of said institution.

"If, when the said sum shall be received by said corporation, the one tenth thereof shall not, in the judgment of the directors, be sufficient for such erection or such purchase and erection as the case may be, the whole sum may, in their discretion, be allowed to accumulate until the one tenth thereof with its accumulation shall be so sufficient, when such one tenth may be used therefor, while the income of the remaining nine tenths of said sum and accumulations shall be devoted to the support and maintenance of said institution.

22] * "The charter of the said corporation shall also provide, if and so far as may be consistent with law and practicable, for the management of the said corporation by a board of five directors, to consist of the governor for the time being of the state of

Ohio, the member of Congress for the time being for the congressional district embracing said town of Willoughby, the treasurer for the time being of said county of Lake, the mayor for the time being of Willoughby, and the said Gamaliel C. St. John, and for the choice of a resident of Willoughby by the said governor as successor to the said St. John as often as the fifth place shall become or be vacant.

"Sixth: If my said wife shall die before me, then the dispositions provided for in the third and fourth paragraphs hereof shall take effect upon my death.

"Seventh: I direct my said executor and executrix as soon as they may deem advisable, but within two years after my decease, to sell all my real estate and invest the proceeds in interest-paying securities, and as to all my estate I give them and my trustees power to invest and re-invest the same or any part thereof, having regard both to income and safety.

"Eighth: In case my intention with respect to the said institution for girls shall because of illegality fail, or become impossible of realization, I then devise and bequeath the sum intended for it to the Smithsonian Institution at Washington, District of Columbia, to be devoted to the purposes for which it was established.

"Ninth: I appoint my said wife executrix and my said brother-in-law executor of this my will, and neither as such nor as trustees shall they be required to give security. All the powers herein granted to them may be exercised by the survivor of them and unless limited to their lives, by their successor or successors in the administration of my estate."

Mrs. Andrews dying at the same time her husband did, his brother-in-law, Mr. St. John, duly qualified as executor and trustee under the will. Thereafter he commenced this suit in the supreme court of New York county, seeking a construction *of the [23 will and a determination of the rights of the Andrews Institute for Girls, the Smithsonian Institution, and the heirs at law and next of kin of the deceased. The Andrews Institute for Girls, the Smithsonian Institution, Chief Justice Melville W. Fuller, as Chancellor thereof, the attorney general of the state of New York, and the heirs and next of kin of the deceased, were made parties defendant. At a hearing in a special term of the supreme court of the county of New York it was held that "the defendant the Andrews Institute for Girls is entitled to the residuary estate of the said Wallace C. Andrews, deceased, together with the income thereof which has accrued since the death of said deceased, after paying the expenses of administration," and also that the

defendant the Smithsonian Institution has no interest in the estate of the said Wallace C. Andrews, deceased. This decision was sustained by the appellate division of the first department, and thereafter, with a slight modification, by the court of appeals of the state, which remitted the record of the supreme court of New York city, where the final judgment was entered. Thereupon that judgment was brought here on a writ of error by the Smithsonian Institution and its chancellor.

The defendants in error filed a motion to dismiss, which was postponed until the final hearing, and the case is now before us on such final hearing and motion to dismiss.

Messrs. Frank W. Hackett and Edmund Wetmore argued the cause and filed a brief for plaintiffs in error:

That a state court holds that the Federal question was not raised is not conclusive. This court will look into the record and judge for itself what was the fact. It may find that the state court has ignored a claim of constitutional right. Such action is the equivalent of denying the Federal right.

Des Moines Nav. & R. Co. v. Iowa Homestead Co. 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *Chapman v. Goodnow* (*Chapman v. Crane*) 123 U. S. 540, 31 L. ed. 235, 8 Sup. Ct. Rep. 211; *Rogers v. Alabama*, 192 U. S. 230, 48 L. ed. 418, 24 Sup. Ct. Rep. 257.

This court must judge for itself of the true nature and effect of the order relied upon.

Great Western Teleg. Co. v. Purdy, 162 U. S. 335, 40 L. ed. 990, 16 Sup. Ct. Rep. 810.

A right may be "specially set up and claimed," though not in terms stated to be a right claimed under the Constitution.

Tilt v. Kelsey, 207 U. S. 51, 52 L. ed. 99, 28 Sup. Ct. Rep. 1.

Where the Federal question is raised for the first time in the supreme court of a state, and that court takes no notice of it, in its opinion, if this court sees that the question was in fact raised, it will take jurisdiction.

Arrowsmith v. Harmoning, 118 U. S. 194, 30 L. ed. 243, 6 Sup. Ct. Rep. 1023.

The settled practice of this court is to look into the record in order to ascertain whether in fact there was presented to the state court a claim of a constitutional right.

McCullough v. Virginia, 172 U. S. 117, 43 L. ed. 387, 19 Sup. Ct. Rep. 134.

The benefit of claiming the protection of the Constitution is not dependent upon an adherence to technical form. It is suffi-

cient if it appear from the record that the right was specially set up or claimed in such manner as to bring it to the attention of the court.

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 231, 41 L. ed. 982, 17 Sup. Ct. Rep. 581; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 534, 46 L. ed. 676, 22 Sup. Ct. Rep. 446.

Mr. Virgil P. Kline argued the cause, and, with Messrs. Henry Wollman and Sheldon H. Tolles, filed a brief for defendant in error the Andrews Institute for Girls:

There is no Federal question in the record, and this court, therefore, has no jurisdiction.

Waters-Pierce Oil Co. v. Texas, 212 U. S. 112, ante, 431, 29 Sup. Ct. Rep. 227.

The claim of Federal right must be seasonably and specially made, and must appear plainly and openly upon the record. It cannot be introduced into the record by stealth or as an afterthought.

F. G. Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. ed. 1149, 17 Sup. Ct. Rep. 709.

It rests upon the litigant to make his claim and invoke the consideration of the court; but when no such ground has been presented to or considered by the courts of the state, it cannot be said that those courts have disregarded the Constitution of the United States, and this court has no jurisdiction.

Scudder v. Comptroller (*Scudder v. Coler*) 175 U. S. 32, 36, 44 L. ed. 62, 63, 20 Sup. Ct. Rep. 26.

The first mention of the subject appears in the motion for reargument after the final decision, which motion was denied by the court of appeals, it finding that "no Federal question having been raised in this court."

Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 52 L. ed. 625, 28 Sup. Ct. Rep. 337; *McCorquodale v. Texas*, 211 U. S. 432, ante, 269, 29 Sup. Ct. Rep. 146.

It is impossible, upon this record, to avoid the conclusion that it never occurred to the plaintiffs in error to raise a Federal question until after the case had been finally decided against them in the highest court of the state.

Scudder v. Comptroller, supra.

Effort is made in the affidavit filed with the motion for reargument to make it appear that the question was presented earlier. This court has held, in *Zadig v. Baldwin*, 166 U. S. 485, 41 L. ed. 1087, 17 Sup. Ct. Rep. 639, that Federal questions cannot be established by this process, but must appear on the record.

If a case is carried through the state courts upon arguments drawn from the state

Constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time, when he takes his writ of error, that the decision is wrong under the Constitution of the United States. *Osborne v. Clarke*, 204 U. S. 565, 51 L. ed. 619, 27 Sup. Ct. Rep. 319.

Mr. James W. Hawes argued the cause and filed a brief for defendant in error St. John:

When, in the courts of a state, the validity of a statute of another state is not drawn in question, but only its construction, no Federal question arises.

Lloyd v. Matthews, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Allen v. Alleghany Co.* 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Baltimore & P. R. Co. v. Hopkins*, 130 U. S. 210, 223, 32 L. ed. 908, 913, 9 Sup. Ct. Rep. 503; *United States v. Lynch*, 137 U. S. 280, 285, 34 L. ed. 700, 702, 11 Sup. Ct. Rep. 114; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 495, 496, 47 L. ed. 273-275, 23 Sup. Ct. Rep. 194.

A real, and not a fictitious, question, is essential to the jurisdiction of this court over the judgments of state courts.

Millingar v. Hartuppee, 6 Wall. 258, 18 L. ed. 829; *New Orleans v. New Orleans Water Works Co.* 142 U. S. 79, 87, 35 L. ed. 943, 946, 12 Sup. Ct. Rep. 142; *Hamblin v. Western Land Co.* 147 U. S. 531, 532, 37 L. ed. 267, 268, 13 Sup. Ct. Rep. 353; *New Orleans Waterworks Co. v. Louisiana*, 185 U. S. 336, 46 L. ed. 936, 22 Sup. Ct. Rep. 691; *Sawyer v. Piper*, 189 U. S. 154, 47 L. ed. 757, 23 Sup. Ct. Rep. 633.

Where the record discloses that, if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has also been raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the Federal question, to sustain the judgment, this court will not review the judgment.

Jenkins v. Loewenthal, 110 U. S. 222, 28 L. ed. 129, 3 Sup. Ct. Rep. 638; *Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co.* 120 U. S. 141, 156, 157, 30 L. ed. 614, 620, 621, 7 Sup. Ct. Rep. 472; *Eustis v. Bolles*, 150 U. S. 361, 37 L. ed. 1111, 14 Sup. Ct. Rep. 131; *Hammond v. Connecticut Mut. L. Ins. Co.* 150 U. S. 633, 37 L. ed. 1206, 14 Sup. Ct. Rep. 236; *Missouri P. R. Co. v. Fitzgerald*, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Harrison v. Morton*, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28

Sup. Ct. Rep. 30; *Arkansas Southern R. Co. v. German Nat. Bank*, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78; *Vandalia R. Co. v. Indiana*, 207 U. S. 359, 52 L. ed. 246, 28 Sup. Ct. Rep. 130; *Elder v. Wood*, 208 U. S. 226, 233, 52 L. ed. 464, 466, 28 Sup. Ct. Rep. 263.

This court has no jurisdiction to review a judgment of the highest court of a state unless a Federal question has been, either in express terms or by necessary effect, decided by that court against the plaintiffs in error.

Blount v. Walker, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120; *Chappell v. Stewart*, 169 U. S. 733, 42 L. ed. 1215, 18 Sup. Ct. Rep. 940; *Jones v. Vane*, 200 U. S. 614, 50 L. ed. 621, 26 Sup. Ct. Rep. 755; *Field v. Barber Asphalt Paving Co.* 209 U. S. 540, 52 L. ed. 917, 28 Sup. Ct. Rep. 757.

The court of appeals will not consider a constitutional question unless it was raised in a proper manner in the courts below, it being held to be waived.

Dodge v. Cornelius, 168 N. Y. 244, 61 N. E. 244; *Paul v. Delaware, L. & W. R. Co.* 175 N. Y. 478, 67 N. E. 1087; *Re Andersen*, 178 N. Y. 420, 70 N. E. 921; *New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co.* 180 N. Y. 293, 73 N. E. 48; *Purdy v. Erie R. Co.* 162 N. Y. 50, 48 L.R.A. 669, 56 N. E. 508; *Colby v. Day*, 177 N. Y. 549, 69 N. E. 367.

Assuming that a Federal question was involved in this case, no Federal question was raised by plaintiffs in error prior to their motion for a reargument; and as the Federal question was not considered and acted upon by the court of appeals upon that motion, the raising of the Federal question came too late.

McMillen v. Ferrum Min. Co. 197 U. S. 343, 49 L. ed. 784, 25 Sup. Ct. Rep. 533; *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, 52 L. ed. 625, 28 Sup. Ct. Rep. 337; *Paraíso v. United States*, 207 U. S. 368, 52 L. ed. 249, 28 Sup. Ct. Rep. 127; *Harding v. Illinois*, 196 U. S. 78, 84, 86, 87, 49 L. ed. 394-397, 25 Sup. Ct. Rep. 176.

Inasmuch as plaintiffs in error relied in this case upon the full faith and credit clause of the Constitution of the United States, their claim must be "specially set up and claimed" by them.

Johnson v. New York L. Ins. Co. 187 U. S. 491, 495, 47 L. ed. 273, 274, 23 Sup. Ct. Rep. 194; *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 488, 43 L. ed. 521, 525, 19 Sup. Ct. Rep. 247; *Spies v. Illinois*, 123

U. S. 131, 181, 31 L. ed. 80, 91, 8 Sup. Ct. Rep. 21, 22.

A mere claim which amounts to no more than a vague and inferential suggestion that a right under the Constitution of the United States has been denied, is not sufficient.

Thomas v. Iowa, 209 U. S. 258, 52 L. ed. 782, 28 Sup. Ct. Rep. 487; *Chicago, I. & L. R. Co. v. McGuire*, 196 U. S. 128, 49 L. ed. 413, 25 Sup. Ct. Rep. 200; *Skaneateles Paper Co. v. Syracuse*, 201 U. S. 642, 50 L. ed. 901, 26 Sup. Ct. Rep. 763; *Scudder v. Comptroller (Scudder v. Coler)* 175 U. S. 32, 44 L. ed. 62, 20 Sup. Ct. Rep. 26; *Eastern Bldg. & L. Asso. v. Welling*, 181 U. S. 47, 45 L. ed. 739, 21 Sup. Ct. Rep. 531; *Stewart v. Louisiana*, 207 U. S. 584, 52 L. ed. 351, 28 Sup. Ct. Rep. 262; *Jacobi v. Alabama*, 187 U. S. 133, 47 L. ed. 106, 23 Sup. Ct. Rep. 48; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 653, 41 L. ed. 1149, 1151, 17 Sup. Ct. Rep. 709; *Capital City Dairy Co. v. Ohio*, supra; *Osborne v. Clark*, 204 U. S. 565, 568, 51 L. ed. 619, 626, 27 Sup. Ct. Rep. 319; *New York C. & H. R. R. Co. v. New York*, 186 U. S. 269, 273, 46 L. ed. 1158, 1160, 22 Sup. Ct. Rep. 916.

Banholzer v. New York L. Ins. Co. 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972, is practically identical with the case at bar, and is conclusive that the writ of error herein should be dismissed.

Mr. Harold Nathan argued the cause and filed a brief for defendant in error Norman C. Andrews:

Where the decision below was adverse to the plaintiffs in error upon two independent grounds, one of which is not a Federal question, the Supreme Court will dismiss the writ of error.

Missouri P. R. Co. v. Fitzgerald, 160 U. S. 556, 40 L. ed. 536, 16 Sup. Ct. Rep. 389; *Seeberger v. McCormick*, 175 U. S. 274, 44 L. ed. 161, 20 Sup. Ct. Rep. 128; *Berea College v. Kentucky*, 211 U. S. 45, ante, 81, 29 Sup. Ct. Rep. 33.

Where it does not appear upon what ground the highest court of the state proceeded in affirming the judgment, and the case might properly have been determined upon a ground broad enough to support the judgment without resort to a Federal question, this court has no jurisdiction.

Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528.

When the record discloses completely adequate grounds other than a Federal question, this court does not inquire whether the decision upon them was or was not correct, or reach a Federal question by determining that they ought not to have been held to warrant the result.

Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30.

If the court below rested its judgment upon principles of common law as it understood them, this court should not take jurisdiction, although the court below, whether rightly or wrongly, also upheld and relied upon the statute.

Arkansas Southern R. Co. v. German Nat. Bank, 207 U. S. 270, 52 L. ed. 201, 28 Sup. Ct. Rep. 78.

It is too late to raise a Federal question reviewable by this court on a motion for rehearing in the state court unless that court entertained the motion and expressly passed upon the Federal question.

Disconto Gesellschaft v. Umbreit, 208 U. S. 570, 52 L. ed. 625, 28 Sup. Ct. Rep. 337; *Pim v. St. Louis*, 165 U. S. 273, 41 L. ed. 714, 17 Sup. Ct. Rep. 322; *Fullerton v. Texas*, 196 U. S. 192, 49 L. ed. 443, 25 Sup. Ct. Rep. 221; *McMillen v. Ferrum Min. Co.* 197 U. S. 343, 347, 49 L. ed. 784, 787, 25 Sup. Ct. Rep. 533; *French v. Taylor*, 199 U. S. 274, 278, 50 L. ed. 189, 192, 26 Sup. Ct. Rep. 76; *Mutual L. Ins. Co. v. McGrew*, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L.R.A. 33, 23 Sup. Ct. Rep. 375.

The mere construction by a state court of a statute of another state, without questioning its validity, does not deny to it the full faith and credit demanded by the statutes in order to give the Supreme Court jurisdiction.

Allen v. Alleghany Co. 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 30 L. ed. 519, 7 Sup. Ct. Rep. 398; *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L. ed. 273, 23 Sup. Ct. Rep. 194; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558.

Whether a state statute is or is not in accordance with the requirement of the Constitution of such state is not a Federal question.

Leeper v. Texas, 139 U. S. 462, 35 L. ed. 225, 11 Sup. Ct. Rep. 577; *Murray v. Louisiana*, 163 U. S. 101, 108, 41 L. ed. 87, 90, 16 Sup. Ct. Rep. 990; *Mobile, J. & K. C. R. Co. v. Mississippi*, 210 U. S. 187, 52 L. ed. 1016, 28 Sup. Ct. Rep. 650.

The meaning of the Ohio Constitution was sought in the decisions of the Ohio courts, as well as confirmed by an independent construction; and in such case the Federal question is not presented.

Banholzer v. New York L. Ins. Co. supra.

Mr. Henry M. Earle filed a brief for defendant in error Edith A. Logan.

Messrs. William S. Jackson and C. A. Dolson filed a brief on behalf of the state of New York.

Mr. Justice Brewer delivered the opinion of the court:

It is difficult to spell out from the record in this case the decision of any question arising under the Constitution and laws of the United States. Neither in the pleadings nor in the opinions is there a direct reference to any special provision of the Federal Constitution. It is true that, after the decision by the court of appeals, an affidavit was filed by one of the counsel for plaintiffs in error in support of a petition for a rehearing, stating that, in the brief, as well as upon the oral argument in that court, a Federal question (describing it) had been presented and discussed, which petition was denied by the court of appeals in these words:

"Ordered, that the said motion be and the same hereby is denied, with \$10 costs, no Federal question having been raised in this court."

It is unnecessary to determine whether this of itself is sufficient to give jurisdiction to this court. The language of the court of appeals may be construed as denying that any such matter was brought to its attention as stated in the affidavit, or as holding that it presented no Federal question. *Mallett v. North Carolina*, 181 U. S. 589, 45 L. ed. 1015, 21 Sup. Ct. Rep. 730; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 530, 46 L. ed. 673, 22 Sup. Ct. Rep. 446; *Leigh v. Green*, 193 U. S. 79, 48 L. ed. 623, 24 Sup. Ct. Rep. 390; *McKay v. Kalyton*, 204 U. S. 458, 51 L. ed. 566, 27 Sup. Ct. Rep. 346.

Counsel further contend that there was necessarily involved in the decision of the case the determination of a question arising under the Constitution and laws of the United States, and that hence this court has jurisdiction of this writ of error, even if the question was not formally referred to by 28]counsel *or the state courts. *Chapman v. Goodnow* (*Chapman v. Crane*) 123 U. S. 540-548, 31 L. ed. 235-238, 8 Sup. Ct. Rep. 211; *Des Moines Nav. & R. Co. v. Iowa Homestead Co.* 123 U. S. 552, 31 L. ed. 202, 8 Sup. Ct. Rep. 217; *McCullough v. Virginia*, 172 U. S. 102, 117, 43 L. ed. 382, 387, 19 Sup. Ct. Rep. 134; *Missouri, K. & T. R. Co. v. Elliott*, 184 U. S. 530, 534, 46 L. ed. 673, 676, 22 Sup. Ct. Rep. 446; *Rogers v. Alabama*, 192 U. S. 226, 230, 48 L. ed. 417, 418, 24 Sup. Ct. Rep. 257, 258, in which last case it is said:

53 L. ed.

"It is a necessary and well-settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights. . . . There can be no doubt that, if full faith and credit were denied to a judgment rendered in another state upon a suggestion of want of jurisdiction, without evidence to warrant the finding, this court would enforce the constitutional requirement. See *German Sav. & L. Soc. v. Dormitzer*, 192 U. S. 125, 48 L. ed. 373, 24 Sup. Ct. Rep. 221."

The question upon which counsel rely arises upon article 4, § 1, of the Federal Constitution, which reads:

"Full faith and credit shall be given each state to the public acts, records, and judicial proceedings of every other state; and the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

It is not pretended that any judgment of the state of Ohio was disregarded by the courts of New York, but it is contended that full force and effect was not given to the Constitution of the state of Ohio. This duty is as obligatory as the similar duty in respect to the judicial proceedings of that state. *South Ottawa v. Perkins*, 94 U. S. 260, 268, 24 L. ed. 154, 157; *Chicago & A. R. Co. v. Wiggins Ferry Co.* 119 U. S. 615, 622, 30 L. ed. 519, 522, 7 Sup. Ct. Rep. 398, 401, in which Mr. Chief Justice Waite said:

"Without doubt the constitutional requirement, art. 4, § 1, that 'full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,' implies that the public acts of every state shall be given the same effect by the courts of another state that they have by law and usage at home. This is clearly the logical result of the principles announced as early as 1813 in *Mills v. Duryee*, 7 Cranch, 481, 3 L. [29 ed. 411, and steadily adhered to ever since." *Hancock Nat. Bank v. Farnum*, 176 U. S. 640, 642, 44 L. ed. 619, 620, 20 Sup. Ct. Rep. 506.

On the other hand, it is settled that the mere construction by a state court of the statute of another state, without questioning its validity, does not deny to it the full faith and credit demanded by the constitutional provision. *Glenn v. Garth*, 147 U. S. 360, 37 L. ed. 203, 13 Sup. Ct. Rep. 350; *Lloyd v. Matthews*, 155 U. S. 222, 39 L. ed. 128, 15 Sup. Ct. Rep. 70; *Banholzer v. New York L. Ins. Co.* 178 U. S. 402, 44 L. ed. 1124, 20 Sup. Ct. Rep. 972; *Johnson v. New York L. Ins. Co.* 187 U. S. 491, 47 L.

ed. 273, 23 Sup. Ct. Rep. 194; *Finney v. Guy*, 189 U. S. 335, 47 L. ed. 839, 23 Sup. Ct. Rep. 558; *Allen v. Alleghany Co.* 196 U. S. 458, 49 L. ed. 551, 25 Sup. Ct. Rep. 311.

In the light of these decisions we pass to consider the particular question presented. Sections 1 and 2 of article 13 of the Ohio Constitution read:

"Sec. 1. The general assembly shall pass no special act conferring corporate powers.

"Sec. 2. Corporations may be formed under general laws; but all such laws may, from time to time, be altered or repealed."

By § 3235, vol. 2, *Bates's Anno. Stat. (Ohio)* 6th ed. p. 1836; it is provided: "Corporations may be formed in the manner provided in this chapter for any purpose for which individuals may lawfully associate themselves, except for carrying on professional business;" and immediately following this section are those naming the conditions and methods of incorporation. After the death of the testator, and on March 19, 1902, the general assembly of the state of Ohio passed an act (*Laws 1902*, p. 61), the 1st section of which is as follows:

"Sec. 1. Whenever, by the last will and testament of any person which has heretofore been, or shall hereafter be, duly admitted to probate in this state or elsewhere, any decedent has devised or bequeathed, or may devise or bequeath, his or her property, or any portion thereof, for charitable uses within this state, or for the establishment and maintenance of any industrial or educational school or institution to be located at any place within this state; and when-
30]ever, in any *such will and testament, it has been, or may be, provided that the executor or executors thereof shall organize a corporation under the laws of this state for the purpose of receiving the property so devised or bequeathed, and carrying out the charitable purposes in such will expressed, or establishing and maintaining the institution or school therein provided for, and such will further provides for the management of such corporation by a board of trustees or directors, consisting, in part, of officials of this state, of the county in which such charities are to be administered or such institution or school located, the officials of any municipal incorporation in said county, and the member of Congress for the district of which said county forms a part, or any of such officials, and names any other person or persons to be associated with said officials or any of them, and provides for the appointment of a successor or successors to the person or persons so appointed, to act with such officials in any manner specified in said will, such executor or executors, or his or their successors in

office, and the persons hereinafter named, may constitute themselves a body corporate, with the general powers of benevolent incorporations."

The 2d section requires that a copy of the will or testament, for the carrying out of the provisions of which the corporation is organized, shall be set forth in the articles of incorporation. Thereafter the Andrews Institute for Girls was incorporated, containing, as required by § 2, the will of the testator. Now it is contended by counsel for the plaintiffs in error that this act was a special act, conferring corporate powers, and that therefore it and the incorporation made under it was in conflict with the Constitution of Ohio. It is not suggested that there has been any decision of the courts of Ohio in reference to the validity of the act or subsequent incorporation of the Andrews Institute, but it is insisted that it is so obvious that the act is a special act, conferring corporate powers, inasmuch as the terms of the will of an individual are the basis of the act and the incorporation, that the courts of *New[31 York could not have given force and effect to the prohibitions of the Constitution of Ohio. Nevertheless, whether rightly or wrongly, the New York courts held that there was no violation of the Constitution of Ohio, the court of appeals saying in its opinion:

"At the death of the testator the general statutes of Ohio provided that corporations might be formed for any purpose for which individuals might lawfully associate themselves, except for carrying on professional business. 2 *Bates's Anno. Stat. (Ohio)* 6th ed. p. 1836.

"Subsequent to the death of the testator, and in March, 1902, an act was passed by the general assembly of the state of Ohio entitled, 'An Act to Provide for the Administration of Charitable Trusts in Certain Cases.' If we assume that such act was passed to aid in the incorporation of the Andrews Institute for Girls, it is not necessarily unconstitutional for that reason. It is not an uncommon thing in any state for questions to arise making it desirable or perhaps necessary for further general legislation to enable persons interested to carry out desired and desirable measures. The fact that such further general statute is passed to aid a particular person for the time being does not make the act a special, as distinguished from a general, one. Whether an act, general in form, is a mere device to evade a wholesome constitutional provision, is largely dependent upon the special circumstances of each case. If the act relates to persons, places, and things as a class, and is neither local nor temporary, the mere fact that its practi-

cal effect is special and private does not necessarily prove that it violates constitutional provisions against special legislation. *Re New York Elev. R. Co.* 70 N. Y. 327-344; *Re Church*, 92 N. Y. 1; *Re Henneberger*, 155 N. Y. 420, 426, 42 L.R.A. 132, 50 N. E. 61; *People v. Dunn*, 157 N. Y. 528, 43 L.R.A. 247, 52 N. E. 572; *Kittinger v. Buffalo Traction Co.* 160 N. Y. 377, 54 N. E. 1081; *People ex rel. Clauson v. Newburgh & S. Pl. Road Co.* 86 N. Y. 1; *Re New York & L. I. Bridge Co.* 148 N. Y. 540, 42 N. E. 1088; *Waterloo Woolen Mfg. Co. v. Shanahan*, 128 N. Y. 345, 14 L.R.A. 481, 28 N. E. 358; *Ferguson v. Ross*, 126 N. Y. 32]459, 27 N. E. 954; **Sun Printing & Pub. Asso. v. New York*, 152 N. Y. 257, 37 L.R.A. 788, 46 N. E. 499.

"The act so passed by the general assembly of the state of Ohio in 1902 would not seem to be a violation of the Constitution of that state. *Platt v. Craig*, 66 Ohio St. 75, 63 N. E. 594; *State v. Spellmire*, 67 Ohio St. 77, 65 N. E. 619; *Gentsch v. State*, 71 Ohio St. 151, 72 N. E. 900; *Cincinnati Street R. Co. v. Horstman*, 72 Ohio St. 93, 73 N. E. 1075; *State ex rel. Atty. Gen. v. Sherman*, 22 Ohio St. 411.

"Subsequent to the death of the testator, and on the 8th day of May, 1902, 'The Andrews Institute for Girls' was incorporated pursuant to the laws of the state of Ohio 'for the purpose of receiving the property devised and bequeathed in and by the wills of Wallace C. Andrews, and Margaret M. St. John Andrews, late of the city and state of New York, to the corporation therein directed to be formed, and for the purpose of carrying out the charitable purposes in such wills expressed, and of establishing and maintaining the institution therein provided for.'

"The articles of incorporation include a complete copy of the will of the testator, and also of the will and codicil of Margaret M. St. John Andrews. They also provide that the corporation shall be located in the town of Willoughby, Ohio, and name as members of the corporation the persons proposed in the will of said testator, together with two other persons in the state of Ohio, which persons so named constitute the board of directors for the administration and management of the property and trust or other funds of the corporation, and for the control and management of said institution. Said act of the general assembly of the state of Ohio among other things provides: 'The attorney general of the state of Ohio shall, in his official capacity, have power to bring proceedings in any court of record, and enforce any such devise or bequest, whenever he deems such action necessary for the protection and

carrying out of the purposes named in said last will and testament, without waiting for the organization of such corporation.'"

*That there is some foundation for the[33 conclusion reached by the court of appeals is obvious from the opinions of the supreme court of Ohio, cited in the foregoing quotation. It is unnecessary to hold that there was no error in the ruling of the court of appeals. It is enough for the purposes of this case to hold that that court did not question the validity of any provision of the Constitution of the state of Ohio, and did not sustain any act or incorporation which it held to be in conflict with such provision. At most, there was simply a matter of error, and not a repudiation of the obligations of the Federal Constitution.

We do not see that any provision of the Federal Constitution has been violated, and the writ of error is dismissed.

The CHIEF JUSTICE did not hear the arguments and took no part in the decision of this case.

MERCHANTS NATIONAL BANK OF
BALTIMORE, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 33-47.)

Internal revenue — taxation of national bank circulation.

A national bank whose outstanding circulating notes amount to less than 5 per cent of its capital is not exempted from the payment of the half-yearly duty imposed by U. S. Rev. Stat. § 5214, U. S. Comp. Stat. 1901, p. 3500, upon the average amount of its notes in circulation, by the provision of § 3411 (U. S. Comp. Stat. 1901, p. 2248), that the outstanding circulation of any bank, association, corporation, company, or person shall be free from taxation when reduced to an amount not exceeding 5 per cent of its capital, although the latter section is, by § 3417 (U. S. Comp. Stat. 1901, p. 2251), expressly made applicable to national banking associations, since it was so made applicable, as clearly appears from the legislation from which its provisions were drawn, in order to give national banks representing state banks the benefit of the presumption of loss or inability to retire the circulation of the state bank when 95 per cent thereof had been actually retired.

[For other cases, see Internal Revenue, 87-92, in Digest Sup. Ct. 1908.]

[No. 20.]

Argued March 12, 15, 1909. Decided May 17, 1909.

APPPEAL from the Court of Claims to review a judgment denying the right of a national bank to be exempted from the statutory tax on its outstanding circulation where the amount of such circulation was less than 5 per cent of its capital. Affirmed.

See same case below, 42 Ct. Cl. 6.

The facts are stated in the opinion.

Messrs. **R. E. Marshall** and **James H. Hayden** argued the cause, and, with **Mr. J. Hanson Thomas**, filed a brief for appellant.

Assistant Attorney General **John Q. Thompson** and **Mr. Philip M. Ashford** argued the cause and filed a brief for appellee.

38] ***Mr. Justice White** delivered the opinion of the court:

Organized as a state bank in 1834, the appellant was converted, in June 1865, into a national banking association. For nearly thirty [*sic*] years after its organization as a national bank, that is, up to July 1, 1904, the bank was assessed for and paid the duty of one half of 1 per cent upon the average amount of its notes in circulation, in conformity with § 5214, Rev. Stat. (U. S. Comp. Stat. 1901, p. 3500). Availing itself of the right conferred by § 5218, Rev. Stat., copied in the margin,[†] the bank made application to be refunded the sum of \$4,713.01, on the ground that, in making certain of the half-yearly payments under § 5214, there had been a miscalculation, and besides, because of an error of law, some of the half-yearly payments had been exacted when the bank was exempt. We put aside so much of the claim as was based upon mere errors of calculation, as no contention on that subject is here presented.

The alleged error of law or asserted right to exemption rests upon the assumption that, by the operation of § 3411, Rev. Stat. (U. S. Comp. Stat. 1901, p. 2248), the bank was not liable to pay the half-yearly duty on its outstanding circulation whenever the amount of its circulation fell below 5 per cent of its capital,—a contingency which, it was insisted, had arisen during certain of the half-yearly periods between January, 1888, and July, 1904. The request to be

refunded having been rejected by the Treasurer of the United States, this suit was commenced, and this appeal was taken from a judgment in favor of the United States. 42 Ct. Cl. 6.

In the argument for the bank it is stated that all the errors relied upon are embraced in the following propositions:

*“1. The said court erred in holding[39 and deciding that the claimant, being a national bank, was not exempt from taxation on its notes in circulation during the half-yearly periods when the average amount of its said notes was less than 5 per centum of its chartered capital.

“2. The said court erred in holding and deciding that § 3411, Revised Statutes, relates solely to the taxation of the outstanding circulating notes of state banks which had ceased to exist, or had been converted into national banks, and did not limit the claimant's liability to taxation on its own outstanding circulation.”

Without presently determining whether the right to be refunded, even if otherwise well founded, was without merit because of the voluntary nature of the payments or the effect of the statute of limitations, we come to consider the merits of the contention. It depends upon whether § 5214, Rev. Stat., is limited and controlled by the provisions of § 3411, Rev. Stat. The two sections are as follows:

“Sec. 5214. In lieu of all existing taxes, every association shall pay to the Treasurer of the United States, in the months of January and July, a duty of one half of one per centum each half-year upon the average amount of its notes in circulation, and a duty of one quarter of one per centum each half-year upon the average amount of its deposits, and a duty of one quarter of one per centum each half-year on the average amount of its capital stock, beyond the amount invested in United States bonds.”

“Sec. 3411. Whenever the outstanding circulation of any bank, association, corporation, company, or person is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which has ceased to issue notes for circulation deposits in the Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall *prescribe, it shall be exempt[40 from any tax upon such circulation.”

It is insisted that the sections, considered as applicable to the same subject, are harmonious, and that giving effect to both, while leaving a national banking association

[†]Sec. 5218. In all cases where an association has paid or may pay in excess of what may be or has been found due from it, on account of the duty required to be paid to the Treasurer of the United States, the association may state an account therefor, which, on being certified by the Treasurer of the United States, and found correct by the First Comptroller of the Treasury, shall be refunded in the ordinary manner by warrant on the Treasury.

liable to the duty imposed by § 5214, will yet entitle it to the exemption provided in § 3411 when the contingency stated in that section has come to pass. And as this result, it is argued, is clear and free from all doubt, considering the text of the two sections, recourse may not be had to legislation prior to the Revised Statutes, from which the provisions of the sections were drawn, in order to arrive at their correct meaning. Reference to such prior legislation, it is insisted, cannot be resorted to for the purpose of creating a doubt, but only to solve one otherwise arising from the text, citing *Hamilton v. Rathbone*, 175 U. S. 418, 44 L. ed. 220, 20 Sup. Ct. Rep. 155; *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, 36, 39 L. ed. 601, 611, 15 Sup. Ct. Rep. 508, and cases cited.

Accurately considering the text of the two sections and the context of the respective titles of the Revised Statutes in which they are found, we think the contention that the sections are free from ambiguity and may be harmoniously applied without the necessity of construction is without merit. It is conceded that for the more than thirty-five years since the enactment of the Revised Statutes, in the administration of the national-bank act, national banking associations have been required to and have, without question, paid the half-yearly duty on circulation, wholly irrespective of the exemption provided in § 3411,—a condition which clearly suffices, to say the least, to engender doubt as to the correctness of the belated contention now urged. Besides, the sections are in different titles of the Revised Statutes, the one (§ 3411) "Internal Revenue," the other (§ 5214) "National Banks." While § 5214 and the other sections contained in the title in which it is found leave no doubt that § 5214 was intended to deal with the outstanding circulation of national banks, not only the text of § 3411, but the other sections of the chapter, under the 41]general *title "Internal Revenue," in which it is found, cause it to be questionable whether that section is at all concerned with the subject of the circulating notes of a national banking association. As suggesting doubt and ambiguity concerning the contention that national banking associations are embraced within the enumeration of banks and bankers made in § 3411, whose outstanding circulation would become "free from taxation" in the specified contingency, it is to be observed that the enumeration conforms generally to that made in other sections of the chapter, which other enumerations clearly relate only to state banks and private bankers. Indeed, this is strengthened by the fact that, in the Revised Statutes, associations organized under

the national bank act are distinctively characterized as national banking associations, and that their designation by that call is explicitly made use of in various sections of the chapter in which § 3411 appears. In view (a) of the distinct provisions as to the circulating notes of national banks, found in the appropriate title of the Revised Statutes (b) of the general subject to which the chapter in which § 3411 is contained relates, and (c) that in that chapter, when it was deemed essential to legislate concerning national banking associations, they were specially designated by that appellation, it would seem to result that it cannot possibly be said that § 3411 clearly has relation to the outstanding circulation of national banking associations. Moreover, the assumption that, considering the text of the two sections, and treating them as relating to the same subject, they are each susceptible of being fully enforced, is a mistaken one. The duty upon the outstanding circulation imposed by § 5214 is assessed half-yearly, not upon the amount outstanding at any particular time, but upon the average for the six months. Section 3411, however, provides that the outstanding circulation to which it refers "shall be free from taxation whenever such outstanding circulation is reduced to an amount not exceeding five per centum of the chartered or declared capital existing at the time the same was issued,"—a provision which clearly contemplates a positive and permanent *ex-[42]emption, to arise from the reduction to the limit specified, and wholly incompatible with the system of average provided in § 5214. This results because, by that system of average, even although the sum of the outstanding circulation of a national banking association might, on a particular day or days of a half-yearly period, fall below 5 per centum of its capital, yet the duty to be paid would attach wholly without reference to that condition, and be determined by the average for the six months. Besides, when there is taken into account the plain meaning of the concluding portion of § 3411, concerning a deposit with the Treasurer of the United States of money to meet outstanding circulation of the banks embraced within that section, it becomes manifest that the circulation referred to in § 3411 cannot be the circulation of a national banking association referred to in § 5214, since the method of deposit of money to secure the payment of outstanding circulation provided by § 3411 is absolutely in conflict with the methods provided for securing and redeeming outstanding circulation of national banking associations, as expressly provided in the sections of the Re-

vised Statutes concerning national banking associations, which sections are cognate to and inseparably connected with the provisions of § 5214. And, beyond all this, it is apparent that, to treat the outstanding circulation referred to in § 3411 as embracing the outstanding circulation of national banking associations, contemplated by § 5214, would require it to be held that the very purpose intended to be accomplished by the national-bank act was frustrated by the exemption accorded by § 3411. It has long been settled that one of the public policies embodied in the national-bank act was to secure the public credit and encourage the issue of notes to circulate as currency, founded upon the security of the bonds of the United States,—a purpose which would be directly discouraged by exempting a national banking association which reduced its circulation below 5 per centum of its capital from the payment of a duty thereon, and yet enforcing the payment of such duty against a national bank which had not reduced its outstanding 43]*circulation to the limit stated. In addition, as the half-yearly duty provided by § 5214 was intended, among other things, at least, to create a general fund for paying the cost of engraving and printing the circulating notes of national banking associations (*Twin City Nat. Bank v. Nebeker*, 167 U. S. 196, 42 L. ed. 134, 17 Sup. Ct. Rep. 766), § 3411 could not be construed as now claimed without giving rise to the assumption that it was without reason intended to exempt national banking associations which might choose to allow their circulation to fall below 5 per centum from a burden which, in the nature of things, was common to all such banks.

But, in effect, it is argued, conceding that all the ambiguities just stated arise from treating the two sections as relating to the same subject, and from seeking to harmoniously enforce them on that hypothesis, yet there is no warrant for considering the genesis of the provisions in order to dispel the apparent conflict between them, because of the express terms of § 3417, Rev. Stat. (U. S. Comp. Stat. 1901, p. 2251), found in the same chapter which embraces § 3411. The section relied upon is in the margin.† It will be observed that it is expressly declared therein that the provisions of the chapter in which the section is contained shall “not apply to associations which are

taxed under and by virtue of title ‘National Banks.’” This declaration, however, is limited by the words “except as contained in sections,” which are enumerated, one of them being § 3411. From this it is argued that, whatever may otherwise be the conflict between § 5214 and § 3411, construed together, as § 3417 causes § 3411 to be broadly applicable to national banking associations, that section must *be treated as limiting[44 and controlling the provisions of § 5214. But § 3417, unless it be treated as surplusage, implies that § 3411 might not, in and of itself, be broadly applicable to national banking associations. While there is no doubt that the result of § 3417 is to cause § 3411 to be applicable to national banks, the doubt and ambiguity which must arise from the attempt to make that provision broadly applicable, so as to cause it to be controlling upon § 5214, is in nowise removed by § 3417. In other words, giving full effect to § 3417 requires us yet to determine the nature and extent of the application of the provisions of § 3411 to national banking associations,—a determination, as we have seen, essential in order to reconcile the confusion and contradiction which otherwise would prevail from the coassociation of the provisions without limitation or interpretation.

A consideration of the origin of the provisions at once demonstrates the unsoundness of the contention relied upon, establishes the correctness of the administrative construction which has prevailed from the beginning, and dispels the confusion and contradiction which necessarily result from the interpretation contended for. We need not specifically trace and develop the origin of the provisions, since it is expressly conceded in the argument for the appellant that “the provisions of the acts of Congress . . . which are carried into the Revised Statutes as §§ 3407-3417, U. S. Comp. Stat. 1901, pp. 2246-2251, did not, *when and as originally passed*, relate to national banks or to the circulation of national banks, but related to state and private banks. . . .” So, also, it is conceded that, wholly irrespective of the provisions of the national bank act of 1864 [13 Stat. at L. 99, chap. 106], there were imposed by acts of Congress relating to internal revenue burdens of taxation so heavy upon the circulation of the state banks and private bankers as, by their necessary operation, caused the retirement of such circulation as far as pos-

†Sec. 3417. The provisions of this chapter relating to the tax on the deposits, capital, and circulation of banks, and to their returns except as contained in sections thirty-four hundred and ten, thirty-four hundred and eleven, thirty-four hundred and twelve [thirty-four hundred and thirteen], and

thirty-four hundred and sixteen, and such parts of sections thirty-four hundred and fourteen and thirty-four hundred and fifteen as relate to the tax of ten per centum on certain notes, shall not apply to associations which are taxed under and by virtue of the title “National Banks.”

sible. Nor need we refer specially to the origin of § 3411, since it is conceded that the provision was enacted originally in order not to compel the payment by state banks of a tax on circulation when such 45]*circulation no longer existed, upon the assumption that, if 95 per cent had been retired, the remainder was no longer in existence, or, at all events, was not within the power of the bank to retire. It is also unquestioned that where a state bank had become converted into a national bank, or where a national bank had assumed the liabilities of a state bank, the national bank was liable, in addition to the duty on its own circulation, to the payment of the internal revenue tax upon the outstanding circulation of the state bank absorbed by it, or the liabilities of which had been assumed, and that, as to such circulation, national banks were given the benefit of the presumption of loss or destruction or possible retirement when all but 5 per cent of the circulation of the state bank had been actually retired. The concrete result of the provisions just stated and of the antecedent legislation is aptly portrayed in the reenactment in § 9 of the act of July 13, 1866 (14 Stat. at L. 146, 147, chap. 184, U. S. Comp. Stat. 1901, pp. 2248, 2251), of previous provisions on the subject, said § 9 reading as follows:

"That the capital of any state bank or banking association which has ceased, or shall cease to exist, or which has been or shall be converted into a national bank, shall be assumed to be the capital as it existed immediately before such bank ceased to exist or was converted as aforesaid; and whenever the outstanding circulation of any bank association, corporation, company, or person shall be reduced to an amount not exceeding 5 per centum of the chartered or declared capital existing at the time the same was issued, said circulation shall be free from taxation; and whenever any bank which had ceased to issue notes for circulation shall deposit in the Treasury of the United States, in lawful money, the amount of its outstanding circulation, to be redeemed at par, under such regulations as the Secretary of the Treasury shall prescribe, it shall be exempt from any tax upon such circulation; and whenever any state bank or banking association has been converted into a national banking association, and such national banking association has assumed the liabilities of such state bank or 46]*banking association, including the redemption of its bills, by any agreement or understanding whatever with the representatives of such state bank or banking association, such national banking association shall be held to make the required re-

turn and payment on the circulation outstanding, so long as such circulation shall exceed 5 per centum of the capital before such conversion of such state bank or banking association."

It is apparent that these provisions were in substance adopted in the Revised Statutes, and now constitute §§ 3410, 3411, and 3416, and that, as illumined by the history which we have given, it clearly results that the provision of § 3417, expressly making § 3411 applicable to national banking associations, caused that section to apply not in the broad sense now claimed, but that it was expressly made applicable in order, beyond peradventure, to give to national banks, as representing state banks, the benefit of the presumption of loss or inability to retire the circulation of the state bank when such circulation had been reduced by 95 per centum of the volume thereof.

It is strenuously argued that to thus construe the provisions in question will destroy the effect of the revision by causing one or more of the sections contained in the revision to become redundant or superfluous. To test this contention we must recur to the provision of the act of 1866, which has been previously quoted. By that provision (a) what should constitute the sum of the capital of a state bank for the purpose of taxation was declared; (b) the right to an exemption of circulation, when such circulation was less than 5 per cent, was also declared, and the power to deposit money with the Treasurer of the United States to the extent of the outstanding circulation, and thus avoid the continuance of a tax thereon, was also given; (c) the liability of a national banking association for the tax upon the circulation of a state bank which had been assumed, as well as the right of the national banking association to the benefits of the exemption when 95 per cent of the circulation of the state bank had been retired, was also expressed. The argument is that to give *to § 3411, the restrictive[47 significance we have adopted is to render § 3416 superfluous. It is indeed true that the effect of the construction in an extremely narrow and technical sense might be considered as operating a redundancy. But the asserted redundancy is more seeming than real, as § 3416 was plainly not enacted in order to reiterate what was expressly or impliedly embodied in § 3411, but was to declare the obligation of a national bank in a stated contingency to make return and payment on the outstanding circulation of a state bank which was subject to taxation.

The elaborate argument made at bar, to the effect that Congress, at the time of the revision, must have contemplated the non-existence of state banks and the extinguish-

ment of their circulation, and, therefore, must be considered as having intended to make § 3411 applicable to the outstanding circulation of national banks, is, we think, so clearly in conflict with the plain manifestation of the purpose of Congress, as shown by the re-enactment in the revision of the provisions as to state banks and their circulation, as to require no further notice.

Affirmed.

J. M. CEBALLOS & COMPANY, Appts.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 47-70.)

Appeal—from court of claims—review of facts—allowance under government contract.

1. The refusal of the court of claims to make an allowance for the transportation from the Philippine Islands to Spain, under a contract with the United States, of certain Spanish prisoners of war, certified by an American consul to have been landed in a Spanish port, will not be disturbed on appeal where the method prescribed by the contract for determining the initial fact that such persons had been taken on board in the Philippine Islands had not been pursued, and the evidence did not establish to the satisfaction of that court that such persons were entitled to transportation under the contract.

[For other cases, see Appeal and Error, 4892-4902, in Digest Sup. Ct. 1908.]

Government contract—construction—repatriation of Spanish prisoners.

2. The manifest spirit of the contract and the prior conduct of the parties demand that the United States be charged at the cabin rate, with the usual reduction for children under ten years, for the transportation to Spain as cabin passengers of the wives and children of Spanish military and civil officers in the Philippine Islands, under a contract calling for the transportation of such officers at that rate, and of such other persons as might be designated by the Secretary of War at the steerage rate.

[Construction of contract with government, see United States, VI. d, in Digest Sup. Ct. 1908.]

Government contract—construction—repatriation of Spanish prisoners.

3. All noncombatants except the wives and children of military and civil officers were embraced in the words "other persons" in a contract with the United States for the transportation to Spain at the cabin rate of Spanish military and civil officers in the Philippine Islands, and at the steerage rate of such other persons as might be designated by the Secretary of War.

[Construction of contract with government, see United States, VI. d, in Digest Sup. Ct. 1908.]

[No. 108.]

Argued March 10, 1909. Decided May 17, 1909.

APPEAL from the Court of Claims to review a judgment refusing to allow certain items claimed under a contract with the United States for the repatriation of certain persons from the Philippine Islands to Spain. Reversed.

See same case below, 42 Ct. Cl. 318.

The facts are stated in the opinion.

Messrs. William V. Rowe and John J. Hemphill argued the cause, and, with Messrs. Sullivan & Cromwell, filed a brief for appellants:

The United States, in contracting with its citizens, is controlled by, and the court of claims and this court are required to apply, precisely the same principles that govern in ordinary controversies between individual citizens.

Smoot's Case (United States v. Smoot) 15 Wall. 36, 47, 21 L. ed. 107, 110; United States v. Bostwick, 94 U. S. 66, 24 L. ed. 66.

This contract, based upon the proposals of the Quartermaster General's office, was a government contract, drawn, in accordance with its custom in such cases, by the government itself. Its language, therefore, must be construed most strongly against the government.

Garrison v. United States, 7 Wall. 688, 690, 19 L. ed. 277, 278; Noonan v. Bradley, 9 Wall. 394, 407, 19 L. ed. 757, 761; Merriam v. United States, 107 U. S. 437, 441, 27 L. ed. 531, 533, 2 Sup. Ct. Rep. 536; O'Brien v. Miller, 168 U. S. 287, 297, 42 L. ed. 469, 473, 18 Sup. Ct. Rep. 140; Scott v. United States, 12 Wall. 443, 20 L. ed. 438; Bradley v. Washington, A. & G. Steam Packet Co. 13 Pet. 89, 10 L. ed. 72; Coghlan v. Stetson, 22 Blatchf. 88, 19 Fed. 729.

Both statutes and contracts must receive a just and sensible construction, which will effectuate their spirit and intent, and work out reasonable results, and avoid absurd consequences.

Church of the Holy Trinity v. United States, 143 U. S. 461, 36 L. ed. 228, 12 Sup. Ct. Rep. 511; Northwestern Mut. L. Ins. Co. v. Gridley, 100 U. S. 614-616, 25 L. ed. 746, 747; Beawfage's Case, 10 Coke, 101b; Walnut v. Wade, 103 U. S. 683, 26 L. ed. 526; Winslow v. Kimball, 25 Me. 493; Eshleman's Appeal, 74 Pa. 42; Crane v. Alling, 14 N. J. L. 593; R. v. Collingwood, 12 Q. B. 681; United States v. Pine River Logging & Improv. Co. 32 C. C. A. 406, 61 U. S. App. 69, 89 Fed. 907; Peirce v. Van Dusen, 69 L.R.A. 705, 24 C. C. A. 280, 47 U. S. App. 339, 78 Fed. 696.

The practical construction placed upon
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the contract by the acts of the parties, although at variance with its literal meaning, must prevail.

Brooklyn L. Ins. Co. v. Dutcher, 95 U. S. 269, 24 L. ed. 410; District of Columbia v. Gallaher, 124 U. S. 505, 510, 31 L. ed. 526, 527, 8 Sup. Ct. Rep. 585.

Assistant Attorney General John Q. Thompson argued the cause, and, with Mr. Franklin W. Collins, filed a brief for appellee:

Where the language of a contract is clear and explicit, the court will not attempt to construe it. The courts may not make a contract for the parties, but their function and duty consist in enforcing and carrying out the one actually made.

Calderon v. Atlas S. S. Co. 170 U. S. 278, 42 L. ed. 1035, 18 Sup. Ct. Rep. 588.

Mr. Justice White delivered the opinion of the court:

Speaking in a general sense, this case involves determining how much, if anything, is due by the United States to J. M. 49] *Ceballos & Company, the appellants, for services rendered in pursuance of oral and written contracts for the repatriation of certain persons from the Philippine Islands to Spain. Before coming to the case as made by the record it is necessary to dispose of a preliminary consideration which may throw light upon one of the questions arising for decision.

Ceballos & Company—who here assert their rights as arising from contracts made, as we have said, concerning transportation of persons from the Philippine Islands to Spain—after the surrender of the Spanish forces at Santiago, made a contract with the United States for the repatriation from Cuba to Spain of the prisoners of war rewas performed, and it is conceded that all obligations of the United States under the same were discharged. It is admitted, however, that, at the trial below, the Cuban contract, as it is termed, was offered and the mode of execution thereof was established by competent evidence, upon the assumption that such facts were proper to be taken into view in the elucidation of the particular contracts which are here involved. No finding was made by the lower court on the subject, although one was requested. After the filing of the record in this court a motion was made, praying that the lower court be directed to find whether or not the Cuban contract had been made, as stated, and whether or not the wives and children of Spanish officers transported thereunder were also transported under the contract, and, if they were, the rate paid

for such transportation. The motion was resisted, and action thereon was postponed until the hearing on the merits. In the discussion at bar it was conceded by the government that the Cuban contract had been offered in evidence below, that the contract was correctly printed in one of the briefs, and that it had been performed in a particular manner. It was, however, insisted that the Philippine contracts here involved were unambiguous, and therefore the Cuban contract was irrelevant. It was conceded, if it was deemed that there was such ambiguity in the Philippine contracts as to require construction, and that *the construction might be elucidated by the Cuban contract and the mode of its performance, that contract and the admission as to the manner in which it had been performed might be treated as part of the record for the purposes of the case before us, without the necessity of directing findings on the subject. As we are clearly of opinion that the contracts which are here involved require construction, and that the previous contract between the parties as to the movement of the prisoners of war from Cuba to Spain, and the construction which obtained in the execution thereof, may serve within proper limitations to throw light upon the construction of the contracts here involved, we treat the Cuban contract and its mode of performance as embraced in the record, and review the case in the light thereof.

In the month of July, 1898, and from that time until the commencement of this litigation, the members of the appellant firm were the American operators and agents of the Compañía Transatlántica, a steamship line engaged in the transportation of freight and passengers between the ports of Spain and the Philippine Islands. As such agents, Ceballos & Company executed a contract with the United States, a copy of which is in the margin† to safely transport from Cuba to Spain the *troops of Spain sur- [51 rendered at Santiago de Cuba. Under this contract the wives and children of Spanish officers were carried in the cabins, and,

†Cuban Contract.

Sealed proposals having been invited for the transportation of the Spanish prisoners of war who surrendered to the United States forces in Cuba, from Santiago de Cuba to Cadiz, or such port of same as might thereafter be designated, and the proposal submitted by J. M. Ceballos & Company, of New York, having been duly accepted:

It is hereby, on this 21st day of July, 1898, agreed by and between the Secretary of War of the United States and said J. M. Ceballos & Company, that said company shall transport well and safely all of the troops of Spain that were surrendered by General Toral to the Army of the United

without question, the first-class rate was paid for the transportation.

The city of Manila surrendered the 13th 52] of August, 1898, *and August 14 the United States and Spanish authorities agreed upon written terms of capitulation, of which article 5 is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces and of their families, and of the expenses which said repatriation may occasion, shall be referred to the government of the United States at Washington."

The following statement as to the situation at Manila and the making of an oral contract and subsequently of a written contract are taken from findings made below.

There was surrendered to the United States forces at Manila on August 13, 1898, a large number of civil, naval, and military officers and their families, and a much larger number of enlisted men, together with the wives and children of some of these enlisted men. Many of these were in a pitiable condition physically, exhausted with exposure and disease,—1,200 being sick at one time,—all of them fed, 53] guarded, and attended at *the expense of the United States. Smallpox had been prevalent and infection was apprehended. The civil prisoners included Spanish civil officers on duty in the Philippine Islands under the government of Spain. Many of these had wives and children with them. There were besides a number of civilians, such as nurses, nuns, monks, friars, sisters of charity, and lady pensioners. The United States treated all of these classes as prisoners of war, and had supreme control of them after the surrender of Manila until they were delivered aboard plaintiff's ships for transportation, at which time the

supervision of the United States ceased. Spanish officers had, in the meantime, only such supervision over their troops as the United States permitted.

General Otis, commanding the United States forces in Manila, considered that an emergency existed requiring immediate action; and, on October 7 and October 24, 1898, cabled the War Department at Washington the request of the Spanish general at Manila for permission to allow sick Spanish officers and soldiers to depart for Spain. Permission being granted, these officers and soldiers were shipped on vessels of the Compañía Transatlántica by the Spanish authorities in Manila, acting under the supervision and control of the United States authorities, but under an oral agreement with Ceballos & Company, as herein-after stated.

In the emergency deemed existing by the commanding general, and communicated to the War Department, the Secretary of War, in October or November, 1898, entered into an oral agreement with Ceballos & Company, by which the latter agreed to transport such of the Philippine prisoners as the United States desired to return to Spain, the price to be paid for such transportation to be the price fixed after the United States should advertise for bids for such transportation, under contract expected thereafter to be entered into under the terms of a treaty of peace between the United States and Spain.

Under this oral agreement, Ceballos & Company immediately began furnishing vessels, and the transportation of the Philippine *prisoners commenced by a ves-[54 sel which sailed from Manila, November 7, 1898, and continued until another and a written contract was entered for the trans-

States in Cuba, in the capitulation entered into by him at Santiago de Cuba, and from said Santiago de Cuba to such port in Spain as the Secretary of War of the United States may designate, and that the government of the United States will pay for such transportation, and for the subsistence and delivery on shore of the prisoners, the sum of twenty dollars (\$20) for each enlisted man or private soldier, and the sum of fifty-five dollars (\$55) for each officer so delivered.

The said company further stipulates that said subsistence furnished by the company shall be equal to United States Army garrison rations; that cabin accommodations are to be supplied for the said officers, and third-class or steerage accommodations, having suitable galley accommodations, with ample space and ventilation, for the enlisted men or privates; that, for the purpose aforesaid, it will have at Santiago de Cuba within seventeen (17) calendar days from this day (that is to say, on or before the 7th day of the month now next following)

seven (7) steam vessels with a total capacity for the conveyance of at least ten thousand (10,000) prisoners in conformity with the foregoing stipulations, and ready to take them on board and proceed immediately to Spain; and the remaining vessels, in number and capacity as the Secretary of War may notify the company, within twenty-one (21) days from the date of such notice.

The Secretary of War stipulates that the United States will give safe conduct as against the Army and Navy of the United States to the vessels of the company engaged in the business aforesaid while proceeding to Santiago and from there to Spain, such safe conduct not to apply to ships already seized or in blockaded ports, and the ships employed as aforesaid to have only such armament as is customarily carried by merchant ships. Such safe conduct is to extend to foreign West Indian, Cuban, and Spanish ports, and to remain in effect until the prisoners are unloaded in a Span-

portation of those prisoners not transported under the oral agreement.

The shipments under the oral contract were five in number, and the wives and children of officers were carried in the cabin, as under the Cuban contract.

On December 10, 1898 [30 Stat. at L. 1754], by the treaty of peace, it was stipulated in paragraph 1, article 5, that—

"The United States, will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

And in article 6, that—

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses in connection with the insurrections in Cuba and the Philippines and the war with the United States.

"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The government of the United States will, at its own cost, return to Spain, and the government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

On January 20, 1899, the Quartermaster General, U. S. Army, by direction of the Secretary of War, invited sealed proposals "for the transportation of the Spanish prisoners of war now in the Philippine Islands . . . to Cadiz or such other ports of Spain as may hereafter be desig-

nated." Among other things it was stated in the advertisement as follows:

"Their number is estimated as about 16,000 officers and *enlisted men. Cabin ac-55 commodations are to be supplied for the officers and third-class or steerage accommodations, having suitable galley accommodations, conforming to the United States requirements as to space and ventilation, for the enlisted men.

"Proposals will state the price *per capita* for transporting officers and for transporting enlisted men, and for their subsistence, and delivering them on shore at the Spanish port or ports to be designated, and will be accompanied by a guaranty that the prisoners will be comfortably cared for and subsisted while on the journey.

"Payment for the service will be made when evidence is furnished that the ship has arrived with her passengers at point of destination. The number of officers and men counted aboard at place of embarkation by the quartermaster is to determine the number to be paid for."

The following bid was submitted:

"Sir: In accordance with the advertisement of Gen. M. I. Luddington, Quartermaster General, U. S. Army, copy of which is hereto attached, I propose, on behalf of Messrs. J. M. Ceballos & Company, agents of the Compañía Transatlántica, de Barcelona, to furnish transportation for the Spanish prisoners now in the Philippine Islands to any port or ports in Spain. Their number estimated at 16,000 officers and enlisted men. I propose to use in this service the steamers named in the annexed list, which fully sets forth the classification of each, the tonnage capacity of each, their

ish port designated, and is expressly made applicable to steamers of the Spanish Transatlantic Line under the Spanish flag.

For the better security of such safe conduct a document in the following form and duly signed will be furnished to the company for each ship, which shall be exhibited on demand, together with a copy of this contract, to any officer of the Army or Navy of the United States visiting the vessel:

"The President of the United States to all whom it may concern, greeting: This is to certify that the ——— is employed under contract with the government of the United States in the business of transporting from Santiago de Cuba to a port in Spain Spanish prisoners heretofore surrendered to the Army of the United States in Cuba; that the government of the United States has guaranteed safe conduct for this purpose to the in going to and from Santiago de Cuba and until the disembarking of said prisoners in a Spanish port.

"All persons under the jurisdiction of the

United States are required to respect such guarantee.

....."
The company further stipulates that it will furnish the bond of ——— for the proper and faithful performance of this contract.

The Secretary of War agrees that the United States will deliver the prisoners aforesaid on board at Santiago within a reasonable time after the vessels are ready, and to the number of at least ten thousand (10,000) men, five hundred (500) officers, and that the payment of the said twenty (\$20) dollars and fifty-five (\$55) dollars for each man and officer to the numbers last aforesaid shall be made when satisfactory evidence that the prisoners have been transported and delivered in accordance with this contract is presented to him.

Witness our hands and seals this 21st day of July, 1898.

R. A. Alger, Secy. of War.
J. M. Ceballos & Company.

speed, the berth accommodations upon each, and the approximate length of time required by each vessel to make the voyage to Spain. (The length of time is estimated from Manila.) Said list gives the time at which each vessel will arrive in or off the harbor of Manila for orders, the act of God and all dangers of the sea excepted.

"It is proposed not to load the steamers 56] beyond two thirds *of their steerage capacity. This is considered not only advisable as an act of humanity, but absolutely necessary, owing to climatic conditions and length of voyage.

"I further propose to call at any port of the Philippine Islands that the U. S. government may designate, provided the vessels can safely lay afloat.

"The charge for this service is dependent on the ports of call in the Philippines, and also on the quarantine regulations in Spain; but I propose and hereby agree to do this service at a price not to exceed in any case:

For each officer\$215 00

For each enlisted man..... 73 75

"It is proposed to furnish subsistence equal to the United States garrison rations, or, if preferred, the usual rations furnished under Spanish regulations.

"I will furnish a satisfactory bond for the faithful fulfilment of this service."

This bid was accepted, and on March 4, 1899, a contract was executed between the Secretary of War and Ceballos & Company, by their attorney in fact, which, omitting the attestation clause and signatures, is as follows:

"Whereas, under the terms of the treaty of peace entered into by and between the representatives of the governments of the United States and of Spain, signed at Paris on December 10, 1898, it is mutually agreed and stipulated in the first paragraph of article 5 that—

"The United States will, upon the signature of the present treaty, send back to Spain, at its own cost, the Spanish soldiers taken as prisoners of war on the capture of Manila by the American forces."

"And in article 6, which reads as follows:

"Spain will, upon the signature of the present treaty, release all prisoners of war, and all persons detained or imprisoned for political offenses in connection with the insurrection in Cuba and the Philippines and the war with the United States.

57] ***"Reciprocally, the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

"The government of the United States

will, at its own cost, return to Spain, and the government of Spain will, at its own cost, return to the United States, Cuba, Porto Rico, and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article."

"And whereas sealed proposals having been invited for the transportation of the Spanish prisoners from Manila or such other port in the Philippine Islands as may be designated, to Cadiz or such other port in Spain as may be designated, and in response thereto the proposal of J. M. Ceballos & Company, of New York, having been duly accepted by the Secretary of War of the United States:

"Therefore this article of agreement is made and entered into this 4th day of March, 1899, by and between the said J. M. Ceballos & Company, for the transportation of the said prisoners of war from the Philippine Islands to Spain, as are designated in the terms of the treaty of peace, referred and quoted herein.

"The said J. M. Ceballos & Company hereby agree to furnish good and safe transportation for such number of prisoners of war and persons as may be designated by the Secretary of War, from the Philippine Islands to such port in Spain as may be designated by the Secretary of War, and to furnish to them subsistence while *en route* and on board the ships, and to deliver them on shore in Spain.

"The said company further agrees that, for the purpose herein stipulated, they will provide a sufficient number of steamships for the safe and comfortable transportation of the prisoners of war and such other persons as may be designated by the Secretary of War, with cabin accommodations for all officers, and third-class or steerage accommodations, space, *and ventilation for the[58 enlisted men and other persons on board each ship; that the subsistence furnished by the company shall be equal in every respect to the United States army garrison rations.

"The company further agrees to provide a sufficient number of steamships in the harbor of Manila to perform the entire service as herein stipulated, so that the embarkation of the last of the prisoners of war and the other persons may be made not later than May 1st, 1899; that the ships to be used for the purpose are named and described in the list submitted with their proposals, copy of which is hereto attached as a part of this agreement, and the company agrees that no troops shall be transported upon any one of said ships in excess of two thirds of the steerage capacity of each ship, as shown in the list referred to.

"In consideration of the faithful perform-

ances of the foregoing stipulations and in compensation therefor, the Secretary of War hereby agrees, on behalf of the United States, to pay to the said J. M. Ceballos & Company, for the transportation, subsistence, and delivery on shore of each commissioned officer, the sum of two hundred and fifteen dollars (\$215), and for each enlisted man, private soldier, or other person designated by the Secretary of War for transportation the sum of seventy-three dollars and seventy-five cents (\$73.75), the said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain.

"It is further agreed that the prisoners of war and all other persons to be transported shall be delivered by the United States on board the ships at such ports in the Philippine Islands as may be designated by the Secretary of War, within five (5) working days after the vessel or vessels are ready to receive them. Demurrage, if any, earned by any such steamer or steamers, to be paid by the United States at the rate of fifteen cents (15c.) per gross ton register per day, and for any prisoners on board at the rate of \$1.50 for each officer per day 59]and 40 *cents for each enlisted man per day. An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the government of the United States and a representative of the said J. M. Ceballos & Company, and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship.

"It is further agreed that all steamers shall call at the port of Manila for orders, and should the Secretary of War elect to deliver prisoners to any steamer or steamers at any other port in the Philippine Islands, orders to that effect must be given within twenty-four hours after the steamer or steamers have reported to the commanding officer at the port of Manila.

"No member or delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise therefrom."

The findings show that the vessels which were supplied to perform this contract, like those which were supplied to perform the Cuban contract and the subsequent Philippine oral contract, were furnished with cabin and steerage accommodations, and that the officers, civil and military, with their respective families, were carried in the cabin, and in the steerage were carried the enlisted men and their families and

other persons entitled to third-class passage.

For the first twenty-five shipments payment was made by the United States upon certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, certified to be correct at the place of landing, showing the different classes of passengers.

The court below also found as follows:

The obligation of this country to repatriate any other persons or classes of persons than those who were actually prisoners of war or political prisoners was questioned by the Secretary of War.

On December 18, 1899, the Secretary of War addressed an *official letter to the [60 Attorney General, stating that, under the terms of the treaty of peace, the obligation of the United States to send to Spain at its own cost the wives and children of officers and soldiers and civil prisoners designated as officials, and their wives and children, was not clearly defined, and that the rates of compensation for the transportation of such persons were not set forth in the contract. But in that connection the Secretary requested an opinion as to the construction of the treaty of peace in regard to the scope of the description of Spanish prisoners,—whether and to what extent the treaty included the repatriation of noncombatants at the cost of the United States. The Secretary further requested a construction of the contract rate of compensation which might be allowed and paid *per capita* for each class of persons charged for under the terms of the contract with Ceballos & Company. On January 6, 1900, the Attorney General answered this official communication of the Secretary of War, and construed the contract substantially as follows: That it was questionable whether all the persons tendered and transported were not within the purview of the treaty, but that this was a question for the United States authorities, and not for the carrier, who would have been guilty or might have been guilty of a breach of his contract in refusing to carry persons designated to be carried by the United States. The Attorney General further informed the Secretary of War that the contract related to the transportation of prisoners; that, as between the contracting parties, it rested alone with the United States to say whom it would send back to Spain, and, in doing so, to alone determine who were prisoners, and who came within the purview of the treaty or the contract. That the words "other persons" were included within "enlisted men;" and that, as to all enlisted men, and all persons other than officers, military and civil, \$73.75, and no more, was

payable by the United States under the contract.

On January 19, 1900, the Secretary of War notified one of the firm of Ceballos & Co. that 61]he had, on January 17, cabled *General Otis, at Manila, that civil officials, prisoners' wives and children, were entitled to passage to Spain, and that the contract provided for shipment of civil officials as officers on the basis of \$215 *per capita*; that wives and children of officers, soldiers, and civil officials were entitled to transportation to Spain on the basis of \$73.75 *per capita*.

As shown on statement, copied in the margin,† the United States paid to Ceballos & Company, under the Philippine oral and written contracts, the sum of \$1,544,595. It will be seen that no payments were made in respect of the transportation of other persons than officers and enlisted men until after the Attorney General had rendered the opinion above referred to. Of the various classes of persons specified, all but "officers" 62]*were paid for at steerage or third-class rates, and this regardless of whether cabin or steerage accommodations were furnished. Minor children, that is, those

under the age of ten years, were paid for at half the adult rate.

On August 15, 1908, Ceballos & Company commenced this action in the court of claims to recover a balance alleged to be due under the Philippine contracts for the carriage of 3,445 cabin passengers, at \$215 each; 415 minor children, carried in cabin at half rate, \$107.50; 13,647 steerage passengers at \$73.75 each, and 20 minor children carried in steerage at half steerage rate, \$36.75 each. For this service it was averred \$1,792,491.25 had been earned, and after deducting payments of \$1,544,595 there was still due Ceballos & Company, \$247,896.25. Subsequently an amended petition was filed, in which full adult cabin and steerage rates were demanded for minor children, increasing the alleged indebtedness of the United States to the sum of \$293,246.25.

A counterclaim, contained in three numbered paragraphs, was filed on behalf of the United States. In paragraph first it was in substance averred that the United States was entitled to recover back from the claimants the sum of \$371,988.75, paid for the transportation of persons under the alleged

† Payments.
Sundry Checks Received by J. M. Ceballos & Company—Payments on a/c by United States Government.

	Officers.	Enlisted men.	Women and ma- jor children.	Minor children.	Civil officials.	Warrants.
June 20/99.....	1019	7067	-----	-----	-----	\$866,247.62 (\$74,028.62, 10 per cent retained by Government.)
Nov. 28/99.....	131	1198	-----	-----	-----	190,545.12 (including previous 10 per cent as above.
July 30/1900.....	288	3728	1302	406	-----	447,853.75
Oct. 6/1900.....	148	1425	53	-----	-----	140,822.50
Apr. 11/1902.....	-----	-----	-----	-----	393	28,983.75
Apr. 21/1902.....	-----	-----	-----	-----	-----	9,746.25 (315 Civ.)
July 3/1902.....	-----	-----	-----	-----	-----	84,747.50 (Off. @ \$141.25, dif. bet. 1st and 3d class.
Oct. 31/1902.....	{ -----	16	-----	-----	-----	1,180.00
	{ -----	19	-----	-----	-----	1,401.25
	{ -----	6	-----	-----	-----	442.50
Nov. 3/1902.....	{ 1	4	-----	-----	-----	510.00
	{ 1	-----	-----	-----	-----	215.00
	{ -----	10	-----	-----	-----	737.50
	{ -----	1	-----	-----	-----	73.75
Nov. 3, received and ret'd.	8	17	6	-----	-----	3,416.25
Feb. 26/3, deposited	1	1	2	-----	-----	436.25
	5	91	-----	-----	-----	7,786.25
	9	-----	-----	-----	-----	1,935.00
March 7/1908.....	-----	-----	12	-----	18	4,755.00
Sup. Bill No. 22.....	-----	-----	8	-----	2	1,020.00
	-----	-----	9	-----	3	1,808.75
	-----	-----	1	-----	-----	73.75
	2	less not all'd	-----	-----	-----	356.25
Totals.....	1613	18583	1392	406	416	\$1,544,595.00

oral contract in November and December, 1898, and January, 1899, because the same was paid without authority of law, prior to the execution of any contract, expressed or implied, between the United States and Ceballos & Company, or anyone in its behalf. In paragraph second an indebtedness from Ceballos & Company of \$12,788.75 was alleged, because of moneys paid to the firm for the transportation of persons who were not actually landed in Spain, as required by the contract. In paragraph third it was averred that as to two shipments made on November 25, 1899, and December 18, 1899, the claimants, by means of a supplemental bill, had collected a second time transportation charges for fourteen military officers (at the rate of \$215 each) and 91 enlisted men (at the rate of \$73.75 each), whereby \$9,721.25 had been overpaid by the United States to Ceballos & Company.

63] *There was contention then in the court below in regard to the number of persons carried from the Philippines to Spain, and as to the compensation to be paid. For the government it was urged that, deducting the overcharge covered by the third counterclaim for the transportation of 105 persons, payment in full had been made for all persons legally shown to have been transported; viz., 17,305. On the other hand, the appellants contended that 17,527 persons had been carried,—a difference of 222 persons. As to such excess, the government alleged it had refused payment as to 198 persons because it had not been shown by the evidence stipulated for in the contract that such persons had embarked and been carried to Spain, and that it had refused payment as to the remaining 24, because twice counted.

The dispute as to compensation arose from the contention by Ceballos & Company that it had carried the wives and children of Spanish military officers and civil officials in the cabin, and the cabin rate was properly chargeable, while the government insisted that the steerage rate applied and had been paid. Ceballos & Company also contended that, for the carriage of other noncombatants, who were entitled to be considered prisoners of war, the cabin rate applied, whereas the government contended that all noncombatants were embraced within the category of "other persons," who, under the contract, were to be carried in the steerage and paid for at the steerage rate.

The court rejected the first and second counterclaims of the government, and allowed the third. It sustained the contention of the United States as to the number of persons carried to Spain, and the rate

of transportation which governed, except it was held that Ceballos & Company, instead of being paid half adult steerage rate for the transportation of minor children, should have been allowed the full adult rate for each child, and judgment was entered on that basis, in favor of Ceballos & Company for the sum of \$5,391.25. 42 Ct. Cl. 318.

Without hereafter reproducing the findings verbatim, we *shall state, in a condensed form, such of the facts found as we think material to be recited.

Ceballos & Company alone have appealed, and the argument at bar on their behalf has been confined to two questions: 1, The construction of the contract in respect to the persons entitled to be carried at cabin rates; 2, the correctness of the action of the court below in disallowing the claim for the alleged transportation of 198 persons, asserted to have been actually carried under the contracts.

The court below substantially followed the construction of the contract adopted by the Attorney General, and decided that the "higher rate" specified in the contract related to one class, and the lower rate to another class, and within the second class the contract embraced priests, nuns, sisters of charity, all women and children, and every other person designated within the term "prisoners" by the United States, and whether carried in the cabin or steerage. Civil officials were held entitled to be classified with military officers, and their transportation properly chargeable at the cabin rate.

In disposing of the questions arising for consideration we will first consider that relating to the 198 persons claimed by the appellants to have been transported to Spain, but for whose transportation the United States refused to make payment. As already mentioned, for the first twenty-five shipments of prisoners of war from the Philippine Islands to Spain payment was made by the government of the United States upon the certificates of the masters of the respective ships on which said prisoners of war and other persons were transported, showing the different classes of passengers certified to be correct at the place of landing.

The method of determining the persons entitled to transportation under the written contract was, however, changed as to the last fifteen shipments,—running from February 20, 1900, to July 14, 1901, during which time it is claimed said 198 persons were carried to Spain,—so that requests for transportation with reference to available space were required to *be made upon the[65 appellants. Thereupon the United States quartermaster at Manila made demand upon

the appellants in writing to furnish transportation "to the following Spanish prisoners," separately enumerating, as the case might be, the number of commissioned officers, the number of enlisted men, the number of civil officials, the number of wives of officers and officials, the number of children under three years of age, the number of children between three and ten years of age, the number of children over ten years of age, etc.

Pursuant to the requisition of the Quartermaster General, all the men who were placed on the list of passengers for each shipment were required to be at a particular place at a certain time in the morning, and they were counted by an officer of the Quartermaster's Department, and taken aboard launches, and carried out to the Spanish vessel, ready to sail; and, as they went on board, the persons mentioned in the requisitions were counted by another United States officer, accompanied with the officer who represented the steamship company. Occasionally permission was given to officers of considerable rank to go aboard in their own conveyances, and these were checked off when they went aboard by an officer representing the government and an officer representing Ceballos & Company, and were thereby included in the numbers called for by the requisitions.

No objections were offered by Ceballos & Company at the time of the change in the method of computing the number of persons to go aboard.

The 198 persons in question were not embraced in the requests sent by the quartermaster for transportation, nor were they included in the count at the time and place of embarkation. The accounts presented to the Treasury for payment asked compensation for the transportation of such persons, based upon certificates signed by the American consul at the landing place in Spain, to the effect "that the following Spanish prisoners," classifying the persons substantially as in the requisitions above referred to, had been "furnished transportation from Manila, Philippine Islands, to 66]Spain," by the appellants on a "named steamship. For the reason that the method prescribed by the contract for determining the initial fact that the persons had been taken on board in the Philippine Islands by the appellants had not been pursued, and further, because the evidence did not establish to the satisfaction of the court that said 198 persons, although certified by the counsel to have been landed in Spain, were entitled to transportation under the contract, the court of claims refused to make any allowance for the transportation of such persons. The passages of the con-

tract relating to this branch of the controversy are as follows:

"An account of the number of officers, enlisted men, or other persons to be taken at the time of embarkation by a representative of the government of the United States and a representative of the said J. M. Ceballos & Company, and payment to the said company shall be made upon the basis of the number of officers, enlisted men, and persons counted on each ship."

After reciting the compensation to be paid, the contract recited:

"The said sums to be due and payable upon evidence that said officers, enlisted men, or persons have been transported, subsisted, and delivered on shore in Spain."

In refusing to make any allowance for the asserted transportation of these 198 persons, we cannot say, in view of the findings of the court below, that error was committed.

We come to consider the remaining subject of contention, which is thus succinctly stated in the third specification of error made in the brief of counsel for Ceballos & Company: "The court erred in holding that the wives and children of Spanish officers, civil and military, and other noncombatant prisoners of war, although transported as first-class passengers, and afforded cabin accommodations aboard ship, were to be paid for at the third-class rate specified in the contract, to wit, \$73.75."

The principal question involved in this assignment is whether the United States shall pay cabin rates for the transportation of the wives and children of Spanish officers, and other officials of equal rank, who were in fact returned to "Spain with[67 such officers as cabin passengers. As stated in the findings, the oral agreement made in October or November, 1898, between Ceballos & Company and the Secretary of War, was "to transport such of the Philippine prisoners as the United States desired to return to Spain," the compensation therefor to be fixed by the written contract which was expected to be thereafter entered into. There was no substantial change in the method of carrying out this oral contract from that pursued with respect to the Cuban contract. In the Philippines, as in Cuba, the United States tendered with the military officers and civil officials which it desired carried to Spain their wives and children. The proposals invited as the basis of a written contract were couched in similar phraseology to that employed in the Cuban contract, and called for proposals for the transportation "of the Spanish prisoners of war now in the Philippine Islands . . . in number estimated as about 16,000 officers and enlisted men." When,

therefore, Ceballos & Company submitted a bid for furnishing such transportation, in reason they held themselves out as ready, if the United States tendered for transportation the wives and children of the officers and enlisted men of the Spanish forces, to regard them as entitled to the same treatment required by the government for the head of the family. We cannot impute to the parties to the contract an intention to condemn and refuse to give effect to the practice which had been pursued in carrying out the oral agreement, that is, the treating the wives and children as entitled to transportation, and as being, for the purpose of the accommodations to be furnished, of the class to which the government had in effect assigned their male relatives. That the classification referred to as "such other persons as may be designated by the Secretary of War" was not intended to embrace the wives and children of officers is, it seems to us, manifest from the entire text. The government was concerned not only with the furnishing of safe but of comfortable accommodation to those were to be carried on the long voyage from Manila to Spain. It [68] exacted from *Ceballos & Company a stipulation that it should provide "safe and comfortable transportation" for those to be carried; the officers with "cabin accommodations" and "third class" or steerage accommodations, space, and ventilation to be supplied for the enlisted men and other persons on board each ship." It is to be presumed that the agents of the United States in the Philippines saw to it that this stipulation of the contract was observed. It is inconceivable, however, that the government or the appellants intended to commit such an act of inhumanity as would necessarily have arisen if the written contract required that the family of an officer should be separated from the husband and father on shipboard, and be relegated to the discomforts of the steerage and the society of enlisted men and other persons. Clearly, the spirit of the contract is opposed to any such conception. The wives and children of the officers and enlisted men were associated with them in the written terms of capitulation of the Spanish forces at Manila, signed August 14, 1898, the 5th article which, again reproduced, is as follows:

"All questions relating to the repatriation of officers and men of the Spanish forces, and of their families, and of the expenses which said repatriation may occasion, shall be referred to the government of the United States at Washington."

Under the Cuban contract, the wives and children of officers were treated as entitled to be classed with the head of the family in respect to the accommodation to be sup-

plied, and, in the performance of the Philippine oral contract, a like practice was pursued. In effect, therefore, by a course of conduct, the United States had associated the wives and children of the officers and enlisted men with such officers and men for the purpose of the transportation to be furnished and the treatment to be accorded them on the homeward voyage. Just as, in the opinion rendered by the Attorney General, civil officials of equal grade with military officers were assimilated to such officers in construing the terms of the contract, so we think an enlarged meaning must be taken as intended by *the terms "offi-[69]cers and enlisted men" where employed in the written contract. As observed by the Attorney General, in the light of the purpose of the contract, which was to carry out the engagements made by this government with Spain, a liberal construction should be accorded to the terms employed, in order to effectuate to the fullest extent the purposes intended by the treaty. Construing the written contract of March 4, 1899, according to its manifest spirit, and looking to the prior conduct of the parties, we are of opinion that such contract, and the oral contract which was dependent upon it, so far as the wives and children of officers and enlisted men were concerned, should receive the same construction as under the Cuban contract; viz., that the wives and children of Spanish officers tendered by the United States for transportation were to be classed with such officers, and the wives and children of enlisted men were to receive like accommodations as were given to enlisted men.

As it is not questioned by the United States that civil officials representing the Spanish government in the Philippines were entitled, both under the oral and written contracts, to cabin accommodations, we have assumed that construction to be well founded. It follows from the reasoning heretofore employed that the wives and children of such officials were likewise entitled, when tendered by the agents of the United States for transportation, to receive cabin accommodations, and Ceballos & Company, on furnishing such accommodations, were entitled to compensation at the rate stipulated for cabin service. In view, however, of the distinction shown to have been made in the requisitions for space between adults and minor children, the practice shown as to payments made under the contract, and the original demand of Ceballos & Company in the court below, we think it results that the parties, in actual practice, treated the full rate for children under ten years as but half the adult rate specified in the contract, and we think that rate ought to have been

applied by the court below for each minor child, whether carried in the cabin or in the steerage.

70] *We are unable to yield our assent to the contention that other noncombatants than the wives and children of officers, enlisted men, and officials of the government of Spain, should be embraced in the class entitled as of right to cabin accommodations, for which appellants were entitled to be compensated at cabin rates. The mere circumstance that a particular person, although a noncombatant, was a constructive prisoner, did not—at least, in the absence of evidence that the United States tendered such person as a cabin passenger—serve to take the person out of the category of persons whom the Secretary of War might designate to receive transportation in the steerage at third-class rates.

From finding 14 it appears that the wives and children above the age of ten years of military officers and civil officials aggregated 1,327, and that the appellants were paid for the transportation of each the steerage rate of \$73.75, instead of the cabin rate of \$215 each. The appellants are, therefore, entitled to a further payment on account of the transportation of such persons of \$141.25 each, in all, \$187,438.75. It is also shown in such finding that the number of children of Spanish military officers and civil officials who were carried to Spain and were under the age of ten years aggregated 395, and that Ceballos & Company were paid for their transportation \$36.87½ each, one half the adult steerage rate, instead of \$107.50 each, one half the adult cabin rates. Ceballos & Company were therefore entitled for such service to a further payment as to each child of \$70.62½, aggregating for the 395 children \$27,896.87. From the total of these sums, viz., \$215,335.62, must, however, be deducted the overpayment recited in the third counterclaim (which counterclaim the court below sustained), viz., \$9,721.25, leaving due to Ceballos & Company the sum, \$205,614.37.

It results that the judgment of the Court of Claims must be reversed, with instructions to enter a judgment in favor of the appellants for the sum of \$205,614.37; and it is so ordered.

71] *GEORGE G. GOODRICH, Appt.,

v.

JOHN W. FERRIS et al.

(See S. C. Reporter's ed. 71-81.)

Direct appeal from circuit court — frivolousness of Federal question — notice in probate proceedings.

A claim that ten days' statutory notice

of the time appointed for action upon a petition for the settlement of the final account of an executor and for the final distribution of the decedent's estate is so unreasonable as to a nonresident claimant as to be wanting in due process of law is too clearly unsubstantial and devoid of merit to furnish a basis for a direct appeal to the Federal Supreme Court from a decree of a circuit court.

[For other cases, see Appeal and Error, 938, 939, in Digest Sup. Ct. 1908.]

[No. 120.]

Argued March 19, 22, 1909. Decided May 17, 1909.

A PPEAL from the Circuit Court of the United States for the Northern District of California to review a decree dismissing a bill to set aside the probate of a will and to reopen the probate proceedings in which the final account of the executor has been passed and the estate finally distributed. Dismissed for want of jurisdiction.

See same case below, 145 Fed. 844.

The facts are stated in the opinion.

Mr. John G. Johnson argued the cause, and, with Messrs. Tyson S. Dines, L. Sidney Carrère, and Henry Arden, filed a brief for appellant:

The notice of final settlement and distribution, posted for ten days in the city and county of San Francisco, did not constitute due process of law as to appellant, who was and is a citizen and resident of the state of New York.

Hovey v. Elliott, 167 U. S. 409, 447, 42 L. ed. 215, 231, 17 Sup. Ct. Rep. 841; Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 232, 41 L. ed. 983, 17 Sup. Ct. Rep. 581; Galpin v. Page, 18 Wall. 350, 21 L. ed. 959; Smyth v. Ames, 169 U. S. 466, 42 L. ed. 819, 18 Sup. Ct. Rep. 418; Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Hagar v. Reclamation Dist. No. 108, 111 U. S. 712, 28 L. ed. 573, 4 Sup. Ct. Rep. 663.

The notice, even if it had been served upon him personally, would not have given him an opportunity to make a proper appearance in court, and due process of law has been repeatedly interpreted by this court to mean

NOTE.—On notice and hearing required to constitute due process of law—see notes to Kuntz v. Sumption, 2 L.R.A. 657; Chauvin v. Valiton, 3 L.R.A. 194; and Ulman v. Baltimore, 11 L.R.A. 225.

On direct review in Federal Supreme Court of judgments of circuit or district courts—see note to Gwin v. United States, 46 L. ed. U. S. 741.

not only that a party shall have notice, but that he shall have a reasonable and fair opportunity of being heard.

Hagar v. Reclamation Dist. No. 108, *supra*.

Sections 1633 and 1634 of the Civil Code of California, upon which jurisdiction of the court to make the consent decree of distribution is based, are in contravention of § 1, Article 14, of the Constitution of the United States.

Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Tyler v. Registration Ct. Judges, 179 U. S. 405, 45 L. ed. 252, 21 Sup. Ct. Rep. 206; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Cooley, Const. Lim. 353; Hamilton v. Brown, 161 U. S. 256, 40 L. ed. 691, 16 Sup. Ct. Rep. 585; Louisville & N. R. Co. v. Schmidt, 177 U. S. 230, 44 L. ed. 747, 20 Sup. Ct. Rep. 620; Simon v. Craft, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; Iowa C. R. Co. v. Iowa, 160 U. S. 389, 40 L. ed. 467, 16 Sup. Ct. Rep. 344; Bardwell v. Collins (Bardwell v. Anderson) 44 Minn. 97, 9 L.R.A. 152, 20 Am. St. Rep. 556, 46 N. W. 315; Violet v. Alexandria, 92 Va. 561, 31 L.R.A. 382, 53 Am. St. Rep. 825, 23 S. E. 909; Levy v. Superior Ct. 167 U. S. 175, 42 L. ed. 126, 17 Sup. Ct. Rep. 769; Clarke v. McDade, 165 U. S. 168, 41 L. ed. 673, 17 Sup. Ct. Rep. 284; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Hurtado v. California, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292.

Mr. John W. Dorsey argued the cause, and, with Mr. Henry Ach, filed a brief for appellees:

Where the proceeding is fundamentally against or upon the thing or subject-matter, to determine its state or condition, the judgment rendered is a solemn declaration upon the status of the thing itself, and is purely *in rem*. In such cases no process need be issued, but constructive notice, by some prescribed publication, draws to the jurisdiction, and concludes, everybody affected by the proceeding, and makes the adjudication of a court of competent jurisdiction binding upon the world. The right of every possible claimant is determined. Necessarily, in such case, the notice is constructive; at least, to the greater part of the world.

Woodruff v. Taylor, 20 Vt. 65; Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9,030; 2 Smith's Lead. Cas. 585; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 287; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 558, 559.

The jurisdiction to hear and determine in this class of cases may be obtained wholly and entirely by publication.

53 L. ed.

Cloyd v. Trotter, 118 Ill. 391, 9 N. E. 507; Adams v. Cowles, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711; Wunstel v. Landry, 39 La Ann. 312, 1 So. 893; Essig v. Lower, 120 Ind. 239, 21 N. E. 1090; Dillon v. Heller, 39 Kan. 599, 18 Pac. 693; Gillespie v. Thomas, 23 Kan. 138; Walkenhorst v. Lewis, 24 Kan. 420; Rowe v. Palmer, 29 Kan. 337; Venable v. Dutch, 37 Kan. 519, 1 Am. St. Rep. 260, 15 Pac. 520; Huling v. Kaw Valley R. & Improv. Co. 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 605; Mellen v. Moline Malleable Iron Works, 131 U. S. 352, 53 L. ed. 178, 9 Sup. Ct. Rep. 781.

If any notice is given, or its service made, in pursuance of the requirements of the statute, it cannot be violative of any inherent or constitutional right of the persons affected thereby, and hence must be in accord with the law of the land, and amount to due process of law.

Re Davis, 136 Cal. 596, 69 Pac. 412; Wulzen v. San Francisco, 101 Cal. 22, 40 Am. St. Rep. 17, 35 Pac. 353; Burnam v. Com. 1 Duv. 210; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 775; Tyler v. Registration Ct. Judges, 175 Mass. 71, 51 L.R.A. 433, 55 N. E. 812; Dillon v. Heller, 39 Kan. 600, 18 Pac. 693; United States Trust Co. v. United States F. Ins. Co. 18 N. Y. 216; Davidson v. New Orleans, 96 U. S. 97, 105, 24 L. ed. 616, 620; Kennard v. Louisiana, 92 U. S. 480, 23 L. ed. 478; Hurtado v. California, 110 U. S. 533, 28 L. ed. 237, 4 Sup. Ct. Rep. 111, 292; State v. Boswell, 104 Ind. 541, 4 N. E. 677; Wilson v. North Carolina, 169 U. S. 586, 42 L. ed. 865, 18 Sup. Ct. Rep. 435; William Hill Co. v. Lawler, 116 Cal. 359, 48 Pac. 323; Hanley v. Hanley, 114 Cal. 694, 46 Pac. 736; Kearney v. Kearney, 72 Cal. 595, 15 Pac. 769; Mulcahey v. Dow, 131 Cal. 77, 63 Pac. 158; Re Griffith, 84 Cal. 109, 23 Pac. 528, 24 Pac. 381; Ackerson v. Orchard, 7 Wash. 377, 34 Pac. 1106, 35 Pac. 605.

The fact that a claimant is a nonresident does not make the slightest difference. That fact may appeal to the discretion, but cannot affect the jurisdiction, of the court.

Townsend v. Eichelberger, 51 Ohio St. 213, 38 N. E. 207; DeMares v. Gilpin, 15 Colo. 76, 24 Pac. 568; Rudland v. Mastic, 77 Fed. 688; Broderick's Will (Kieley v. McGlynn) 21 Wall. 503, 22 L. ed. 599.

It is sufficient to give the notice prescribed by the statute, and where no notice is required, none need be given.

Mr. Henry E. Davis also argued the cause, and, with Mr. J. W. Dorsey, filed a brief for appellees:

The words of the statute which empower this court to review directly the action of

the circuit court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the Federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent.

Penn. Mut. L. Ins. Co. v. Austin, 168 U. S. 685, 695, 42 L. ed. 626, 630, 18 Sup. Ct. Rep. 223; Farrell v. O'Brien (O'Callaghan v. O'Brien) 199 U. S. 89, 100, 101, 50 L. ed. 101, 107, 108, 25 Sup. Ct. Rep. 727; Wilson v. North Carolina, 169 U. S. 586, 595, 42 L. ed. 865, 871, 18 Sup. Ct. Rep. 435.

Mr. Justice White delivered the opinion of the court:

Upon demurrers, the court below dismissed the bill filed by Goodrich, the appellant, for want of equitable jurisdiction to grant the relief which was prayed. 145 Fed. 844. To review that decree this appeal direct to this court is prosecuted. Jurisdiction to review is challenged. That question, therefore, at the outset requires attention.

To clarify the issue for decision, instead of reciting the allegations of the bill in the order in which they are therein stated, we shall briefly recapitulate the facts alleged in their chronological order, in so far as essential to be borne in mind for the purpose of the question of our jurisdiction.

In February, 1886, Thomas H. Williams, a resident of California, died in San Francisco, leaving as his lawful heirs four [75]*sons, viz., Sherrod, Thomas H., Jr., Percy, and Bryant, and one daughter, Mary, who was the wife of Frank S. Johnson. The wife of the deceased and the mother of his children had died before him. Williams left an estate of large value, composed principally of real property. Shortly after his death, on April 2, 1886, in the court having probate jurisdiction in San Francisco, a last will and codicil thereto of Williams were duly admitted to probate. Leaving out of view certain bequests of personal property and small legacies in money, the estate was principally disposed of as follows: The title of the property was vested in the executor and trustee named in the will, George E. Williams, a brother of the deceased, for the purpose of making the distribution which the will provided. To one of the sons, Sherrod, nothing was given. It was provided that the sum of \$50,000 should be absolutely vested in the son Percy, that \$200,000 should "be set aside absolutely" for the benefit of the daughter, Mary, wife of Johnson, and that \$100,000 should be set aside for the benefit of each of the sons, Thomas H., Jr., Percy, and Bryant. The will, however, provided that the gifts to the children above

stated, other than the gift of \$50,000, which was to vest absolutely in Percy, were only intended for the use and benefit of the children to whom they were given during their respective lives, with the remainder in fee to the lineal descendants, or, if none such, to the surviving brothers or sister, as the case might be. The residuum of the estate was directed to be set aside in equal shares for the benefit of the daughter and two of the sons (Thomas H., Jr., and Percy) during their respective lives, with the remainder in fee, as heretofore recited. The will contained the following clause:

"Item 4. When the term of three years after my death, shall have elapsed, unless the executor, herein named, shall for good cause extend it for two years, or in case there be another executor, three of my children, or representatives, shall by writing, extend it for two years, distribution of my estate, shall be made, as herein directed."

*Until the setting aside or distribu- [76] tion thus directed, the executor was authorized to advance monthly to the daughter the sum of \$250, and to each of the three sons, \$100. The executor was authorized to carry on the business in which the testator was engaged at the time of his death, and extensive powers were conferred in regard to the sale and reinvestment of the property to be set aside for the benefit of the children, etc. George E. Williams qualified as executor, and entered upon the performance of his duties.

In 1888 one of the sons, Sherrod, died unmarried and without issue. In the same year Frank S. Johnson, the husband of Mary, the daughter, obtained a decree of divorce against his wife, by which he was awarded the custody of an infant son, Frank Hansford Johnson, the issue of the marriage. In December of the following year, Mary, the divorced wife, married George G. Goodrich, and thereafter lived with him in the city of New York. The son Percy was married in August, 1888; a child was born in 1889, but died the year following; and Percy died on October 3, 1890, leaving his widow surviving. Bryant Williams, another son, died in May, 1893, unmarried and without issue. In that year also Mrs. Goodrich, the daughter, died in the city of New York, without issue from her marriage with Goodrich, leaving her husband surviving.

In the nearly eight years which supervened between the death of the father and the death of Mary, the daughter, the latter undoubtedly received from the executor of the estate of the father, by way of revenue or allowance, the provision made for her benefit by the will of the father. By the various deaths it came to pass that, at the end of 1893, those entitled to the estate of

Williams by the terms of the will, either for life or in remainder, were the surviving son, Thomas H. Williams, Jr., and the infant son of Mary, the daughter, represented by his father, Frank S. Johnson, who had, in 1889, in the proper probate court, been duly appointed the guardian of the estate of such minor.

After the death of Mrs. Goodrich, her husband went from *New York to California for the purpose of the interment of the remains of his wife, and, while being there a short time, undoubtedly met the executor. Goodrich returned to New York, where he continued to reside. In 1896, three years after the return of Goodrich to New York, in the court having jurisdiction over the estate and person of the minor, the guardian Johnson applied for authority to agree with the executor of the estate of Williams on a final distribution of the estate. In making this application no reference was made to the fact of the marriage of Goodrich with the mother of the minor after her divorce. Conforming to the requirements of the California Code of Procedure, after hearing, the guardian was authorized to make the agreement for final distribution. Simultaneously or thereabouts the executor also filed in the proper probate court a petition asking the authority of the court to pass his accounts and make a final distribution of the estate. Express notice was given to Williams, the surviving son, and to Johnson, the guardian of the minor, and, in accordance with the provisions of the California Code, a publication, by a posting of notice for a period of ten days, was ordered and duly made. On January 5, 1897, after hearing, and in view of the consent of the parties, the accounts were finally passed and a full distribution of the estate was made between the parties in interest; that is, 40 per cent of the estate was transferred to the minor, Frank Hansford Johnson, through his guardian, 26 $\frac{2}{3}$ per cent to Thomas H. Williams, Jr., the son, in fee, and 33 $\frac{1}{3}$ per cent was vested in Williams as trustee for the benefit during life of Thomas H. Williams, Jr.

Nearly three years after the entry of the decree of final distribution, in December, 1899, Williams, the trustee, died, and, by proceedings in the superior court of the city and county of San Francisco, John W. Ferris was appointed trustee.

More than eighteen years after the death of Williams and the probate of his will, about eleven years from the date of the death of the daughter, Mary, the wife of Goodrich, and more than seven years after the passing of the final account of the 78]*executor, and the final distribution of the estate by the probate court, viz., on May 53 L. ed.

19, 1904, the bill which is here in question was filed. Ferris, trustee, Williams, the surviving son of the deceased, and Johnson, as guardian, and his minor son, were made defendants. The facts above recited in various forms of statement were alleged, and, in substance, it was charged that the will and codicil of Williams, the deceased, were void because the absolute power of alienation of the property of the deceased, contrary to the laws of California against perpetuities, was, by the terms of the will, suspended for a period of three years, and not for a period measured by the continuance of lives in being, and therefore, as to all property included in the trust which Williams, the deceased, attempted to create by his will, he had died intestate, and all his property, by reason thereof, vested at his death in his heirs at law. It was averred that complainant, as heir of his deceased wife, was entitled to a stated share of her estate. It was charged that all the proceedings had in the probate court were fraudulent and subject to be avoided; that, in those proceedings, the fact of the remarriage of the daughter, Mary, and the survivorship of her husband, Goodrich, the complainant, had been sedulously concealed for the purpose of misleading the court; that when Goodrich was in California, after the death of his wife, he was notified, as the result of an inquiry made of the executor, that the death of his wife terminated her interest in the estate of her father; that the proceedings in the probate court concerning the final accounting and distribution were fraudulently had for the purpose of depriving the complainant of his interest in the estate, and it was expressly charged that, in those proceedings, the existence of the complainant and his interest in the estate were concealed. The whole proceedings, it was also averred, were not only subject to be avoided because of fraud, but to have been absolutely wanting in due process of law, because of the absence of express notice to the complainant, and because the provisions of the statutes of California providing for notice by ten days' posting were void, because insufficient *as to [79 a resident of the city of New York, and, in consequence, repugnant to the due process clause of the 14th Amendment. Without stating the various grounds upon which the defendants demurred, it suffices to say that the bill, having been submitted to the court on the demurrers, was, by it, dismissed, as we have said, because the court was without jurisdiction in equity to set aside the probate of the will and to reopen, upon the grounds alleged in the bill, the probate proceeding had conformably to the local law.

It is manifest from the foregoing state-

ment that the only possible ground upon which the assertion that we have jurisdiction by direct appeal to review the action of the trial court can rest is the contention made below, that, as to the complainant, the notice of the hearing in the probate court upon the petition for the settlement of the account of the executor and for the final distribution of the estate of Williams did not amount to due process of law. *Farrell v. O'Brien* (*O'Callaghan v. O'Brien*) 199 U. S. 89, 100, 50 L. ed. 101, 107, 25 Sup. Ct. Rep. 727, and cases cited. It is equally certain, as held in the cited case, that the mere fact that a constitutional question is alleged does not suffice to give us jurisdiction to review by direct appeal if such question is unsubstantial, and so devoid of merit as to be clearly frivolous.

The grounds for the contention that a constitutional question exists are thus stated in the brief of counsel for appellant: "4. Sections 1633 and 1634 of the Civil Code of California, upon which jurisdiction of the court to make the consent decree of distribution is based, are in contravention of § 1, article 6, of the Constitution of the United States.

"The notice of final settlement and distribution, posted for ten days in the city and county of San Francisco, did not constitute due process of law as to appellant, who was and is a citizen and resident of the state of New York."

The sections of the California Code above referred to are thus set forth in the bill:

"Sec. 1633. When any account is rendered for settlement, the clerk of the court must 80] appoint a day for the settlement *thereof, and thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. If, upon the final hearing at the time of settlement, the court, or a judge thereof, should deem the notice insufficient from any cause, he may order such further notice to be given as may seem to him proper.

"Sec. 1634. If the account mentioned in the preceding section be for a final settlement, and a petition for the final distribution of the estate be filed with said account, the notice of settlement must state those facts, which notice must be given by posting or publication. . . . On the settlement of said account, distribution and partition of the estate to all entitled there-to may be immediately had, without further notice or proceedings."

While various decisions of this court and of the courts of two states are cited in the brief of counsel for appellant under each of

the foregoing propositions, none of them are apposite, and indeed, although citing them, counsel have specifically commented upon but one; *viz.*, *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410. That case, however, concerned the validity of original process by which the conceded property of a nonresident, situate within the jurisdiction of the state of Texas, was sought to be subjected to the control of its courts. The proposition which was presented for decision in that case was whether a statutory notice of five days, given to a resident of Virginia, requiring him to appear in Texas and defend a suit brought against him to foreclose a vendor's lien upon his land, constituted reasonable and adequate notice for the purpose. Manifestly, that case is not, in any particular, analogous to the one under consideration, which is a case involving the devolution and administration of the estate of a decedent,—a subject peculiarly within state control. *Broderick's Will* (*Kieley v. McGlynn*) 21 Wall. 503, 519, 22 L. ed. 599, 205. It is elementary that probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding **in rem*, and is [81 therefore one as to which all the world is charged with notice. And that the law of California conforms to this general and elementary rule is beyond question. *William Hill Co. v. Lawler*, 116 Cal. 359, 48 Pac. 323. The distribution of the estate of Williams was but an incident of the proceeding prescribed by the laws of California in respect to the administration of an estate in the custody of one of its probate courts. Under such circumstances, therefore, and putting aside the question of whether or not the state of California did or did not possess arbitrary power in respect to the character and length of notice to be given of the various steps in the administration of an estate in the custody of one of its courts, we hold that the claim that ten days' statutory notice of the time appointed for the settlement of the final account of the executor, and for action upon the petition for final distribution of the Williams estate, was so unreasonable as to be wanting in due process of law, was clearly unsubstantial and devoid of merit, and furnished no support for the contention that rights under the Constitution of the United States had been violated. As held in *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 314, 318, 43 L. ed. 460, 461, 19 Sup. Ct. Rep. 205, even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain "that only in a clear case will a

notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time."

The jurisdiction to determine this appeal upon the merits being dependent upon the existence of a constitutional question in the record, and the mere averment that such a question was raised below not being sufficient where the alleged Federal question is so wanting in merit as to cause it to be frivolous or without any support whatever in reason, it follows that the appeal must be and it is dismissed for want of jurisdiction.

Mr. Justice McKenna took no part in the decision of this case.

82] *JULIAN E. WOODWELL, Appt.,
v.
UNITED STATES.

(See S. C. Reporter's ed. 82-90.)

Officers — compensation — extra services.

Compensation for the services of an inspector of electric light plants in the Treasury Department, rendered in connection with the installation of an electric light plant for the buildings of the Interior Department, at the request of the Secretary of the Interior, and by the direction of the Secretary of the Treasury, is forbidden by U. S. Rev. Stat. § 1765, U. S. Comp. Stat. 1901, p. 1207, although such services were valuable, and were performed after hours, and in addition to a full discharge of regular duties, since the case is one of the performance of extra services which the law did not specially require, and for which it did not fix the remuneration, and not a case of the filling of two distinct places, offices, or employments.

[For other cases, see Officers, 28-32, in Digest Sup. Ct. 1908.]

[No. 143.]

Argued April 8, 12, 1909. Decided May 17, 1909.

APPEAL from the Court of Claims to review a judgment dismissing a petition to recover for extra services rendered by an inspector of electric light plants in the Treasury Department. Affirmed.

See same case below, 41 Ct. Cl. 357.

The facts are stated in the opinion.

Mr. William H. Robeson argued the cause and filed a brief for appellant:

Two distinct employments were being

filled, each of which had its own duties and its own compensation, and both of which might be held by one person at the same time.

United States v. Saunders, 120 U. S. 126, 129, 30 L. ed. 594, 595, 7 Sup. Ct. Rep. 467.

The law does not forbid compensation for extra services which have no affinity or connection with the duties of the office he holds.

Converse v. United States, 21 How. 469, 16 L. ed. 194.

The service rendered by this appellant was one which could not have been legally required of him, either by the Secretary of the Treasury or Secretary of the Interior; it was rendered with the knowledge and consent of appellant's superior officer; it was rendered for a department having no official control of appellant, and for a department to which he owed no service whatever; and the employment was within the legal discretion of the Secretary of the Interior, and for the benefit of the government.

Crosthwaite v. United States, 30 Ct. Cl. 300; Collier v. United States, 22 Ct. Cl. 125.

Assistant Attorney General John Q. Thompson argued the cause, and, with Mr. Clark McKercher, filed a brief for appellee:

No discretion is left to the head of a department to allow an officer who has a fixed compensation any credit beyond his salary, unless the service he has performed is required by existing laws, and the remuneration for them is fixed by law.

Converse v. United States, 21 How. 473, 16 L. ed. 195; United States v. Shoemaker, 7 Wall. 342, 19 L. ed. 81; Stansbury v. United States, 8 Wall. 36, 19 L. ed. 316; Hall v. United States, 91 U. S. 564, 23 L. ed. 448; Hoyt v. United States, 10 How. 141, 13 L. ed. 361; United States v. King, 147 U. S. 676, 37 L. ed. 328, 13 Sup. Ct. Rep. 439.

Mr. Justice White delivered the opinion of the court:

This appeal is from a judgment of the court of claims, dismissing a petition filed by the appellant to recover from the United States the sum of \$3,675. 41 Ct. Cl. 357. From the findings of the court below the facts upon which the claim was based are substantially as follows: Woodwell, the appellant, is by profession a mechanical and electrical engineer. From a date prior to March 3, 1901, up to the time of the bringing of this suit, he was an inspector of electric light plants under the jurisdiction of the Treasury Department, receiving a salary

NOTE.—On extra pay or compensation to officers—see note to United States v. Macdaniel, 8 L. ed. U. S. 587.

of \$2,000 per annum. In the sundry civil 83]*act, approved March 3, 1901, the following appropriation was made (31 Stat. at L. 1156, chap. 853):

"For the establishment of an electric lighting plant for buildings occupied by offices of the Department of the Interior, the Patent Office building, the old Postoffice building, now occupied by the General Land and Indian Bureaus, and the Pension Office building, and for improvement in the heating of the Patent Office buildings, including necessary conduits, the laying and construction of which are hereby authorized, \$74,000."

On March 11, 1901, the Secretary of the Interior sent to the Secretary of the Treasury a communication in which, after reciting the terms of the appropriation act above referred to, he said:

"When this item was under consideration, the committee on appropriation of the House of Representatives secured, through the Assistant Superintendent of the Treasury, the itemized estimate of cost of the proposed work, upon which the amount of appropriation is based, and, all the hearing before the committee, it was also indicated by members thereof that it would be expected that the projected work should conform to the estimate and the general plan outlined therein.

"I have, therefore, to request that, if practicable, some competent person connected with the Treasury Department, expert in such matters, may be authorized to prepare detailed plans and specifications, upon which proposals for the work contemplated in the appropriation may be called for at an early date."

On March 14, 1901, the Secretary of the Treasury, acknowledging the receipt of this letter, said:

"In reply you are informed that the work incident to the preparation of the plans and specifications can be performed under the supervision of a qualified employee of this office, who is familiar with the requirements; but, as the work will involve the employment of draftsmen and other persons who cannot be supplied from the regular 84]force of this Department* without detriment to its business, it is assumed that such service can be paid for from the appropriation provided for the installation of the plant. Such expense will not exceed \$500, including the expense incident to a general inspection of the work during the period of the installation.

"It is the judgment of this Department that the installation can be completed in all its details, in the most satisfactory manner, without exceeding the limits of the appropriation provided therefor,—namely, \$74,000."

In answering this letter the Secretary of the Interior said:

"Referring to your letter of March 14, 1901, in which you state that, in compliance with the request of this Department, a competent person connected with the Treasury Department will be authorized to prepare necessary plans and specifications covering the installation of the electric lighting plant for the buildings of this Department, and to your suggestion that the work will involve the employment of draftsmen and other persons who cannot be supplied from the regular force of the Treasury Department, and which would involve an expense not to exceed \$500, which would include the expense incident to the general inspection of the work during the period of installation, I have the honor to inclose herewith a copy of the decision of the Comptroller of the Treasury, to whom the matter was submitted by this Department, in which the conclusion is reached that prior to July 1, 1901, the preliminary expenses necessary to carry into effect the appropriation for the electric lighting plant may be incurred, although payment therefor cannot be made previous to that date.

"The Department would be glad to have the preliminary work commenced at the earliest practical date, and would be pleased to consider any recommendations as to the employment of the services of draftsmen, etc., referred to in your letter. If such services cannot be procured upon the terms named by the Comptroller, it is believed that it can, in the meantime, be furnished by detail from some branch of this Department."

*And on May 10, 1901, the Secretary [85 of the Treasury notified the Secretary of the Interior as follows:

"Referring to your letter of May 8, 1901, you are informed that Mr. J. E. Woodwell, inspector of electric light plants, has been directed to confer with E. M. Dawson, chief clerk, Department of the Interior, relative to the installation of an electric light, heat, and power plant in the old Postoffice Department building of this city."

Subsequently, the Secretary of the Interior made the following order, an official copy of which was sent to Mr. Woodwell through the Secretary of the Treasury:

Order.

Department of the Interior,
Washington, June 21, 1901.

A board to consist of Mr. Edward M. Dawson, chief clerk of the Department, Mr. J. E. Woodwell, inspector of electric light plants, Treasury Department, and Mr. Joseph S. Hill, engineer, etc., 'General Post-office,' is hereby constituted to, from time

to time, open bids and recommend awards of contracts for the work embraced in the installation of the electric lighting plant for the buildings of the Interior Department and in the improvement of the heating of the Patent Office building.

The board will meet at the office of the chief clerk of the Department at such time as may be designated by advertisements for opening proposals for the work.

On November 23, 1901, the Acting Secretary of the Treasury sent the following communication:

"Referring to your letter of November 21, 1901, requesting that Mr. J. E. Woodwell, inspector of electric light plants, Treasury Department, be instructed to conduct a test of the engines and dynamos being manufactured by the Ridgeway Dynamo & Engine Company, Ridgeway, Pennsylvania, for the Interior Department, I have the honor to state that, owing to prior and important instructions, it will be impractical for 86]*Mr. Woodwell to make the test the 25th instant, as desired by you.

"You are advised, however, that, if the matter can be held in abeyance until December 2, 1901, Mr. Woodwell will be instructed to make the test."

Thereafter the following from the Acting Secretary of the Interior was received by Mr. Woodwell:

Department of the Interior,
Washington, January 2, 1902.

Permission having been obtained from the Secretary of the Treasury for you to perform such service, you are hereby authorized and directed to proceed to Ridgeway, Pennsylvania, as the representative of this department at shop tests to be made, commencing on Monday next, the 6th instant, of the engines and dynamos to be furnished by the Ridgeway Dynamo & Engine Company, under contract with this Department.

There is herewith inclosed, for your information and guidance, a copy of the specifications of the contract, wherein it is provided that "the regulation, guaranteed efficiency, heating effect, and insulation resistance shall be determined by actual test in the presence of the department's authorized inspector, who shall determine test conditions. The tests to be made at the shops where the dynamos are constructed, upon due notification by contractors of their readiness to commence said test, and at the expense of the contractor, except traveling and other necessary expenses of Department's agent. Should the test be delayed or require repetition for any reason for which the contractor is justly responsible, the cost of the delayed or any subse-

quent test, including the traveling and other necessary expenses of the Department's agent, shall be at the expense of the contractor."

Mr. L. K. Sager, of this Department (Patent Office), will be detailed to accompany you and assist in making the tests.

Your actual expenses while engaged upon this service *will be paid by this De- [87
partment upon presentation of proper accounts and vouchers from funds available.

Because of the foregoing correspondence, Mr. Woodwell, as a mechanical and electrical engineer, performed certain services in and about the installation of said electric lighting and heating plant, between the 10th day of May, 1901, and the 1st day of February, 1902, and devoted 897 hours to said service, and also necessarily expended \$110 in connection therewith.

The services rendered were performed by Woodwell outside of his regular office hours as an employee in the Treasury Department, and during the time when the services were rendered he also fully discharged his duties as such employee of the Treasury Department.

While the court of claims declared that the facts above recited presented a strong equitable case in favor of the claimant, entitling him to a reasonable allowance if authority of law existed therefor, it nevertheless entered judgment for the government upon the ground that the law—as contained in §§ 1763, 1764, and 1765 of the Revised Statutes (U. S. Comp. Stat. 1901, pp. 1205-1207), copied in the margin— forbade the awarding of any compensation.

†Sec. 1763. No person who holds an office, the salary or annual compensation attached to which amounts to the sum of two thousand, five hundred dollars, shall receive compensation for discharging the duties of any other office, unless expressly authorized by law.

Sec. 1764. No allowance or compensation shall be made to any officer or clerk, by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra services whatever which any officer or clerk may be required to perform, unless expressly authorized by law.

Sec. 1765. No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation,

88]*It was held that the facts did not make out a case of the holding by one person at the same time of two distinct offices, places, or employments, each having its own duties and its own compensation, but was merely a case of the performance of extra services by a government employee, for the performance of which, even if it be assumed that there was authority of law therefor, nevertheless there was no "appropriation therefor explicitly stating that it was for such additional pay, extra allowance, or compensation."

We see no reason to doubt the correctness of the reasoning and conclusion of the court below. A succinct history of the legislation respecting the question of extra compensation for government employees is contained in the case of *United States v. King*, 147 U. S. 676, 679-681, 37 L. ed. 328-330, 13 Sup. Ct. Rep. 439. The decision of this case does not require that we should restate that history. If the facts presented by the record before us exhibit a case merely of the performances of extra services, and not one of the filling of two distinct places, offices, or employments, payment for such extra service is plainly prohibited by the terms of § 1765, Rev. Stat. That section was taken from two statutes, the first passed March 3, 1839 (5 Stat. at L. 349, chap. 83, U. S. Comp. Stat. 1901, p. 1207), and the second August 23, 1842 (5 Stat. at L. 510, chap. 183, U. S. Comp. Stat. 1901, p. 1207), and may be considered to be, to some extent, *in pari materia* with §§ 1763 and 1764. *United States v. Saunders*, 120 U. S. 126, 30 L. ed. 594, 7 Sup. Ct. Rep. 467. As said in the *Saunders Case*, speaking of §§ 1763-1765:

"Taking these sections all together, the purpose of this legislation was to prevent a person holding an office or appointment for which the law provides a definite compensation by way of salary or otherwise, which is intended to cover all the services which, as such officer, he may be called upon to render, from receiving extra compensation, additional allowances or pay for other services which may be required of him either by act of Congress or by order of the head of his department, or in any other mode added to or connected with the regular duties of the 89]place which he holds; but that *they have no application to the case of two distinct offices, places, or employments, each of which has its own duties and its own compensation, which offices may both be held by one person at the same time. In the latter case he is, in the eye of the law, two officers, or holds two places or appointments, the functions of which are separate and distinct. and, according to all the decisions, he is, in such case, entitled to recover the two compensations. In the former case, he performs

the added duties under his appointment to a single place, and the statute has provided that he shall receive no additional compensation for that class of duties unless it is so provided by special legislation."

Not only was there no specific provision in the appropriation for the employment and compensation of an electrical engineer to prepare plans and supervise the construction and installation of the plant in question. but the correspondence does not permit an inference that it was the intention of the Department of the Interior to call upon Mr. Woodwell to fill a separate and distinct office or employment from that which he already held under the government. The letter of the Secretary of the Interior of date March 11, 1901, imports that the estimate upon which the appropriation was based was made upon the assumption that such work as was desired to be performed by the experts requested from the Treasury Department would be without extra cost to the government, and the whole correspondence tends to negate the conception of either an express or implied contract between the Secretary of the Interior and Mr. Woodwell, by which the latter was to perform services for which he was to be especially compensated out of the appropriation in question or otherwise. The request made of the Secretary of the Treasury was not that he should name a competent person with whom the Secretary of the Interior might contract for the performance of the desired services, but was that he should "authorize," that is, designate, "a competent person" to do such work. The reply to such request, dated March 14, 1901, we think makes evident the *fact that it was not expected that the 90 person who was to be supplied from the regular force of the Treasury Department, because it could be done without detriment to the public service, would be additionally compensated. Indeed, any inference that such thought was entertained by the Secretary of the Treasury is rebutted by the circumstance that, in his letter, he directed the attention of the Secretary of the Interior to the fact that an expense of about \$500 would be necessary for the employment of draftsmen and others who could not be supplied by the Treasury Department, and that this sum would be regarded as sufficient for "the expense incident to a general inspection of the work during the period of installation." The direction given to Mr. Woodwell to confer with the chief clerk of the Department of the Interior "relative to the installation of a electric light, heating, and power plant in the old Postoffice Department building" was addressed to him in his capacity of "inspector of electric light plants" in the Treasury Department. Pre-

sumptively, the aid which Mr. Woodwell rendered by direction of the Secretary of the Treasury to the Department of the Interior was done by him in and by virtue of the order and direction of his superior officer, and was not, therefore, a distinct employment. Certainly it cannot be said that Mr. Woodwell, whatever may have been the value of his services, was called upon to render a service specially required by an existing law, and for the performance of which the remuneration was fixed by law. These conclusions clearly bring the case within the prohibitions against payment contained in § 1765, Rev. Stat. As there is no contention in argument respecting the claim for expenses (\$110), which it is assumed has been paid, we eliminate it from consideration.

Affirmed.

91]*FRANCIS C. WELCH, Trustee, Plff.
in Err.,
v.

GEORGE B. SWASEY et al., as the Board
of Appeal from the Building Commission
of the City of Boston.

(See S. C. Reporter's ed. 91-108.)

Error to state court — Federal question — validity of state legislation.

1. A decision sustaining the validity under the state Constitution of an alleged delegation of legislative power to a building commission does not present a Federal question for determination by the Federal Supreme Court on writ of error to a state court.

[For other cases, see Appeal and Error, 2152-2163, in Digest Sup. Ct. 1908.]

Constitutional law — police power — building regulations.

2. Regulations with respect to the height of buildings and in regard to their mode of construction in cities, made by legislative enactment for the safety, comfort, or convenience of the people, and for the benefit of property owners generally, are valid if the height and conditions provided for can be plainly seen not to be unreasonable or inappropriate.

[For other cases, see Constitutional Law, IV. c, 2, in Digest Sup. Ct. 1908.]

NOTE.—On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

For a discussion of police power generally—see notes to *State v. Marshall*, 1 L.R.A. 51; *Electric Improv. Co. v. San Francisco*, 13 L.R.A. 131; *State v. Schlemmer*, 10 L.R.A. 135; and *Barbier v. Connolly*, 28 L. ed. U. S. 923.

As to what constitutes due process of law—see notes to *Kuntz v. Sumption*, 2 L.R.A.

53 L. ed.

Constitutional law — due process of law — building regulations — police power.

3. The discrimination or classification made between the commercial and residential sections of Boston, by Mass. Pub. Acts 1904, chap. 333, and Acts 1905, chap. 383, limiting the maximum height of buildings in the commercial district to 125 feet, and the residential districts to from 80 to 100 feet, will not, in the face of a decision of the highest state court, upholding such legislation, as passed in the exercise of the police power, be held so unreasonable as to deprive the owner of property in the residential section of its profitable use without justification, and hence to take his property without due process of law unless compensation be given him for such invasion of his rights, even though esthetic considerations may have entered into the reasons for the passage of such enactments.

[For other cases, see Constitutional Law, IV. b, 5, and IV. c, 2, in Digest Sup. Ct. 1908.]

Constitutional law — equal protection of the laws — discrimination in building regulations.

4. The equal protection of the laws is not denied an owner of property in the residential section of Boston by the discrimination or classification made between the commercial and residential sections of that city by Mass. Pub. Acts 1904, chap. 333, and Acts 1905, chap. 383, limiting the height of buildings in the commercial district to 125 feet, and in the residential districts to from 80 to 100 feet.

[For other cases, see Constitutional Law, IV. a, 1, in Digest Sup. Ct. 1908.]

[No. 153.]

Argued April 15, 16, 1909. Decided May 17, 1909.

IN ERROR to the Supreme Judicial Court of the State of Massachusetts to review a judgment denying mandamus to compel the board of appeal from the building commissioner of the city of Boston to issue a building permit. **Affirmed.**

See same case below, 193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745.

Statement by Mr. Justice Peckham:

*The plaintiff in error duly applied to [92 the justices of the supreme judicial court of

655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; and *Gilman v. Tucker*, 13 L.R.A. 304. And see notes to *People v. O'Brien*, 2 L.R.A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621; and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

the state of Massachusetts for a mandamus against the defendants, who constitute a board of appeal from the building commissioner of the city of Boston, to compel the defendants to issue a permit to him to build on his lot on the corner of Arlington and Marlborough streets, in that city. The application was referred by the justice presiding to the full court, and was by it denied (193 Mass. 364, 118 Am. St. Rep. 523, 79 N. E. 745), and the plaintiff has brought the case here by writ of error.

The action of defendants in refusing the permit was based on the statutes of Massachusetts, chap. 333 of the Acts of 1904, and chap. 383 of the Acts of 1905. The two acts are set forth in the margin.† The reason for [93] the refusal to grant the building *permit was because the building site for the proposed building was situated in one of the districts B, as created under the provisions of the acts mentioned, in which districts the

height of *the buildings is limited to 80, [94 or in some cases, to 100 feet, while the height of buildings in districts A is limited to 125 feet. The height of the building which plaintiff in error proposed to build and for which he asked the building permit was stated by him in his application therefor to be 124 feet, 6 inches.

The designation of what parts in districts B and upon what conditions a building could be therein erected more than 80 while not more than 100 feet high was to be made by a commission, as provided for in the act of 1905, and the commission duly carried out the provisions of the act in that respect. The sole reason for refusing the permit was on *account of the proposed [95 height of the building, being greater than the law allowed.

The plaintiff in error contended that the defendants were not justified in their refusal to grant the permit, because the stat-

†Acts of 1904, Chapter 333.

An Act Relative to the Height of Buildings in the City of Boston.

Be it enacted, etc., as follows:

Section 1. The city of Boston shall be divided into districts of two classes, to be designated districts A and B. The boundaries of the said districts, established as hereinafter provided, shall continue for a period of fifteen years, and shall be determined in such manner that those parts of the city in which all or the greater part of the buildings situate therein are, at the time of such determination, used for business or commercial purposes, shall be included in the district or districts designated A, and those parts of the city in which all or the greater part of the buildings situate therein are, at the said time, used for residential purposes or for other purposes not business or commercial, shall be in the district or districts designated B.

Sec. 2. Upon the passage of this act the mayor of the city shall appoint a commission of three members, to be called "Commission on Height of Buildings in the City of Boston." The commission shall, immediately upon its appointment, give notice and public hearings, and shall make an order establishing the boundaries of the districts aforesaid, and within one month after its appointment shall cause the same to be recorded in the registry of deeds for the county of Suffolk. The boundaries so established shall continue for a period of fifteen years from the date of the said recording. Any person who is aggrieved by the said order may, within thirty days after the recording thereof, appeal to the commission for a revision; and the commission may, within six months after its appointment, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk, and shall date back to the original date of recording. The members of the com-

mission shall serve until the districts have been established as aforesaid; and any vacancy in the commission caused by resignation, death, or inability to act shall be filled by the mayor, on written application by the remaining members of the commission or of ten inhabitants of the city. The members of the commission shall receive such compensation as the mayor shall determine.

Sec. 3. In the city of Boston no building shall be erected to a height of more than 125 feet above the grade of the street in any district designated A, and no building shall be erected to a height of more than 80 feet above the grade of the street in any district designated B. These restrictions shall not apply to grain or coal elevators or sugar refineries in any district designated A, nor to steeples, domes, towers, or cupolas erected for strictly ornamental purposes, of fire-proof material, on buildings of the above height or less in any district. The supreme judicial court of the superior court shall each have jurisdiction in equity to enforce the provisions of this act, and to restrain the violation thereof.

Sec. 4. This act shall take effect upon its passage (Approved May 13, 1904.)

Acts of 1905, Chapter 383.

An Act Relative to the Height of Buildings in the City of Boston.

Be it enacted, etc., as follows:

Section 1. Within thirty days after the passage of this act the mayor of the city of Boston shall appoint a commission of three members to determine, in accordance with the conditions hereinafter provided, the height of buildings within the district designated by the commission on height of buildings in the city of Boston as district B, in accordance with chapter 333 of the acts of the year 1904.

Sec. 2. Said commission shall, immediately upon its appointment, give notice and

utes upon which their refusal was based were unconstitutional and void; but he conceded that, if they were valid, the defendants were justified in their refusal.

The court, while deciding that mandamus was a proper remedy, held that the statutes and the reports of the commissions thereunder were constitutional.

Mr. Burton Edward Eames argued the cause, and, with Messrs. Charles H. Tyler and Owen D. Young, filed a brief for plaintiff in error:

The 14th Amendment, although it did not take away the police power of the states in the sense of limiting the subjects upon which the police power may be exercised (*Jones v. Brim*, 165 U. S. 180, 182, 41 L. ed. 677, 678, 17 Sup. Ct. Rep. 282), or in the sense of preventing all taking or regulation of property or all inequalities, did, nevertheless, place in the Federal Constitu-

tion limitations upon the police power of the states similar to the limitations which had previously existed by virtue of similar provisions in the state Constitutions.

Cooley, Const. Lim. 7th ed. p. 418; *Holden v. Hardy*, 169 U. S. 366, 382, 42 L. ed. 780, 787, 18 Sup. Ct. Rep. 383.

The court will look to the real purpose of the statute.

Watertown v. Mayo, 109 Mass. 319, 12 Am. Rep. 694; *Austin v. Murray*, 16 Pick. 126; *State v. Redmon*, 134 Wis. 107, 14 L.R.A.(N.S.) 229, 114 N. W. 137; *Mugler v. Kansas*, 123 U. S. 661, 31 L. ed. 210, 8 Sup. Ct. Rep. 273; *Brimmer v. Rebman*, 138 U. S. 82, 34 L. ed. 863, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Yick Wo v. Hopkins*, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; *Soon Hing v. Crowley*, 113 U. S. 703, 710, 28 L. ed. 1145, 1147, 5 Sup. Ct. Rep. 730; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59, 63, 27 L. ed. 383,

public hearings, and shall make an order establishing the boundaries of or otherwise pointing out such parts, if any, of said district B, as it may designate, in which buildings may be erected to a height exceeding 80 feet, but not exceeding 100 feet, and the height between 80 feet and 100 feet to which buildings may so be erected, and the conditions under which buildings may be erected to said height, except that such order may provide for the erection of buildings as aforesaid to a height not exceeding 125 feet in that portion of said district B which lies within 50 feet from the boundary line separating said district B from the district designated by the commission of height of buildings in the city of Boston as district A, in accordance with said chapter 333, provided said boundary line divides the premises affected by such order from other adjoining premises, both owned by the same person or persons, and within sixty days after its appointment shall cause the same to be recorded in the registry of deeds for the county of Suffolk. Any person who is aggrieved by such order may, within sixty days after the recording thereof, appeal to the commission for a revision; and the commission may, previous to the 1st day of January in the year 1906, revise such order, and the revision shall be recorded in the registry of deeds for the county of Suffolk, and shall date back to the original date of recording. The boundaries so established shall continue for a period of fifteen years from the date of the recording of the order made by the commission on height of buildings in the city of Boston under chapter 333 of the acts of the year 1904. The members of the commission shall receive such compensation as the mayor shall determine.

Sec. 3. Within such parts of district B as may be designated by the commission as aforesaid (which may, except as hereinafter provided, include any parts of said district B affected by prior acts limiting the height

of buildings), buildings may be erected to the height fixed by the commission as aforesaid, exceeding 80 feet, but not exceeding 100 feet, or 125 feet, as hereinbefore provided, and subject to such conditions as may be fixed as aforesaid by the commission; but within the following-described territory, to wit: Beginning at the corner of Beacon street and Hancock avenue, thence continuing westerly on Beacon street to Joy street, thence continuing northerly on Joy street to Myrtle street, thence continuing easterly on Myrtle street to Hancock street, thence continuing southerly on Hancock street and Hancock avenue to the point of beginning, no building shall be erected to a height greater than 70 feet, measured on its principal front, and no building shall be erected on a parkway, boulevard, or public way on which a building line has been established by the board of park commissioners or by the board of street commissioners, acting under any general or special statute, to a greater height than that allowed by the order of said boards; and no building upon land any owner of which has received and retained compensation in damages for any limitation of height, or who retains any claim for such damages, shall be erected to a height greater than that fixed by the limitation for which such damages were received or claimed.

Sec. 4. No limitations of the height of buildings in the city of Boston shall apply to churches, steeples, towers, domes, cupolas, belfries, or statuary not used for purposes of habitation, nor to chimneys, gas holders, coal or grain elevators, open balustrades, skylights, ventilators, flagstaffs, railings, weather vanes, soil pipes, steam exhausts, signs, roof houses not exceeding 12 feet square and 12 feet high, nor to other similar constructions such as are usually erected above the roof line of buildings.

Sec. 5. This act shall take effect upon its passage. (Approved May 8, 1905.)

385, 2 Sup. Ct. Rep. 87; *Henderson v. New York* (*Henderson v. Wickham*) 92 U. S. 259, 23 L. ed. 543; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Health Department v. Trinity Church*, 145 N. Y. 40, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636; *Farist Steel Co. v. Bridgeport*, 60 Conn. 292, 13 L.R.A. 590, 22 Atl. 561; *Priewe v. Wisconsin State Land & Improv. Co.* 103 Wis. 549, 74 Am. St. Rep. 904, 79 N. W. 780.

And, in determining what is the real purpose of the statute, the court will consider the history of the times, and the circumstances leading up to its enactment.

Church of the Holy Trinity v. United States, 143 U. S. 457, 463, 36 L. ed. 226, 229, 12 Sup. Ct. Rep. 511.

The purpose may also be inferred from the terms of the act itself.

Lochner v. New York, 198 U. S. 45, 64, 49 L. ed. 937, 944, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Talbot v. Hudson*, 16 Gray, 420; *Simpson v. Story*, 145 Mass. 498, 1 Am. St. Rep. 480, 14 N. E. 641; *Pollock v. Farmers' Loan & T. Co.* 157 U. S. 429, 558, 39 L. ed. 759, 811, 15 Sup. Ct. Rep. 673; *Farist Steel Co. v. Bridgeport*, 60 Conn. 278, 13 L.R.A. 590, 22 Atl. 561.

Although property may be taken by right of eminent domain for esthetic purposes (*Higginson v. Nahant*, 11 Allen, 530; *Atty. Gen. v. Williams* (*Knowlton v. Williams*) 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77), still that purpose is not sufficient to warrant the exercise of the police power in such manner as to interfere with the use of property.

Com. v. Boston Advertising Co. 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601; *St. Louis v. Hill*, 116 Mo. 527, 21 L.R.A. 226, 22 S. W. 861; *St. Louis v. Dorr*, 145 Mo. 466, 42 L.R.A. 686, 68 Am. St. Rep. 575, 41 S. W. 1094, 46 S. W. 976; *People v. Green*, 85 App. Div. 400, 83 N. Y. Supp. 460; *Bostock v. Sams*, 95 Md. 400, 59 L.R.A. 282, 93 Am. St. Rep. 394, 52 Atl. 665; *Bill Posting Sign Co. v. Atlantic City*, 71 N. J. L. 72, 58 Atl. 242; *Passaic v. Patterson Bill Posting, Advertising, & Sign Painting Co.* 72 N. J. L. 285, 111 Am. St. Rep. 676, 62 Atl. 267, 5 A. & E. Ann. Cas. 995; *Chicago v. Gunning System*, 214 Ill. 628, 70 L.R.A. 230, 73 N. E. 1035, 2 A. & E. Ann. Cas. 892; 20 *Harvard Law Rev.* pp. 42, 43.

The principle of reasonableness is a principle of proportionateness.

Watertown v. Mayo, supra; *Ex parte Whitwell*, 98 Cal. 73, 19 L.R.A. 727, 35 Am. St. Rep. 152, 32 Pac. 870; *State v. Speyer*, 67 Vt. 502, 29 L.R.A. 573, 48 Am. 926

St. Rep. 832, 32 Atl. 476; *Com. v. Tewksbury*, 11 Met. 57; *Cooley*, Const. Lim. 7th ed. p. 878; *Miller v. Horton*, 152 Mass. 547, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; *State ex rel. Wyatt v. Ashbrook*, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; *People v. Gillson*, 109 N. Y. 403, 4 Am. St. Rep. 465, 17 N. E. 343; *Health Department v. Trinity Church*, 145 N. Y. 32, 27 L.R.A. 710, 45 Am. St. Rep. 579, 39 N. E. 833; *Re Jacobs*, 98 N. Y. 110, 50 Am. Rep. 636; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Jacobson v. Massachusetts*, 197 U. S. 11, 28, 31, 49 L. ed. 643, 650, 651, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 24 L. ed. 527; *Sawyer v. Davis*, 136 Mass. 239, 49 Am. Rep. 27; *Rideout v. Knox*, 148 Mass. 368, 2 L.R.A. 81, 12 Am. St. Rep. 560, 19 N. E. 390; *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37, 16 Am. Rep. 611; *Bent v. Emery*, 173 Mass. 496, 53 N. E. 910; *Martin v. District of Columbia*, 205 U. S. 135, 51 L. ed. 743, 27 Sup. Ct. Rep. 440; *State v. Redmon*, 134 Wis. 89, 14 L.R.A. (N.S.) 229, 114 N. W. 137; *Freund*, Pol. Power, § 63.

Any regulation which deprives any person of a profitable use of his property constitutes a taking of property, and the owner is entitled, under the Constitution, to compensation, unless the invasion of rights is so slight as to permit the regulation to be justified under the police power.

Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166, 179, 20 L. ed. 557, 560; *United States v. Lynah*, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349; *Sweet v. Rechel*, 159 U. S. 380, 399, 40 L. ed. 188, 196, 16 Sup. Ct. Rep. 43; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 Am. Rep. 147; *Bent v. Emery*, 173 Mass. 495, 53 N. E. 910; *Grand Rapids Boom Co. v. Jarvis*, 30 Mich. 320; *Re Jacobs*, 98 N. Y. 105, 50 Am. Rep. 636; *Edwards v. Bruorton*, 184 Mass. 529, 69 N. E. 328; *Miller v. Horton*, 152 Mass. 547, 10 L.R.A. 116, 23 Am. St. Rep. 850, 26 N. E. 100; *Mugler v. Kansas*, 123 U. S. 668, 31 L. ed. 212, 8 Sup. Ct. Rep. 273; *Parker v. Com.* 178 Mass. 205, 59 N. E. 634.

The infringement is disproportionate to any public necessity or end.

Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Parker v. Com.* 178 Mass. 199, 59 N. E. 634; *Janesville v. Carpenter*, 214 U. S.

77 Wis. 301, 8 L.R.A. 808, 20 Am. St. Rep. 123, 46 N. W. 128; *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. ed. 169, 25 Sup. Ct. Rep. 18; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213.

Classification must be a reasonable one with reference to the purpose for which the statute is enacted; it cannot be arbitrary.

Gulf, C. & S. F. R. Co. v. Ellis, 165 U. S. 150, 159, 165, 41 L. ed. 666, 669, 671, 17 Sup. Ct. Rep. 255; *Connolly v. Union Sewer Pipe Co.* 184 U. S. 540, 560, 46 L. ed. 679, 690, 22 Sup. Ct. Rep. 431; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 104, 43 L. ed. 909, 912, 19 Sup. Ct. Rep. 609; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114; *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215; *State v. Divine*, 98 N. C. 778, 4 S. E. 477.

The essence of the requirement of equal protection is that laws or regulations must apply equally to property of the same kind and in like circumstances.

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 52 L. ed. 78, 28 Sup. Ct. Rep. 7, 12 A. & E. Ann. Cas. 757; *Cotting v. Kansas City Stock Yards Co.* (*Cotting v. Godard*) 183 U. S. 79, 46 L. ed. 92, 22 Sup. Ct. Rep. 30; *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 269, 48 L. ed. 971, 972, 24 Sup. Ct. Rep. 638; *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. ed. 923, 924, 5 Sup. Ct. Rep. 357; *Watertown v. Mayo*, 109 Mass. 315, 319, 12 Am. Rep. 694.

The court will take judicial notice of facts of common knowledge, of the location of the lines drawn by the commission of the situation of various streets, and of the character of the various districts and localities of the city.

Brimmer v. Rebman, *supra*; *Minnesota v. Barber*, 136 U. S. 313, 321, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Jacobson v. Massachusetts*, 197 U. S. 11, 23, 49 L. ed. 643, 648, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Muller v. Oregon*, 208 U. S. 412, 421, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324; *Siegbert v. Stiles*, 39 Wis. 533; *The Montello (United States v. The Montello)* 11 Wall. 411, 20 L. ed. 191; *Gardner v. Eberhart*, 82 Ill. 316; *Prince v. Crocker*, 166 Mass. 347, 32 L.R.A. 610, 44 N. E. 446.

Reasonable classification of cities may be made, but it must be based upon some real difference with reference to the purposes of the act.

Tenement House Department v. Moeschen, 179 N. Y. 325, 70 L.R.A. 704, 103 Am. St. Rep. 910, 72 N. E. 231, 1 A. & E. Ann. Cas. 439; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *State ex rel.* 53 L. ed.

Richards v. Hammer, 42 N. J. L. 440; *Bessette v. People*, 193 Ill. 334, 56 L.R.A. 558, 62 N. E. 215.

The classification attempted within the city of Boston itself is not based upon reasonable grounds.

Yick Wo v. Hopkins, 118 U. S. 356, 368, 30 L. ed. 220, 225, 6 Sup. Ct. Rep. 1064; *Jackson v. Stevenson*, 156 Mass. 496, 32 Am. St. Rep. 476, 31 N. E. 691.

The statutes create exceptions in favor of certain occupations.

Connolly v. Union Sewer Pipe Co. 184 U. S. 540, 46 L. ed. 679, 22 Sup. Ct. Rep. 431.

Mr. Thomas M. Babson argued the cause and filed a brief for defendants in error:

The statute was enacted, according to the decision of the supreme judicial court of the state, in behalf of the public health and safety, and the Supreme Court of the United States will not strike it down as an unconstitutional interference with private property, unless it can plainly see that it has no real and substantial relation to those objects, and is a mere arbitrary attack upon the owners of land.

Slaughter-House Cases, 16 Wall. 36, 21 L. ed. 394; *Bartemeyer v. Iowa*, 18 Wall. 129, 21 L. ed. 929; *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24 L. ed. 989; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep. 273; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *Lawton v. Steele*, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Holden v. Hardy*, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; *Fischer v. St. Louis*, 194 U. S. 361, 48 L. ed. 1018, 24 Sup. Ct. Rep. 673; *California Reduction Co. v. Sanitary Reduction Works*, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 52 L. ed. 828, 28 Sup. Ct. Rep. 529.

The right of the state to regulate the construction of buildings has been recognized and exercised ever since the population of our cities became dense enough to make regulation desirable and necessary for the protection of the inhabitants from fire and disease.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499; *Fischer v. St. Louis*, *supra*; *Ex parte Fiske*, 72 Cal. 125, 13 Pac. 310; *Baumgartner v. Hasty*, 100 Ind. 575, 50 Am. Rep. 830; *First Nat. Bank v. Sarlls*, 129 Ind. 201, 13 L.R.A. 481,

28 Am. St. Rep. 185, 28 N. E. 434; *Wadleigh v. Gilman*, 12 Me. 403, 28 Am. Dec. 188; *Easton v. Covey*, 74 Md. 262, 22 Atl. 266; *Watertown v. Mayo*, 109 Mass. 315, 12 Am. Rep. 694; *Salem v. Maynes*, 123 Mass. 372; *Brady v. Northwestern Ins. Co.* 11 Mich. 425; *Fire Department v. Gilmour*, 149 N. Y. 453, 52 Am. St. Rep. 747, 44 N. E. 177; *Rochester v. West*, 164 N. Y. 510, 53 L.R.A. 548, 79 Am. St. Rep. 659, 58 N. E. 673; *Respublica v. Duquet*, 2 Yeates, 493; *Douglass v. Com.* 2 Rawle, 262; *Klingler v. Bickel*, 117 Pa. 326, 11 Atl. 555; *Charleston v. Elford*, 1 McMull. L. 234; *Knoxville v. Bird*, 12 Lea, 121, 47 Am. Rep. 326; *Baxter v. Seattle*, 3 Wash. 352, 28 Pac. 537; *Charleston v. Reed*, 27 W. Va. 681, 55 Am. Rep. 336; *Hudson County Water Co. v. McCarter*, 209 U. S. 349, 355, 52 L. ed. 828, 831, 28 Sup. Ct. Rep. 529; *People ex rel. Kemp v. D'Oench*, 111 N. Y. 359, 18 N. E. 862; 1 *Abbott, Mun. Corp.* p. 237; 2 *Tiedeman, State & Federal Control of Persons & Property*, p. 754.

In a case of this kind involving the question whether a certain state statute is aimed and adapted to promote the public welfare, the Supreme Court of the United States should and does well hesitate to overturn a decision of the highest court of the state. The validity of the statute may depend on certain facts, general, notorious, and acknowledged within the state, and with which the state courts may be assumed to be exceptionally familiar. They understand the situation which led to the demand for the enactment of the statute, and they appreciate the disastrous results which, in all probability, would flow from a denial of its validity.

Clark v. Nash, 198 U. S. 361, 49 L. ed. 1085, 25 Sup. Ct. Rep. 676, 4 A. & E. Ann. Cas. 1171; *Strickley v. Highland Boy Gold Min. Co.* 200 U. S. 527, 50 L. ed. 581, 26 Sup. Ct. Rep. 301, 4 A. & E. Ann. Cas. 1174; *Bacon v. Walker*, 204 U. S. 311, 51 L. ed. 499, 27 Sup. Ct. Rep. 289.

Land is not taken unless it is physically entered upon, or the owner substantially deprived of the beneficial use.

Smith v. Washington, 20 How. 135, 15 L. ed. 858; *Northern Transp. Co. v. Chicago*, 99 U. S. 635, 25 L. ed. 336; *D. M. Osborne & Co. v. Missouri P. R. Co.* 147 U. S. 248, 37 L. ed. 155, 13 Sup. Ct. Rep. 299; *Gibson v. United States*, 166 U. S. 275, 41 L. ed. 1002, 17 Sup. Ct. Rep. 578; *Meyer v. Richmond*, 172 U. S. 95, 43 L. ed. 379, 19 Sup. Ct. Rep. 106; *Sharp v. United States*, 191 U. S. 341, 48 L. ed. 211, 24 Sup. Ct. Rep. 114; *Bedford v. United States*, 192 U. S. 217, 48 L. ed. 414, 24 Sup. Ct. Rep. 238.

Regulations and restrictions upon the use

of real property have been imposed which limit its use and impair its value more severely than those in the case at bar, without giving rise to any constitutional obligation to compensate the owner.

Slaughter-House Cases and *Boston Beer Co. v. Massachusetts*, *supra*; *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 24 L. ed. 1036; *Barbier v. Connolly*; *Mugler v. Kansas*; and *Fischer v. St. Louis*, —*supra*.

A police regulation is not unconstitutional merely because it is applicable to a certain section of the state only; granting that a purely arbitrary distinction would be invalid, such as a burdensome restriction applied only to the democratic wards, or to those inhabited principally by people of a certain race or religion, yet all that is required is that the discrimination between localities be based upon some conceivably rational distinction; with the policy of the law the court has no concern.

Cooley, *Const. Lim.* 7th ed. 554; *Missouri v. Lewis* (*Bowman v. Lewis*) 101 U. S. 22, 25 L. ed. 989; *Hayes v. Missouri*, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; *Budd v. New York*, 143 U. S. 517, 548, 36 L. ed. 247, 257, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Gardner v. Michigan*, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; *Slaughter-House Cases* and *Barbier v. Connolly*, *supra*.

The legislature is authorized, and even required in enacting a police regulation, to consider the hardship it may inflict upon individuals as well as the benefit to the public.

Lawton v. Steele, 152 U. S. 133, 38 L. ed. 385, 14 Sup. Ct. Rep. 499.

There are obvious reasons why the legislature, in passing this act as a health measure, should see the greater need of sunlight and air in the residential quarters of the city, occupied during the day by women and children, than in the business district where men are employed. The legislature is well justified in throwing a greater protection around women and children than it allows men, even if property rights are thereby somewhat interfered with.

Muller v. Oregon, 208 U. S. 412, 52 L. ed. 551, 28 Sup. Ct. Rep. 324.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The ground of objection of plaintiff in error to this legislation is that the statutes unduly and unreasonably infringe upon his constitutional rights (a) as to taking of property without compensation; (b) as to denial of equal protection of the laws.

Plaintiff in error refers to the existence

of a general law in Massachusetts, applicable to every city therein, limiting the height of all buildings to 125 feet above the grade of the street (Acts of 1891, chap. 355), and states that he does not attack the validity of that act in any respect, but concedes that it is constitutional and valid. See also, on same subject, Acts of 1892, chap. 419, § 25, making such limitation as to the city of Boston. His objection is directed to the particular statutes because they provide for a much lower limit in certain parts of the city of Boston, to be designated by a commission, and because a general restriction of height as low as 80 or 100 feet over any substantial portion of the city is, as he contends, an unreasonable infringement upon his rights of property; also that the application of those limits to districts B, which comprise the greater part of the city of Boston, leaving the general 125-foot limit in force in those portions of the city which **104***the commission should designate (being the commercial districts), is an unreasonable and arbitrary denial of equal rights to the plaintiff in error and others in like situation.

Stating his objections more in detail, the plaintiff in error contends that the purposes of the acts are not such as justify the exercise of what is termed the police power, because, in fact, their real purpose was of an esthetic nature, designed purely to preserve architectural symmetry and regular sky lines, and that such power cannot be exercised for such a purpose. It is further objected that the infringement upon property rights by these acts is unreasonable and disproportioned to any public necessity, and also that the distinction between 125 feet for the height of buildings in the commercial districts described in the acts, and 80 to 100 feet in certain other or so-called residential districts, is wholly unjustifiable and arbitrary, having no well-founded reason for such distinction, and is without the least reference to the public safety, as from fire, and inefficient as means to any appropriate end to be attained by such laws.

In relation to these objections the counsel for the plaintiff in error, in presenting his case at bar, made a very clear and able argument.

Under the concession of counsel, that the law limiting the height of buildings to 125 feet is valid, we have to deal only with the question of the validity of the provisions stated in these statutes and in the conditions provided for by the commissions, limiting the height in districts B between 80 and 100 feet.

We do not understand that the plaintiff in error makes the objection of illegality arising from an alleged delegation of legisla-

tive power to the commissions provided for by the statutes. At all events, it does not raise a Federal question. The state court holds that kind of legislation to be valid under the state Constitution, and this court will follow its determination upon that question.

We come, then, to an examination of the question whether *these statutes with **105** reference to limitations on height between 80 and 100 feet, and in no case greater than 100 feet, are valid. There is here a discrimination or classification between sections of the city, one of which, the business or commercial part, has a limitation of 125 feet, and the other, used for residential purposes, has a permitted height of buildings from 80 to 100 feet.

The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of, some purpose for which the legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real, substantial relation to a public object which government can accomplish, if the statutes are arbitrary and unreasonable, and beyond the necessities of the case, the courts will declare their invalidity. The following are a few of the many cases upon this subject: *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Minnesota v. Barber*, 136 U. S. 313, 320, 34 L. ed. 455, 458, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Jacobson v. Massachusetts*, 197 U. S. 11, 28, 49 L. ed. 643, 650, 25 Sup. Ct. Rep. 358, 3 A. & E. Ann. Cas. 765; *Lochner v. New York*, 198 U. S. 45, 57, 49 L. ed. 937, 941, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Chicago, B. & Q. R. Co. v. Illinois*, 200 U. S. 561, 593, 50 L. ed. 596, 609, 26 Sup. Ct. Rep. 341, 4 A. & E. Ann. Cas. 1175.

In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the state where the law is to become operative,—whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare,—are all matters which the state court is familiar with; but a like familiarity cannot be ascribed to this court, assum-

106]ing "judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a state whose people are to be affected by the operation of the law. The highest court of the state in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be. We do not, of course, intend to say that, under such circumstances, the judgment of the state court upon the question will be regarded as conclusive, but simply that it is entitled to the very greatest respect, and will only be interfered with, in cases of this kind, where the decision is, in our judgment, plainly wrong. In this case the supreme judicial court of the state holds the legislation valid, and that there is a fair reason for the discrimination between the height of buildings in the residential as compared with the commercial districts. That court has also held that regulations in regard to the height of buildings, and in regard to their mode of construction in cities, made by legislative enactments for the safety, comfort, or convenience of the people, and for the benefit of property owners generally, are valid. *Atty. Gen. v. Williams (Knowlton v. Williams)* 174 Mass. 476, 47 L.R.A. 314, 55 N. E. 77. We concur in that view, assuming, of course, that the height and conditions provided for can be plainly seen to be not unreasonable or inappropriate.

In relation to the discrimination or classification made between the commercial and the residential portion of the city, the state court holds in this case that there is reasonable ground therefor, in the very great value of the land and the demand for space in those parts of Boston where a greater number of buildings are used for the purposes of business or commercially than where the buildings are situated in the residential portion of the city, and where no such reasons exist for high buildings. While so deciding, the court cited, with *approval, *Com. v. Boston Advertising Co.* 188 Mass. 348, 69 L.R.A. 817, 108 Am. St. Rep. 494, 74 N. E. 601, which holds that the police power cannot be exercised for a merely esthetic purpose. The court distinguishes between the two cases, and sustains the present statutes. As to the condition adopted by the commission for permitting the erection, in either of the districts B, that is, the residential portion, of buildings of over 80 feet, but never more than 100, that the width on each and every public street on which the

building stands shall be at least one half its height, the court refuses to hold that such condition was entirely for esthetic reasons. The chief justice said: "We conceive that the safety of adjoining buildings, in view of the risk of the falling of walls after a fire, may have entered into the purpose of the commissioners. We are of opinion that the statutes and the orders of the commissioners are constitutional"

We are not prepared to hold that this limitation of 80 to 100 feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power.

It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that, in this limited commercial area, the high buildings are generally of fireproof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women or children are found there in the daytime, and very few people sleep there at night. And there may, in the residential part, be more wooden buildings, the fire apparatus may be more widely scattered, and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters *are[108 more remote from the water front, and that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which, it must be presumed, were known by the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the city of Boston. If they are, it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That, in addition to these sufficient facts, considerations of an esthetic nature also entered into the reasons for their passage, would not invalidate them. Under these circumstances there is no unreasonable interference with the rights of property of the plaintiff in error, nor do the statutes de-

prive him of the equal protection of the laws. The reasons contained in the opinion of the state court are, in our view, sufficient to justify their enactment. The judgment is therefore affirmed.

KAIMIOLA NAKOOKOO GRAY, Appt.,
v.
DAVID NOHOLOA.

(See S. C. Reporter's ed. 108-113.)

Appeal—review of facts—concurrent findings.

1. Concurrent findings of the two lower courts on the question as to what is the correct English translation of a will written in the Hawaiian language will be followed by the Supreme Court of the United States on appeal from the Hawaiian supreme court. [For other cases, see *Appeal and Error*, 4558, 4559, in *Digest Sup. Ct.* 1908.]

Wills—partial intestacy.

2. The intention of the testatrix, a leper, residing at the leper settlement at Kalaupapa, Hawaii, to give to her husband not only the property which she left situated at that place, but also all other property owned by her, wherever situated, and of whatever character, clearly appears from a gift to her husband of "all property known belonging to me and appearing in my name, situate at Kalaupapa," describing it as three horses and a wooden house, and "other houses owned by me, as well as all other property owned by me."

[For other cases, see *Wills*, III, 1, in *Digest Sup. Ct.* 1908.]

[No. 174.]

Submitted April 20, 1909. Decided May 17, 1909.

A PPEAL from the Supreme Court of the Territory of Hawaii to review a decree which affirmed a decree of the Circuit Court of the Second Circuit of that territory, refusing to grant letters of administration upon a portion of the property of a testatrix, as to which she was alleged to have died intestate. Affirmed.

See same case below, 18 Haw. 265.

Statement by Mr. Justice Peckham:

The appellant herein appeals from the decree of the supreme court of the territory

of Hawaii. The facts relating to the case are as follows:

Hikaalani Hobron Noholoa was a resident of the island of Molokai, territory of Hawaii, which is called the leper settlement, and was a leper, about seventy-five years of age, at the time of her death, on or about the 29th of June, 1906. Deceased left a husband, who was also a resident of the settlement and a leper, and a niece, the appellant, Kaimiola Nakookoo Gray, also residing on the island, and two grandnieces, being minors, residing in Honolulu. She left a will written in the Hawaiian language, of which the following was taken as a translation by the courts below:

"I, the undersigned, a leper residing at Kalaupapa, island of Molokai, territory of Hawaii, do make this my last will for all property known belonging to me and appearing in my name situate at Kalaupapa aforesaid, with good will (or intention) do hereby bequeath the same as hereinafter described: One gray horse, one bay mare; one black mare; one frame wooden house and other houses owned by me, as well as all other property owned by me, to my husband David Noholoa, residing at Kalaupapa aforesaid, to him and to his heirs, administrators and executors forever. Renouncing all claims that my relatives may set up in law to this."

The above will was duly admitted to probate in the circuit court of the second circuit of the territory on the 12th day of December, 1906, and, upon petition duly made, the court granted letters of administration with the will annexed to Enoch Johnson, who thereupon received such letters, and entered upon his duties as such administrator.

*After the application on the part of [110 the husband for the probate of the will of his wife, and after the filing of the same with the clerk of the circuit court, but before the granting of letters of administration to Enoch Johnson, as prayed for by the husband, a petition was filed with the same court by Kaimiola Nakookoo Gray, the appellant herein, and a niece of the deceased testatrix, in which petition it was averred that the will of the testatrix, which was offered for probate, did not dispose of any property other than which was within and at the leper settlement, and that the testatrix, at the time of her death, owned other property outside of the settlement, of the assessed value of several thousand dollars, and it was averred that there was no person who could lawfully demand settlement of the people who had possession of the property outside of the settlement, and therefore the petitioner asked for the appointment of some suitable person as administrator of the

NOTE.—As to how far the intention of a testator is to govern in the construction of a will—see notes to *Pray v. Belt*, 7 L. ed. U. S. 309; *Dougherty v. Rogers*, 3 L.R.A. 847; *Boston Safe Deposit & T. Co. v. Coffin*, 8 L.R.A. 740; *Davidson v. Coon*, 9 L.R.A. 587; and *Masterson v. Townshend*, 10 L.R.A. 816.
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estate of which decedent died intestate, and that due notice might be given thereof.

Subsequently to the filing of this petition the probate court duly admitted the will as translated by the court to probate, and also denied the petition of the niece for letters of administration upon that portion of the land of deceased which she asserted was not included in the will. The translation of the will which she put in evidence in her proceeding was the same one that was made by the court in the proceeding to admit the will to probate.

Kaimiola Nakookoo Gray duly appealed from the order or decree of the probate court, refusing to grant letters of administration, as petitioned for, and the appeal was duly argued, without objection, in the supreme court of the territory, upon the same translation of the will, and the decree was affirmed.

A motion was then made for a rehearing of the case, and upon that motion, for the first time, *ex parte* affidavits were used on behalf of the appellant in regard to the translation of the will of testatrix. These affidavits asserted that the translation adopted, and most of it made, by the 111] probate court, and *adopted by the supreme court upon a hearing, without protest or question on her part, was not an accurate translation, and the following was asserted to be the true translation:

"I, the undersigned, a leper residing at Kalaupapa, island of Molokai, territory of Hawaii, make this my last testament concerning all chattels known as mine and in my possession, being in Kalaupapa aforementioned; with sane mind I bequeath all those said goods of mine described as follows, to wit,

"1 Creamed-colored horse,

"1 Bay mare,

"1 Black mare,

"1 Wooden house together with certain other houses, and all other chattels belonging to me, to my husband, David Noholoa, residing at said Kalaupapa and to his heirs and assigns forever. My heirs shall not have any right to claim these at law.

"In witness whereof I hereunto subscribe my name this 18th day of November, 1901."

The court refused to accept such translation or to set aside or correct the translation already made and adopted by it, and thereupon denied the motion for a rehearing, Frear, Chief Justice, dissenting.

From the decree of affirmance, Kaimiola Nakookoo Gray has appealed to this court.

Mr. David L. Withington submitted the cause for appellant. Messrs. J. Alfred Magoon and J. Lightfoot were on the brief:

In a question concerning the construction of wills, the intention of the testator is the guiding consideration; and this intention will always prevail unless it is against some positive rule of law.

Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Lambert v. Paine, 3 Cranch, 97, 2 L. ed. 377; Finlay v. King, 3 Pet. 346, 7 L. ed. 701; Colton v. Colton, 127 U. S. 300, 32 L. ed. 138, 8 Sup. Ct. Rep. 1164; Lee v. Simpson, 134 U. S. 572, 33 L. ed. 1038, 10 Sup. Ct. Rep. 631; Harris v. Judd, 3 Haw. 421; Zupplein v. Austin, 6 Haw. 8; Thurston v. Allen, 8 Haw. 392.

In arriving at the intention of a testator, his circumstances, surroundings, and condition at the time of the making of the will can be considered for the purpose of explaining any latent ambiguity.

Harrison v. Nixon, 9 Pet. 483, 9 L. ed. 201; Jones v. Habersham, 107 U. S. 174, 27 L. ed. 401, 2 Sup. Ct. Rep. 336; Robinson v. Adams, 4 Dall. 12, Appx., 1 L. ed. 920, Appx.; Smith v. Bell, supra; Wright v. Denn, 10 Wheat, 204, 6 L. ed. 303; Given v. Hilton, 95 U. S. 591, 24 L. ed. 458.

The generally expressed intent prevails over the technical meaning of words employed.

Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589; Sheetz's Appeal, 82 Pa. 213; Den ex dem. McMurtrie v. McMurtrie, 15 N. J. L. 276; Den ex dem. Blackwell v. Blackwell, 15 N. J. L. 386; Stokes v. Tilly, 9 N. J. Eq. 130; Carnagy v. Woodcock, 2 Munf. 234, 5 Am. Dec. 470; Morton v. Barrett, 22 Me. 265, 39 Am. Rep. 575; Rose v. McHose, 26 Mo. 590.

The supreme court of the territory of Hawaii erred in holding and deciding that the rule "*ejusdem generis*" does not apply in the construction of this will.

Brawley v. Collins, 88 N. C. 607; Andrews v. Schoppe, 84 Me. 170, 24 Atl. 807; Benton v. Benton, 63 N. H. 295, 56 Am. Rep. 512; Jackson v. Vandersprengle, 2 Dall. 142, 1 L. ed. 323; Ennis v. Smith, 14 How. 400, 418-421, 14 L. ed. 472, 480-482; Dole v. Johnson, 3 Allen, 364; Bills v. Putnam, 64 N. H. 554, 15 Atl. 140; Vincent v. Murray, 73 N. C. 20; Farish v. Cook, 78 Mo. 217, 47 Am. Rep. 107; Reakert's Appeal, 173 Pa. 368, 34 Atl. 58; Bond v. Martin, 25 Ky. L. Rep. 719, 76 S. W. 326; Gallagher v. McKeague, 125 Wis. 116, 110 Am. St. Rep. 821, 103 N. W. 233.

Messrs. William L. Stanley and Clarence H. Olson submitted the cause for appellee. Mr. Henry Holmes was on the brief.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

The sole question in this case is whether property which belonged to testatrix in her 112]lifetime, and was situated outside *of the leper island, or settlement, at the time of her death, passed by her will.

The appellant asserts that the translation of the will, although made by one and adopted by both courts below without opposition, and offered on her part in this proceeding, both in the trial court and upon review, is nevertheless, inaccurate; that the translation which she submitted in her motion for a rehearing, as contained, in certain *ex parte* affidavits, is the more accurate of the two, and, if it were adopted, the original will in such case, as so translated, would not dispose of any property which belonged to the testatrix at the time of her death, situated outside of the leper settlement; and, as no executor was appointed in the will, the petition of the appellant for the appointment of an administrator with the will annexed as to all outside property of which the testatrix died intestate should, as she claims, have been granted, and to that end the order should be reversed.

What is the correct English translation of the original will in this case, written in the Hawaiian language, is a pure question of fact.

The record shows that Judge Kepoikai, judge of the probate branch of the circuit court, second circuit, himself translated, at least in part, the will now before us for construction. The record discloses no objection or opposition to such translation, or any criticism of its accuracy at that time. The supreme court, on appeal, used the same translation, without criticism or opposition, as had been used by the trial court, and, upon that translation, affirmed the decree. Mr. Justice Hartwell, in writing the opinion of the supreme court, said: "The original of the will shows more clearly than does the evidently defective translation that the intention was to dispose of 'also all the other property known to be mine.' The decedent evidently knew well what her property at Kalaupapa was, and there is no reason to suppose that she did not know of the property in Honolulu." [18 Haw. 266.] So that whether the translation adopted by the court below and the supreme court 113]was defective or not, the *view of the latter court was that a correct translation showed the intention of the testatrix to dispose of all her property, or, as the court said, "also all the other property known to be mine."

As the two courts below have determined the question of fact, we follow our usual 53 L. ed.

course in such cases, and adopt the translation of the will which they have adopted.

The legal question then arising is, What did the testatrix mean by her will? Her intention is to be derived from her language, and we are of opinion that the lower court was correct in its construction as given to us.

A perusal of the will as translated and adopted by the courts below leaves us in no doubt that the testatrix's intention was to give to her husband, not only the property which she left situated at Kalaupapa, but also all other property owned by her, wherever it might be situated and whatever it might be. We do not think she intended to die intestate as to any portion of her property, or to limit her bounty to her husband to such property only as was situated at Kalaupapa.

The decree of the Supreme Court of the Territory is therefore affirmed.

GEORGE D. COLLINS, Plff. in Err.,

v.

THOMAS F. O'NEIL, Sheriff of the City and County of San Francisco, State of California, et al. [No. 241.]

GEORGE D. COLLINS, Appt.,

v.

SHERIFF OF THE CITY & COUNTY OF SAN FRANCISCO, State of California, et al. [No. 320.]

(See S. C. Reporter's ed. 113-124.)

Extradition — prosecution for subsequent offense — opportunity to return.

1. Immunity from trial for an offense committed by a person after his extradition until he has been afforded an opportunity to return to the country whence he was extradited was not given by the provisions of the treaties with Great Britain of August 9, 1842 (8 Stat. at L. 576), and July 12, 1889 (26 Stat. at L. 1508, 1509), or of U. S. Rev. Stat. § 5275, U. S. Comp. Stat. 1901, p. 3596, under which such immunity as to prior offenses only is secured.

[For other cases, see Extradition, 65-67, in Digest Sup. Ct. 1908.]

Extradition — prosecution for subsequent offense.

2. An extradited person is given no right to have the trial of the offense for which he was extradited brought to a conclusion before he can be tried for an offense subsequently committed by the provisions of the

NOTE.—On prosecution of extradited person for other crimes than the one for which he was surrendered—see notes to *Com. v. Wright*, 19 L.R.A. 206; *Ex parte McKnight*, 14 L.R.A. 128; *Whitten v. Tomlinson*, 40 L. ed. U. S. 406; *Cook v. Hart*, 36 L. ed. U. S. 934; and *Greene v. United States*, 85 C. C. A. 275.

treates with Great Britain of August 9, 1842, and July 12, 1889, or of U. S. Rev. Stat. § 5275, U. S. Comp. Stat. 1901, p. 3596, under which he is entitled to a reasonable time to return to the country whence he was extradited before he can be tried for another offense committed prior to his extradition.

[For other cases, see Extradition, V. in Digest Sup. Ct. 1908.]

[Nos. 241 and 320.]

Argued and submitted April 5, 1909. Decided May 17, 1909.

IN ERROR to the Supreme Court of the State of California to review a judgment dismissing a writ of habeas corpus to inquire into a detention under a conviction for an offense committed by the accused subsequent to his extradition. Affirmed. Also

APPEAL from the Circuit Court of the United States for the Northern District of California to review an order dismissing a similar writ. Affirmed.

See same case below, in No. 241, 151 Cal. 340, 90 Pac. 827, 91 Pac. 397.

Statement by Mr. Justice Peckham:

In No. 241, the plaintiff in error, being imprisoned in the county jail of San Francisco, in the state of California, by the sheriff, applied to the supreme court of that state in banc for a writ of habeas corpus to obtain his discharge from imprisonment. The writ was granted, and, after hearing, was dismissed, and the petitioner remanded to the custody of the sheriff. 151 Cal. 340, 70 Pac. 827, 91 Pac. 397. A writ of error was then sued out from this court and the case brought here.

In No. 320, the appellant applied to the circuit court of the United States for the northern district of California for a similar writ, which was issued, and a hearing had, and the writ dismissed by the court. 149 Fed. 573, and see 151 Fed. 358, 154 Fed. 980. From the order of dismissal an appeal was allowed to this court. The two cases have been heard here as one.

115] *The material facts are these: On July 13, 1905, an indictment was found by the grand jury of San Francisco county, California against the plaintiff in error charging him with the crime of perjury, alleged to have been committed in San Francisco on June 30 of that year. The plaintiff in error not being found within the state, was subsequently discovered was in Victoria, British Columbia, and proper demand, under the treaty between the United States and Great Britain, being made for his surrender upon that indictment for trial, he was, on October 7, 1905, duly surrendered, and removed from Victoria by one Gibson,

the agent designated in the Canadian extradition warrant, to San Francisco, where he was placed in the custody of the then sheriff, who also had a bench warrant issued from the superior court on the perjury indictment against the plaintiff in error.

His trial upon the indictment upon which he had been extradited began in San Francisco in December, 1905, and resulted in the disagreement of the jury on the 23d of December of that year, and the case was then continued, to be thereafter reset for trial. Upon the trial of the indictment for which plaintiff in error was extradited, he was himself sworn, and testified as a witness, and, on the 29th of December, 1905, after he had given such evidence, he was indicted again by the grand jury of San Francisco county, the indictment charging him with perjury committed on December 12, 1905, while testifying on his own behalf on the trial, as already stated. He was arraigned on this indictment in January, 1906, and after he had made all objections to his being arraigned or placed on trial on this second indictment until the conclusion of the first, and until he had then been afforded opportunity to return to Victoria, he was, nevertheless, brought to the bar and the trial proceeded with, resulting in a verdict of guilty on February 27, 1906, upon which judgment was entered that he be imprisoned in the state prison for the term of fourteen years.

From that judgment he appealed to the district court of *appeals of California, [116 where it was affirmed, and thereafter he applied to the state supreme court for a rehearing by that court, which was denied. People v. Collins, 6 Cal. App. 492, 92 Pac. 513.]

Thereupon the plaintiff in error, being restrained of his liberty, as well under the judgment of conviction, as otherwise under the extradition warrant, applied to the state supreme court for a writ of habeas corpus, as above stated, contending that his conviction and sentence were void and in excess of the jurisdiction of the state court, as being in contravention of his extradition rights under the treaty between the United States and Great Britain, and § 5275 of the United States Revised Statutes (U. S. Comp. Stat. 1901, p. 3596), set forth in the margin.†

The writ was issued and a return made, denying many of the allegations of the peti-

†U. S. Rev. Stat. § 5275, U. S. Comp. Stat. 1901, p. 3596.

"Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all

tion, and, after hearing, it was finally dismissed, and the plaintiff in error remanded to the custody of the sheriff. 154 Fed. 980.

Mr. George D. Collins, *in propria persona*, submitted the cause for plaintiff in error.

Mr. William Hoff Cook argued the cause and filed a brief for defendant in error.

Mr. Justice Peckham after making the foregoing statement, delivered the opinion of the court:

The objections which the plaintiff in error urges to his further imprisonment are founded upon what he insists is implied from the provisions of the treaties between the United States and Great Britain (1842-1889 [8 Stat. at L. 572, 26 Stat. at L. 1508]), and he contends that, under those treaties, the state of California had no right or jurisdiction to try him for any offense whatever other than the one for which he was extradited and delivered to the Government of the United States for trial, even though he committed an offense subsequently to the extradition; and he further asserts that after a trial has been had for the offense for which he was extradited, he is entitled to be afforded reasonable time and opportunity after his final release on that charge to return to the country of asylum, and that the trial of the crime for which he was extradited must be had within a reasonable time after his extradition, or he is, for that reason, entitled to his discharge. In other words, the plaintiff in error claims immunity, under the treaties, from arrest or detention for any crime committed **121***by him after he had been brought back upon the extradition warrant until he has been allowed a reasonable time to return to the place from which he was taken. He contends that the duty originally resting upon the demanding country to try him only for the offense for which he was extradited, and to then afford him reasonable opportunity to return, is unaffected by the fact that he committed another crime after his extradition.

The treaty of 1842, August 9 (8 Stat. at L. 576, § 10), is the one in regard to which discussions as to its meaning have arisen. *United States v. Rauscher*, 119 U. S. 407, 30 L. ed. 425, 7 Sup. Ct. Rep. 234. Subse-

quently to the treaty, Great Britain passed the extradition act of 1870 (32 and 33 Viet. chap. 52), and also in 1873 an act to amend the extradition act of 1870 (36 and 37 Viet. chap. 60). Both these acts are cited as the extradition acts of 1870 and 1873. See 1 Moore, *Extradition*, 1891, pp. 741, 755. In subdivision 2 of § 3 of the act of 1870 it is provided: "(2) A fugitive criminal shall not be surrendered to a foreign state unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had an opportunity of returning to her Majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender, other than the extradition crime proved by the facts on which the surrender is grounded."

Article 3 of the treaty or convention of 1889, July 12, between Great Britain and the United States, is to be found in 26 Stat. at L. 1508, 1509, and is also, among others, set out in *Johnson v. Browne*, 205 U. S. 309, 319, 51 L. ed. 816, 819, 27 Sup. Ct. Rep. 539, 542, 10 A. & E. Ann. Cas. 636, 638, as follows: "Article 3. No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense committed prior to his extradition, other than the offense for which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered." The treatment of the criminal for all acts committed or said to have been committed by him prior to extradition is thus fully provided for.

*The contention of the plaintiff in **122** error that the duty to afford opportunity to return after a trial or other termination of the case upon which he was extradited is unaffected by any subsequent crime he may have committed is not even plausible. Nothing in the *Rauscher Case* (supra) is authority for any such contention. The duty to afford opportunity to return after trial, as stated, is limited to matters which happened before extradition; and, in the nature of things, such duty cannot be extended by implication so as to cover a totally different state of facts. Because, in some cases, in construing the treaty, it has been stated that a person extradited can be tried only for the offense for which he was surrendered for trial until he has had an

necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for **53** L. ed.

or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe keeping and protection of the accused."

opportunity of returning, it is assumed by the plaintiff in error that such language prohibits the trial of a person so extradited for any crime committed by him subsequently as well as prior to the surrender, without an opportunity for his return to the other country. The whole question is simply one as to the meaning of the treaty, and we cannot doubt for a single moment what that meaning is.

Much is said by the plaintiff in error as to his right to an asylum, as if it inhered in himself. The right is, however, simply provided for by treaty, and must be found therein, so far alone as the criminal is concerned.

The question then is, Does either the treaty or convention, by express provision or by inference, provide for a return of the criminal to the surrendering country after his surrender, and after a subsequent commission of a crime in the country to which he was surrendered? To ask the question is to answer it. The plaintiff in error contends for the treaty right to leave the country, notwithstanding his commission of the subsequent crime. This we cannot assent to. It is impossible to conceive of representatives of two civilized countries solemnly entering into a treaty of extradition, and therein providing that a criminal surrendered according to demand, for a crime that he has committed, if, subsequently to his surrender, he is guilty of murder or treason [123] or other crime, is, nevertheless, to *have the right guaranteed to him to return unmolested to the country which surrendered him. We can imagine no country, by treaty, as desirous of exacting such a condition of surrender, or any country as willing to accept it. When a treaty or statute contains a provision that the party surrendered shall be tried for no other offense until he has had an opportunity to leave the country, the meaning of such a provision is perfectly plain, and must receive a reasonable and sensible construction. The party proceeded against must not be tried for any other offense existing at the time when he was extradited (whether, at the time of such extradition, it had or had not been discovered), until he shall have had a reasonable time to return to the country from which he was taken, after his trial or other termination of the proceeding. That such privilege should be accorded to one who commits a crime after his surrender to a demanding government lacks all semblance of reason or sense.

Spear, in the second edition of his work on the Law of Extradition, says, at page 84, that the party extradited is not "protected against trial for any offenses which he may commit against the receiving government

subsequently to his extradition, and while in its custody, or after his discharge therefrom." Such a criminal has no asylum, because he never had an asylum within the jurisdiction of the government delivering him, with regard to the crime which he committed since such delivery. *Ibid.*

The contention is also without merit that he has, at any rate, the right to a trial to a conclusion of the case for which he was extradited, before he can be tried for a crime subsequently committed. The matter lies within the jurisdiction of the state whose laws he has violated since his extradition, and we cannot see that it is a matter of any interest to the surrendering government.

There is nothing in the section of the U. S. Rev. Stat., *supra*, which gives the least countenance to the claims of the plaintiff in error.

*The other objections made by him [124 in regard to the person who now has him in custody under the various warrants and processes, copies of which are returned in the record, we regard as unimportant.

As soon as the judgments herein are affirmed the plaintiff in error will, of course, pursuant to the judgment entered upon the verdict of conviction against him, be taken to the state prison in California, provided for in the sentence, and there confined according to law. The orders and judgments in the two cases are affirmed.

UNITED STATES EX REL. EMILY
E. PARISH, Executrix of Joseph W. Parish,
Deceased, Plff. in Err.,

v.

FRANKLIN MACVEAGH, Secretary of the
United States Treasury.

(See S. C. Reporter's ed. 124-138.)

Mandamus — to executive officer — ministerial duty.

A duty enforceable by mandamus, and not one involving the exercise of judgment and discretion, was imposed upon the Secretary of the Treasury by the act of February 17, 1903 (32 Stat. at L. 1612, chap. 559), referring to him the Parish claim, under a contract to furnish ice to the government at a fixed price, to "determine and ascertain the full amount which should have been paid" to the contractor "if the

NOTE. — As to when mandamus is the proper remedy—see notes to *United States v. Lamont*, 39 L. ed. U. S. 160; *M'Cluney v. Silliman*, 4 L. ed. U. S. 263; *Fleming v. Guthrie*, 3 L.R.A. 54; *Burnsville Turnp. Co. v. State*, 3 L.R.A. 265; *State ex rel. Charleston, C. & C. R. Co. v. Whitesides*, 3 L.R.A. 777; and *Ex parte Hurn*, 13 L.R.A. 120.

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said contract had been carried out in full, without change or default made by either of the parties," under the ruling of the measure of damages laid down by the Federal Supreme Court, and in "accordance with the evidence in the case collected by the court of claims," and, after determining the full amount thus due, to deduct all payments, and pay over the balance to the claimant.

[For other cases, see *Mandamus*, 115-131, in *Digest Sup. Ct. 1908.*]

[No. 111.]

Argued March 11, 12, 1909. Decided May 17, 1909.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, dismissing a petition for mandamus to require the Secretary of the Treasury to issue a draft in payment of a claim referred to him by Congress. Judgments of both courts reversed, and the case remanded for judgment in favor of relator.

See same case below, 30 App. D. C. 45.

Statement by Mr. Justice McKenna:

This is a writ of error directed to review the judgment of the court of appeals of the District of Columbia, affirming a judgment of the supreme court, dismissing a petition for mandamus to require Leslie M. Shaw, then Secretary of the Treasury, to issue a draft in favor of the petitioner, plaintiff in error here, for the sum of \$181,358.95, in payment of a claim referred to him by an act of Congress approved February 17, 1903. [32 Stat. at L. 1612, chap. 559.] Shaw, pending the appeal, resigned, and Cortelyou, his successor in office, was made a party in his stead, and subsequently, Franklin MacVeagh becoming Secretary, he was substituted for Cortelyou. We shall call plaintiff in error relator and defendant in error respondent, they having occupied that relation in the trial court.

J. W. Parish, of whose estate relator is executrix, entered into a contract with the United States, as J. W. Parish & Company, to deliver, for the use of the United States medical department at Memphis, St. Louis, and Cairo, the whole amount of ice required to be consumed during the remainder of the year 1863. The quality of the ice was to be "A No. 1," and the contract stated the prices to be paid at the designated points respectively. On March 25, 1863, Joseph B. Brown, by instruction of the Assistant Surgeon General, issued an order directing Parish to deliver the ice as follows: St. Louis, 5,000 tons, Cairo, 5,000 tons, Memphis, 10,000 tons, and Nashville 10,000 tons, "making a 53 L. ed.

total," the order recited, "of 30,000 tons which you have contracted to deliver. The ice to *be delivered at Nashville and [126 Memphis is for the use of the sick of the armies in the field and should be furnished without delay." Parish immediately proceeded to execute the order, and was performing it when, on the 31st of March, 1863, he received a letter from the Assistant Surgeon General, under the instructions of the Surgeon General, suspending the order of March 25th until instructions should be received from the Surgeon General. At the date of this letter 12,768 tons of ice had been delivered and paid for at the contract price. The order of suspension was never recalled. Under the authority of an act of Congress approved May 31, 1872 [17 Stat. at L. 195, chap. 245], Parish brought suit against the United States to enforce his demand under the contract. The court of claims dismissed the suit. 12 Ct. Cl. 609. This court reversed the judgment and remanded the case, with directions to ascertain the damages sustained by Parish. 100 U. S. 500, 25 L. ed. 763. The court of claims rendered judgment for the claimant for the sum of \$10,444.91. 16 Ct. Cl. 642. Parish then petitioned Congress to satisfy as much of his claim as had not been satisfied by the court of claims. Responding to a reference by a committee of the House of Representatives, the War Department, through the Surgeon General, reported that the whole of the undelivered ice, through the order of suspension, amounted to 17,232 tons, and the same had been lost by the contractor. The report also stated that, under the evidence before the court of claims, and additional evidence before the Department, Parish was entitled to be reimbursed, in addition to the judgment of the court of claims, in the sum of \$58,341.85, for the loss he had sustained because of the nondelivery of the 17,232 tons. After this report, on February 20, 1886, Congress passed an act directing payment of said sum of \$58,341.85 to Parish, in addition to said sum of \$10,444.91, being the balance of money laid out and expended by him in the purchase of 17,232 tons of ice for the use and at the request of the government of the United States, which were not afterwards called for, but were wholly lost to the said Parish. 24 Stat. at L. 653, chap. 11. Parish again *applied to [127 Congress for relief, and, on February 17, 1903, the act in controversy was passed. It will be given in the opinion.

Messrs. Holmes Conrad and Leigh Robinson argued the cause and filed a brief for plaintiff in error:

In performing the duty laid upon him by the act of February 17, 1903, the Secre-

tary of the Treasury was not acting in the exercise of judicial or discretionary, but only of ministerial, powers.

Marbury v. Madison, 1 Cranch, 165, 2 L. ed. 70; *Kendall v. United States*, 12 Pet. 524, 9 L. ed. 1181; *United States ex rel. Dunlap v. Black*, 128 U. S. 48, 32 L. ed. 357, 9 Sup. Ct. Rep. 12; *Cooley, Taxn. p. 515*; *People ex rel. Otsego County Bank v. Otsego County*, 51 N. Y. 401; *Butterworth v. United States*, 112 U. S. 57, 28 L. ed. 658, 5 Sup. Ct. Rep. 25.

A ministerial duty is one to be performed or exercised in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and irrespective of the judgment of him on whom the duty is imposed, as to the propriety of the performance.

Mississippi v. Johnson, 4 Wall. 498, 18 L. ed. 440; *Ex parte Candee*, 48 Ala. 399; *Com. v. Fairfax County Justices*, 2 Va. Cas. 9; *Betts v. Dimon*, 3 Conn. 107; *Flournoy v. Jeffersonville*, 17 Ind. 174, 79 Am. Dec. 468; *Rock Island County v. United States*, 4 Wall. 435, 18 L. ed. 419; *Gordon v. United States*, 7 Wall. 194, 19 L. ed. 36; *Chorpenning v. United States*, 3 Ct. Cl. 144; *Roberts v. United States*, 176 U. S. 223, 230, 231, 44 L. ed. 443, 446, 447, 20 Sup. Ct. Rep. 376.

The findings of the court of claims are like a special verdict, where a jury find the facts of the case, and refer the decision of the cause upon those facts to the court. So far as they go, the findings constitute the evidence collected in the case in the court of claims.

Mason Lumber Co. v. Buchtel, 101 U. S. 638, 25 L. ed. 1074; *Suydam v. Williamson*, 20 How. 432, 15 L. ed. 979; *Stone v. United States*, 164 U. S. 382, 41 L. ed. 478, 17 Sup. Ct. Rep. 71; *United States v. Smith*, 94 U. S. 218, 24 L. ed. 115; *United States v. New York Indians*, 173 U. S. 470, 43 L. ed. 771, 19 Sup. Ct. Rep. 464; *Stanley v. Albany County*, 121 U. S. 547, 30 L. ed. 1002, 7 Sup. Ct. Rep. 1234; *Runkle v. Burnham*, 153 U. S. 225, 38 L. ed. 697, 14 Sup. Ct. Rep. 837; *Consolidated Canal Co. v. Mesa Canal Co.* 177 U. S. 302, 44 L. ed. 779, 20 Sup. Ct. Rep. 628.

A rule for the measure of damages which directs that, in case of breach of contract, the injured party shall receive from the defaulting party just what would have been received had there been no default, is a perfectly plain rule, which has no tendency to mislead anyone, and therefore did not mislead the auditor who stated the account.

Alder v. Keighley, 15 Mees. & W. 117; *Hadley v. Baxendale*, 9 Exch. 341; *Benjamin v. Hillard*, 23 How. 167, 16 L. ed. 522.

The reports of committees, made to the

legislature, have been held to be proper sources of information in ascertaining the intent or meaning of an act.

Kendall v. United States, 12 Pet. 612, 9 L. ed. 1216; *Ex parte Farley*, 40 Fed. 69; *Buttfield v. Stranahan*, 192 U. S. 495, 48 L. ed. 535, 24 Sup. Ct. Rep. 349; *The Delaware*, 161 U. S. 472, 40 L. ed. 776, 16 Sup. Ct. Rep. 516; 4 Ops. Atty. Gen. 479; *Binns v. United States*, 194 U. S. 495, 48 L. ed. 1090, 24 Sup. Ct. Rep. 816; *Johnson v. Southern P. Co.* 196 U. S. 19, 49 L. ed. 370, 25 Sup. Ct. Rep. 158.

Assistant Attorney General **Russell** argued the cause and filed a brief for defendant in error:

If rights claimed under the government be set up against it, they must be so clearly defined that there can be no question of the purpose of Congress to confer them.

Leavenworth, L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. ed. 634.

Mr. Justice McKenna delivered the opinion of the court:

It will be observed that the controversy in this case started in a contract of no uncertainty of meaning, and an ordinary action for damages for its breach, but has accumulated incidents and complexity, and has finally terminated in a dispute over an ambiguous statute.

*The case was submitted in the su-[131]preme court of the District upon what may be called a demurrer to the return, which was regarded, and is now regarded, as presenting the question of the power of the Secretary of the Treasury under the act of Congress. This is the ultimate question. If that officer had the power, which he asserts in his return, to review the evidence taken in the court of claims, and to "make such findings" as might "seem right and proper to him," the judgment of the court of appeals must be affirmed. As we may not control the Secretary's discretion (*United States ex rel. Riverside Oil Co. v. Hitchcock*, 190 U. S. 316, 47 L. ed. 1074, 23 Sup. Ct. Rep. 698), we can have no concern with the reasoning advanced by him to support its exercise.

As we have seen, in the first suit brought by Parish, the court of claims decided against him. It based its decision on the ground that the Assistant Surgeon General had no "right to interpret the contract and decide that it called for 30,000 tons of ice, and direct how it should be delivered." The court, however, found the facts. It found as follows: "9. The said Parish was *prepared and willing* [italics ours] to deliver the said 30,000 tons of ice, in conformity with the conditions and obligations of his

said contract and the terms of said letter of March 25, 1863, of which the defendant had notice, but they would not, nor did, receive more than the 12,768 tons aforesaid." This finding is quoted in the reports of the congressional committees as one of the elements inducing their recommendation of the passage of the bill.

This court disagreed with the court of claims upon the question of the authority of the Assistant Surgeon General, and reversed that court, but decided that the measure of Parish's damages was "the cost of ice purchased at Lake Pepin and lost, the expense bestowed upon its care, and the time and expense of making that purchase, and any sum actually lost in regard to the other 17,232 tons of ice purchased to enable them to meet the requirements." This ruling was based on the assumption that Parish "neither delivered nor offered to deliver the remainder."

132] *The court of claims, upon the return of the case to it, found obstruction in its rules to taking additional evidence, but, on that before it, made an award in favor of Parish in the sum of \$10,444.91.

He was dissatisfied, and justly dissatisfied. He appealed to Congress, the petition alleges, and respondent does not deny the allegation, for "the means of satisfying so much of his claim as the court of last resort had adjudicated to be his unquestionable right." The petition further alleges (again with no denial by respondent) that his "claim was referred by the House committee to the War Department for report. The Surgeon General found that the whole amount of undelivered ice, viz., 17,232 tons, was lost to said Parish, and ascertained the cost thereof." Congress passed an act February 20, 1886, appropriating the sum of \$58,341.85 to pay that loss. 24 Stat. at L. 653, 654, chap. 11. By the payment of the money appropriated, Parish received the contract price on the ice actually delivered, namely, 12,768 tons, and, in addition, what he had actually spent and actually lost on account of the balance, namely, 17,232 tons of ice. This is not denied, nor that that which was paid to him was only that which this court had decided should have been paid to him January 1, 1864. "That is to say," to quote from the petition, "the said Parish had not only lost the interest on this large sum of money for more than two decades, but had been forced to meet the expense of litigating the claim, and had been subjected to the labors and anxieties and trials of prosecuting the same."

The next step was the passage of the act in controversy; and we come to its consideration and the determination of how its

ambiguity, if indeed it have any, is to be resolved. It had, we may say at the start of our discussion, its impulse in the belief that injury had been done to Parish, and it was intended to provide a means of redress. Keeping in view this purpose, we may get light by which to interpret the act.

As we have already said, the ruling of this court in *Parish v. United States*, 100 U. S. 500, 25 L. ed. 763, was based on the assumption that *Parish had "neither delivered nor offered to deliver" the 17,232 tons of ice, the nonacceptance of which has given rise to this controversy. Commenting on that declaration, the committees of Congress called it a "mistaken allegation" and a "false assumption," and said that the decision of the court turned upon it. The committees further said that the court "entirely overlooked" finding 9 of the court of claims, and that the "result of this oversight was to cause the court to lay down a rule of damages inconsistent with the facts and unjust to the parties." The committees then reviewed certain cases, among others, *United States v. Behan*, 110 U. S. 338, 28 L. ed. 168, 4 Sup. Ct. Rep. 81, and declared that the latter case established the *prima facie* measure of damages for a breach of a contract sustained by the injured party to consist of "two distinct items or grounds of damage; namely, first, what he has already expended toward performance, less the value of material on hand; secondly, the profits that he would realize by performing the whole contract." The report recognized that profits cannot always be recovered, that they may be remote and speculative, incapable of that clear and direct proof which the law requires. But it is manifest that the committees did not think the case called for that limitation, for it was said that the reasons for the application of the "equitable rules in the Behan Case were not nearly so clear and strong as in the Parish Case," and declared as follows:

"In the latter case the contract expressly provided what should be paid for the ice delivered at the various places named. The profits, therefore, were readily and easily ascertainable. In fact, that was the theory of the plaintiff in making his case before the court of claims, and the record of that court shows that the proofs on that point were explicit, bringing the case properly within the principles laid down in *Behan v. United States*.

"In a word, it is perfectly clear that the supreme court quite overlooked one of the most important findings of fact in the Parish Case. At all events, there is no doubt that the law *is properly stated in the [134 *Behan Case*. And all the present bill con-

templates is a final and proper settlement on the rule of law which is older than our republic, and is everywhere recognized as the only equitable one that can be applied in the premises."

It is manifest, therefore, that the act was passed under the conviction that Parish had rights which had not been satisfied; and we are brought to the consideration of the act as the means of satisfying them.

The act provides "that the Secretary of the Treasury is hereby authorized and directed to make full and complete examination into the claim of Joseph W. Parish against the United States for balances alleged to be due him by virtue of a contract made by J. W. Parish & Company with Henry Johnson, medical storekeeper, acting on behalf of the United States. . . . That the Secretary shall determine and ascertain the *full amount which should have been paid said J. W. Parish & Company, if the said contract had been carried out in full, without change or default made by either of the parties thereto* [italics ours] under the rule of the measure of damages laid down by the Supreme Court of the United States in the case of the United States v. Behan, supra, and *in accordance with the evidence in the case, collected by the United States court of claims* [italics ours], and after determining the full amount thus due, . . . under the said contract and rule of law aforesaid, to deduct therefrom all payments . . . stating what balance, if any, is due under the rule and evidence prescribed herein, and pay the said balance to said Joseph W. Parish, the present owner of said claim; and sufficient money to pay such balance is hereby appropriated out of any money in the Treasury which has not been otherwise appropriated." 32 Stat. at L. 1612, chap. 559.

The issue between the parties in their ultimate statement is as follows: Relator contends, that the Secretary was directed to ascertain what amount Parish should receive under the contract, "which he was ready, able, and willing to carry out." Respondent contends that the Secretary was [135] to pass on the *evidence taken in the court of claims, and make such finding as might seem right and proper to him. In other words, to exercise judgment and discretion.

To sustain their respective contentions the parties do not urge the same words as the tests of the meaning of the statute. The relator, to determine the Secretary's duty, puts emphasis on the provision that he was to ascertain the "full amount which should have been paid . . . if the contract had been carried out in full, without

change or default made by either of the parties thereto." Respondent finds difficulty with that provision, and says that "at first glance" it "may look positive and arbitrary." But it is urged that the clause "does not say which *would* have been paid, but which 'should' have been paid; and when we turn to the 'contract' an ambiguity immediately arises, because the contract, 'carried out in full,' did not call for any particular quantity of ice." And to remove the effect of the certainty in the quantity of ice required, made by the order for 30,000 tons, it is said that the "special act nowhere speaks of this order, but only of the contract." The final comment is that "no other clause of the act seems to be worth quoting as an unambiguous order to make an arbitrary calculation and allowance," while the act "in places unequivocally requires something different from an arbitrary calculation." To support this it is urged that the act directs a full and complete examination of Parish's claim for a balance alleged to be due him by virtue of the contract. To do this, it is argued, "would require as much judgment and discretion as the Secretary could muster." A striking contrast is exhibited to this by declaring that the duty required of the Secretary under relator's contention was "to do a sum in arithmetic which any school-boy could do in five minutes; that is, multiply the prices per ton with the 30,000 tons, and deduct the amount already paid, as per receipts on file in the Treasury."

It is elementary that all the words of the statute must be considered in determining its meaning, and we may not *there-[136] fore, disregard the provision of the statute which directs the Secretary to determine and ascertain the full amount which should have been paid if the said *contract had been carried out in full, without change or default made by either of the parties*. And it seems to us that these words express the subject of inquiry, the exact command to the Secretary to which the other provisions of the statute are subordinate. He was not to determine if Parish was in default. That inquiry was precluded. It had been adjudged otherwise by the court of claims and by this court. It had been declared otherwise by the legislature. The act of Congress of February 20, 1886, passed to complete the judgments of the courts, appropriated the sum of \$58,341,85, "being the balance of money laid out and expended by him [Parish] in the purchase of 17,232 tons of ice, for the use and at the request of the government of the United States, which were not afterwards called for, . . . but *were wholly lost to said Parish*" (the italics ours).

The following things, therefore, had been determined: The existence of a contract for the delivery of ice, quantity not mentioned, at different points and at different prices. The quantity was afterwards fixed at 30,000 tons, and the contract made specific in every particular,—quantity, quality, places of delivery, and prices. Performance was undertaken and 12,768 tons delivered. Then came the order of suspension,—not revocation, it must be kept in mind,—and Parish had to keep prepared. He was not permitted to fulfil his contract, he dared not be unprepared to do so upon any notice. This court, in *Parish v. United States*, supra, has portrayed the situation. The demand upon him was “an unequivocal demand,” the court said, for 30,000 tons, and “to enable him to fulfil this demand . . . required promptitude and diligence in securing the ice.” The court states why. A moment’s reflection on the situation shows us why. The ice was needed for the use of the armies in the field. It might be demanded at any time. The necessity for it might be imperative. If Parish could not have supplied it, this court said, the officers of the *government would have procured at any price in the market,—a price which would have been enormously enhanced by that very demand,—and Parish would have been liable for the difference between such price and the contract price. He was, therefore, this court said, “under an imperative necessity to prepare to fulfil this requirement.” He realized his situation, and that he prepared against its contingencies was the finding of the court of claims, it was the declaration of Congress in the act of February 20, 1886, and it was the repeated declaration of the committees of Congress in their recommendation of the passage of the act in controversy. We see now the reason for regarding the opening clause of the act as its principal and dominating clause. We see now why his readiness to perform, the possession of the means of performance, and the offer of performance, were to be assumed by the Secretary, and the loss of profits only was to be determined. And the profits, the committees said, “were readily and easily ascertainable.” Indeed, because they were, their calculation was referred to an executive officer. If to ascertain them involved an intricate judicial problem, the reference would have been to the judicial tribunals, for we cannot agree with the intimation of the government, that Congress would imagine that the court of claims and this court were unable “to master the difficulties” of that problem. The better supposition is that Congress regarded the controversy as over, and that the time for

reparation had arrived, and, that it might be quick and complete, referred the matter to that officer who could best state the balance due and pay it.

It does not militate with this conclusion that the duty enjoined was simple. The committees of Congress believed it to be so, believed that the extent of relief to which Parish was entitled and the items of it had been established. The act in controversy was the expression of that belief. Its purpose was relief shown to be due from a problem already solved—not to start another problem. The duty enjoined required a reference in a sense to evidence, it may be, but it was to evidence *whose probative[138 force had been estimated and declared. It conduced to but one conclusion. That conclusion was stated by the Auditor of the War Department, following the direction of the statute, to be a balance in Parish’s favor of \$181,358.95. This amount represented the amount that Parish should have received over and above what he was paid by direct payment, judgment, or appropriation by Congress, and the balance due him under the rule in the *Behan Case*.

The judgment of the Court of Appeals is reversed, and that court is directed to reverse the judgment of the Supreme Court, and direct the latter court to sustain the demurrer of relator to the return of respondent, and enter judgment as prayed for in the petition of relator.

Mr. Justice Moody took no part in the decision.

DISTRICT OF COLUMBIA, Plff. in Err.,
v.
ALICE BROOKE.

(See S. C. Reporter’s ed. 138-152.)

Certiorari — return — waiver of defects.

1. Technical defects in the return of municipal officers in a proceeding by certiorari to quash an alleged illegal drainage tax assessment are waived by failure to object

NOTE. — As to what constitutes due process of law—see notes to *Kuntz v. Sumpston*, 2 L.R.A. 655; *Re Gannon*, 5 L.R.A. 359; *Ulman v. Baltimore*, 11 L.R.A. 224; and *Gilman v. Tucker*, 13 L.R.A. 304. And see notes to *People v. O’Brien*, 2 L.R.A. 255; *Pearson v. Yewdall*, 24 L. ed. U. S. 436; and *Wilson v. North Carolina*, 42 L. ed. U. S. 865.

As to the validity of class legislation—see notes to *State v. Goodwill*, 6 L.R.A. 621, and *State v. Loomis*, 21 L.R.A. 789.

As to constitutional equality of privileges, immunities, and protection—see note to *Louisville Safety Vault & T. Co. v. Louisville & N. R. Co.* 14 L.R.A. 579.

when the return to the rule to show cause was made the return to the writ.

[For other cases, see *Certiorari*, I. e, in *Digest Sup. Ct. 1908.*]

Drainage tax — validity — sufficiency of existing drainage as defense.

2. An abutting owner cannot urge against the validity of a drainage tax assessment for connecting her property with a sewer that no showing was made that any nuisance existed on her property, or that the means of drainage already there were unsanitary or insufficient, or that any necessity existed for making the connection.

[For other cases, see *Public Improvements*, II. f, in *Digest Sup. Ct. 1908.*]

Statutes who may question validity.

3. An abutting owner of property on which dwellings have been erected cannot challenge the validity of a provision in the act of May 9, 1896 (29 Stat. at L. 125, p. 206), creating a drainage system in the District of Columbia, which affects only owners of unimproved property.

[For other cases, see *Statutes*, 53-60, in *Digest Sup. Ct. 1908.*]

Constitutional law — due process of law — drainage tax.

4. Due process of law is not denied an abutting owner of property on which dwellings have been erected by the attempt, in the act of May 19, 1896, creating a drainage system in the District of Columbia, under which she is assessed for the expense of connecting her property with a sewer, to give a controlling evidential effect to the existence of such improvements as dwellings, as indicating the necessity for making such connection.

[For other cases, see *Constitutional Law*, 559-581, in *Digest Sup. Ct. 1908.*]

Constitutional law — discrimination between residents and nonresidents.

5. The distinction between resident and nonresident owners of abutting property in the act of May 19, 1896, creating a drainage system for the District of Columbia, in that the coercion of the law as to making connections with a sewer is by criminal punishment in the case of residents, whereas, against nonresident owners, the District does the work in case of their neglect, and assesses the cost against the property as a tax, does not invalidate the statute for discrimination, even assuming that Congress is forbidden to enact discriminating legislation.

[For other cases, see *Constitutional Law*, 213-236, in *Digest Sup. Ct. 1908.*]

[No. 117.]

Argued April 7, 1909. Decided May 17, 1909.

IN ERROR to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of the District, quashing, on *certiorari*, an assessment for a drainage tax. Reversed with directions to reverse the judg-

ment of the Supreme Court of the District, and to dismiss the petition.

See same case below, 29 App. D. C. 563.

Statement by Mr. Justice McKenna:

This writ was issued to review a judgment of the court of appeals, affirming a judgment of the supreme court, quashing *and vacating certain proceedings tak-[140] en for the assessment of a drainage tax upon the property of defendant in error, under the authority of an act of Congress of May 19, 1896,—“As Act to Provide for the Drainage of Lots in the District of Columbia.” 29 Stat. at L. 125, chap. 206.

The act provides (1) that each original lot or subdivisional lot in the District of Columbia, where there is a public sewer, shall be connected with such sewer, and where there is a water main, connected with such water main, under certain conditions, which are enumerated. (2) It is made the duty of the commissioners of the District to notify the owner or owners of every lot required by the act to be connected with a public sewer or water main, as the case may be, to so connect such lot, the work to be done in accordance with the regulations governing plumbing and house drainage in the District. (3) If the owner or owners neglect for thirty days after receipt of notice to make such connections, he shall or they shall be deemed guilty of a misdemeanor, and be punished by a fine of not less than \$1 nor more than \$5 for each day of neglect. (4) If the owner be a nonresident of the District, or cannot be found therein, the commissioners shall give notice by publication twice a week, for two weeks, in some newspaper published in the city of Washington, to such owners, directing the connection of such lot with such sewer or such water main, as the case may be: “Provided, however, that, if the residence or place of abode of the said nonresident lot owner be known or can be ascertained on reasonable inquiry, then, and in that case, a copy of the aforesaid notice shall be mailed to said nonresident, addressed to him in his proper name, at his said place of residence or abode with legal postage prepaid; and in case such owner or owners shall fail or neglect to comply with the notice aforesaid within thirty days, it shall be the duty of said commissioners to cause such connection to be made, the expense to be paid out of the emergency fund; such expense, with necessary expense of advertisement, shall be assessed as a tax against such lot, which tax shall be carried on the regular tax *roll of the [141] District of Columbia, and shall be collected in the manner provided for the collection of other taxes.”

The petition of defendant in error for certiorari alleges that she is a resident of Maryland, and was owner of the property against which the assessment was made at the time the connections were made by the commissioners. She alleges that the assessment or tax is illegal in its entirety and beyond the power of the respondent (the District) to collect, in this, that the respondent had no jurisdiction of her property, "the said act of Congress being," she further alleges, "unconstitutional and void, because it discriminates between owners of real estate in said District; the said act not being uniform and capable of universal enforcement." She also alleges that the assessment or tax is void in its entirety because the provisions of the 4th section of the act were not complied with in certain particulars which were set out. We do not give them, because two only are relied on; to wit, that the record does not show that notice was mailed to her, as provided by § 4, and that the record fails to disclose that any nuisance existed on her property, or that the means of drainage already there were unsanitary or unsufficient.

A rule to show cause was issued, to which the District made return. The return was verified by the commissioners. It denied some of the allegations of the petition, averred the constitutionality of the act, and that due and legal proceedings were taken thereunder in making the connections and assessing the tax, including notice to petitioner. To the return were attached, to use the language of the court of appeals, "copies of such pertinent official papers and records as were in the custody of the District."

The writ was ordered to be granted. The return to the rule was made the return to the writ. Subsequently, the court, reciting that the cause having been argued by counsel, and submitted to the court on the writ of certiorari, and the return thereto filed herein by respondent, adjudged the tax to be "illegal and void," and that it should 142] be "quashed and held *for naught." The respondent was "forthwith directed to cancel the same on its tax records."

The judgment was affirmed by the court of appeals. 29 App. D. C. 563.

Mr. Francis H. Stephens argued the cause, and, with Mr. Edward H. Thomas, filed a brief for plaintiff in error:

The legislation in question in the present case is that of the Congress of the United States, and must be considered in the light of the conclusion, so often announced by this court, that the United States possess complete jurisdiction, both of a political 53 L. ed.

and municipal nature, over the District of Columbia.

Parsons v. District of Columbia, 170 U. S. 53, 42 L. ed. 946, 18 Sup. Ct. Rep. 521; Kendall v. United States, 12 Pet. 619, 9 L. ed. 1218; Mattingly v. District of Columbia, 97 U. S. 687, 24 L. ed. 1098.

In the exercise of this power, Congress, like any state legislature, unrestricted by constitutional provisions, may, at its discretion, wholly exempt certain classes of property from taxation, or may tax them at a lower rate than other property.

Gibbons v. District of Columbia, 116 U. S. 407, 29 L. ed. 681, 6 Sup. Ct. Rep. 427.

The fact that the mode prescribed for the nonresident may be more inconvenient than that prescribed for the resident is not because the statute intends to make a discrimination, but because of the situation of the parties, and because, in the judgment of the lawmaking power, no other way could be adopted that would be as effective for the protection of the public.

McFadden v. Blocker, 3 Ind. Terr. 224, 58 L.R.A. 898, 54 S. W. 873.

Even where personal liberty was involved, a similar statute was held constitutional.

Frost v. Brisbin, 19 Wend. 11, 32 Am. Dec. 423; Howard v. Citizens' Bank & T. Co. 12 App. D. C. 235; Robinson v. Morrison, 2 App. D. C. 128.

The discrimination in the act is neither unreasonable nor unjust.

Central Loan & T. Co. v. Campbell Commission Co. 173 U. S. 84, 43 L. ed. 623, 19 Sup. Ct. Rep. 346; Taylor v. Crawford, 72 Ohio St. 560, 69 L.R.A. 805, 74 N. E. 1065; Allen v. Wyckoff, 48 N. J. L. 90, 57 Am. Rep. 548, 2 Atl. 659; Campbell v. Morris, 3 Harr. & McH. 535; Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. ed. 806; Field v. Barber Asphalt Paving Co. 194 U. S. 618, 621, 622, 48 L. ed. 1142, 1153, 1154, 24 Sup. Ct. Rep. 784; Savannah, T. & I. of H. R. Co. v. Savannah, 198 U. S. 392, 49 L. ed. 1097, 25 Sup. Ct. Rep. 690; Hawley v. Hurd, 72 Vt. 122, 52 L.R.A. 195, 82 Am. St. Rep. 922, 47 Atl. 401; McFadden v. Blocker, supra; Tatem v. Wright, 23 N. J. L. 429; Phoenix Ins. Co. v. Com. 5 Bush, 79, 96 Am. Dec. 331; Insurance Co. v. New Orleans, 1 Woods, 85, Fed. Cas. No. 7,052; State v. Travelers' Ins. Co. 73 Conn. 255, 57 L.R.A. 481, 47 Atl. 299; Cribbs v. Benedict, 64 Ark. 555, 44 S. W. 707; 8 Cyc. Law & Proc. pp. 1038, 1047, 1048, 1073; 1 Cooley, Taxn. 3d ed. p. 80; Com. v. Holliday, 98 Ky. 616, 33 S. W. 943; Allen v. Wyckoff, supra.

There is no unlawful discrimination in the remedy which may be used to enforce the doing of the work prescribed by the act. All owners may be required to do such work.

Carleton v. Rugg, 149 Mass. 550, 5 L.R.A. 193, 14 Am. St. Rep. 446, 22 N. E. 55; *Pine City v. Munch*, 42 Minn. 342, 6 L.R.A. 763, 44 N. W. 197; *McBride v. Ross*, 13 App. D. C. 576; *Guerin v. Macfarland*, 27 App. D. C. 478; 1 Dill Mun. Corp. 3d ed. § 379, p. 384; *Watertown v. Cowen*, 4 Paige, 510, 27 Am. Dec. 80.

Even in the exercise of the taxing power, which the courts construe more strictly, a wide latitude is observed and upheld by the courts.

Pacific Exp. Co. v. Seibert, 142 U. S. 339, 35 L. ed. 1035, 1039, 3 Inters. Com. Rep. 810, 12 Sup. Ct. Rep. 250; *Charlotte, C. & A. R. Co. v. Gibbes*, 142 U. S. 386, 35 L. ed. 1051, 12 Sup. Ct. Rep. 255; *Columbus Southern R. Co. v. Wright*, 151 U. S. 470, 478, 38 L. ed. 238, 242, 14 Sup. Ct. Rep. 396; *Merchants' & M. Nat. Bank v. Pennsylvania*, 167 U. S. 461, 42 L. ed. 236, 17 Sup. Ct. Rep. 829; *Magoun v. Illinois Trust & Sav. Bank*, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *L'Hote v. New Orleans*, 177 U. S. 587, 44 L. ed. 899, 20 Sup. Ct. Rep. 788; *American Sugar Ref. Co. v. Louisiana*, 179 U. S. 89, 45 L. ed. 102, 21 Sup. Ct. Rep. 43; *Petit v. Minnesota*, 177 U. S. 164, 44 L. ed. 716, 20 Sup. Ct. Rep. 666; *Austin v. Tennessee*, 179 U. S. 343, 45 L. ed. 224, 21 Sup. Ct. Rep. 132; *St. John v. New York*, 201 U. S. 633, 50 L. ed. 896, 26 Sup. Ct. Rep. 554, 5 A. & E. Ann. Cas. 909; *Taggart v. Claypool*, 145 Ind. 590, 32 L.R.A. 586, 44 N. E. 18; *McFadden v. Blocker*, supra.

The owner cannot remain silent while work is being done of which he has notice, and then, after it is completed and his property benefited, be heard to complain that the proceedings are illegal.

Cass County v. Plotner, 149 Ind. 119, 48 N. E. 635; 2 Cooley, Taxn. 3d ed. p. 1515; *Kellogg v. Ely*, 15 Ohio St. 64; *Vickery v. Hendricks County*, 134 Ind. 554, 32 N. E. 880; *McCoy v. Able*, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; *Ross v. Stackhouse*, 114 Ind. 200, 16 N. E. 501; *State, Hampson, Prosecutor, v. Paterson*, 36 N. J. L. 162; *State, Youngster, Prosecutor, v. Paterson*, 40 N. J. L. 246.

Mr. John Ridout argued the cause, and, with Mr. George C. Gertman, filed a brief for defendant in error:

The record is fatally defective.

District of Columbia v. Burgdorf, 6 App. D. C. 470; *Keyser v. District of Columbia*, 3 App. D. C. 31; *Allman v. District of Columbia*, 3 App. D. C. 8; *Johnson v. District of Columbia*, 6 Mackey, 21; *Lyon v. Alley*, 130 U. S. 177, 32 L. ed. 899, 9 Sup. Ct. Rep. 480; 25 Am. & Eng. Enc. Law, 2d ed. p. 1204; 4 Enc. Pl. & Pr. pp. 11, 12, 277, 282,

287, 290; 6 Cyc. Law & Proc. pp. 804, 822, 9 Century Dig. § 145, p. 1891.

The act is unconstitutional and void.

McGuire v. District of Columbia, 24 App. D. C. 22, 65 L.R.A. 430; *Heylman v. District of Columbia*, 27 App. D. C. 563.

Mr. Justice McKenna delivered the opinion of the court:

Defendant in error, to sustain her contention that the record does not show notice to her of the proposed work, says that it shows only that a "parcel" was mailed to her, not a letter, and that the contents of the parcel are not disclosed. To the extreme technicality of this contention the court of appeals answered that no objection was made to the return, and that it averred that the officers and agents of the District made diligent search for defendant in error in the District, and that she could not be found there, and that plaintiff in error believed that she was a citizen and resident of the state of Maryland. The court also pointed out that the return alleged that notice was given to her by publication, as required by the act of Congress, and by registered letter, postage prepaid, which was received by her. A registry return receipt, with her signature attached thereto, was made part of the return. Commenting on this, the court said that, if there was a defect in the return, it was purely technical, and could have been corrected. "Upon the granting of the writ," the court observed, "had objection been made to the adoption by the commissioners of their preliminary return, the court undoubtedly would have permitted an amendment to the record for the purpose of supplying the defects now complained of by petitioner [defendant in error here]. Having, then, made no objection to the form of the return, it is too late to do so now." If we could concede that the record justifies the distinction made by defendant in error between a parcel and a letter, we should adopt without hesitation the reply made by the court *of appeals to the contention based on that distinction, or upon any defect in the return which could have been removed if objection had been seasonably made.

The second contention of defendant in error is that the record fails to disclose that any nuisance existed on her property, or that the means of drainage already there was unsanitary or insufficient, or that any necessity existed for making the connection. This contention seems to be made in this court for the first time. It certainly received no notice from the court of appeals, and the fact that it assumes that there was means of drainage on defendant in error's

lot is not alleged in her petition. But, suppose the fact had been alleged; a property owner cannot urge against the drainage system of the District that he had adopted a system of his own, and, challenge a comparison with that of the District, and obey or disobey the law according to the result of the comparison. The contention virtually denies any power in Congress to create a system of drainage to which a lot owner must conform.

Finally, defendant in error attacks the validity of the law, and bases attack, to use her words, "upon certain salient vices in the act which are apparent on its face, of which the principal are—

"(a) The attempt to give controlling evidential effect to the mere existence of an improvement in case of improved property, and to the *ex parte* certificate of the health officer in the case of unimproved property, thus violating the 'due process' clause of the Constitution.

"(b) Because the act lacks the requisite uniformity, inasmuch as it undertakes to provide one law for property of residents and another for property of nonresident owners in said District.

"(c) Because the act is not capable of universal enforcement, and creates unequal burdens.

"(d) Because the act is incapable of uniform enforcement as against all property in the District of Columbia."

The first objection was not expressed in 149]the petition nor *made in the lower courts, and we might therefore decline to entertain it. At best, defendant in error can only be heard against "the evidential effect of the mere existence of an improvement," because her property does not come within the category of unimproved property. Her improvements are dwelling houses, and their mere existence indicated the necessity for drainage. That they may sometimes be vacant is unimportant. What rights owners of lots differently improved or owners of unimproved property may have is no concern of defendant in error. Her contention, therefore, that the act deprives her of due process of law, is unsound.

The other objections expressed the same fundamental idea; to wit, that the act discriminates between resident and nonresident owners of property, and, because it does, it is void. The court of appeals yielded to this contention, following the authority of *McGuire v. District of Columbia*, 24 App. D. C. 22, 65 L.R.A. 430.

The defendant in error asserts this discrimination and argues its consequences at some length, but does not refer to any provision of the Constitution of the United States which prohibits Congress from en-

acting laws which discriminate in their operation between persons or things. If there is no express prohibition of such power, may prohibition be implied from our form of government? Upon that proposition we need not express an opinion. If prohibition exists, it must rest on all the powers conferred by the Constitution. This court, however, has just held, in the case of *United States ex rel. Atty. Gen. v. Delaware & H. Co.* 213 U. S. 366, ante, 836, 29 Sup. Ct. Rep. 527, that Congress may, in the exercise of the powers to regulate commerce among the states, discriminate between commodities and between carriers engaged in such commerce. And it was said that the assertion that "injustice and favoritism" might "be operated thereby," could "have no weight in passing upon the question of power." In the case at bar we are dealing with an exercise of the police power,—one of the most essential of powers, at times the most insistent, and always one of the least limitable of the powers of government.

*However, the question of the power[150 of Congress, broadly considered, to discriminate in its legislation, is not necessary to decide, for, whether such power is expressly or impliedly prohibited, the prohibition cannot be stricter or more extensive than the 14th Amendment is upon the states. That amendment is unqualified in its declaration that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." Passing on that amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the states the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world, and assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust, or oppressive laws. *Billings v. Illinois*, 188 U. S. 97, 47 L. ed. 400, 23 Sup. Ct. Rep. 272; *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. ed. 236, 28 Sup. Ct. Rep. 114. In the light of these principles the contentions of defendant in error must be judged. The act in controversy makes a distinction in its provision between resident and nonresident lot owners, but this is a proper basis for classification. Regarded abstractly as human beings, regarded abstractly as lot owners, no legal difference may be observed between residents and nonresidents; but,

regarded in their relation to their respective lots under regulating laws, the limitations upon jurisdiction, and the power to reach one and not the other, important differences immediately appear. We said in *St. John v. New York*, 201 U. S. at page 637, 50 L. ed. 898, 26 Sup. Ct. Rep. 554, not only the purpose of a law must be considered, but the means of its administration,—the ways it may be defeated. Legislation, to be practical and efficient, must regard this special purpose as well as the ultimate purpose. This was in effect repeated in *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784, where a privilege to protest [151]*against a street improvement, given by the statute assailed to resident property owners and denied to nonresident property owners, was sustained, and the statute held not to violate the equality clause of the 14th Amendment. See *Travellers' Ins. Co. v. Connecticut*, 185 U. S. 364, 46 L. ed. 949, 22 Sup. Ct. Rep. 673.

It is not contended that the act of Congress is not impartial within the classes. The act treats all resident lot owners alike and all nonresidents alike. It is contended that there is a difference in the procedure prescribed in case of default, and nonresident lot owners are thereby discriminated against, though they stand in the same relation to the purpose of the law as resident lot owners. In other words, nonresident lot owners are not treated the same as resident owners in like situation, because against resident owners the coercion of the law is by criminal punishment, while against nonresident owners the remedy is by civil proceedings,—the District does the work that the nonresident owners neglect, and charges the expense thereof on their property. This is a distinction, a discrimination, it may be called, but it has even more justification than that sustained in *Field v. Barber Asphalt Paving Co.* *supra*. The statute under consideration in the case at bar enjoins a duty on both resident and nonresident lot owners,—a duty necessary to be followed to preserve the health of the city. There is a difference only in the manner of enforcing it,—a difference arising from the different situation of the lot owners, and therefore competent for Congress to regard in its legislation. In other words, under the circumstances presented by this record, the distinction between residents and nonresidents is a proper basis for classification. It might not be under other circumstances. *Blake v. McClung*, 172 U. S. 239, 43 L. ed. 432, 19 Sup. Ct. Rep. 165; *Blake v. McClung*, 176 U. S. 59, 44 L. ed. 371, 20 Sup. Ct. Rep. 307; *Sully v. Ameri-*

can Nat. Bank, 178 U. S. 289, 44 L. ed. 1072, 20 Sup. Ct. Rep. 935.

That the remedy in the statute under consideration against nonresident owners may be more efficient—more completely fulfil the purpose of the law—than that against resident owners, is beside the question. Indeed, the fact may be disputed. Usually the most emphatic and efficient enforcement *of a law is through crimina-[152]l prosecution. At any rate, it is hard to believe that there will be many resident lot owners whose delinquency under the statute will be so resolute that it will stand against repeated charges of crime and the consequent penalties. But, be that as it may, it was for Congress to decide whether such possibility should be risked rather than incur the greater possibility of more delinquents in so numerous a class as resident lot owners if the District was to first bear the expense of the drainage, and collect it afterward by civil proceedings.

Other criticisms are made of the law to display what is alleged to be its lack of uniformity. For instance, a supposition is made of tenants in common, some of whom are residents and the others nonresidents, and the possible difficulties that may arise from such ownership under the act; and it is asked if the property belongs to resident minors or insane persons, or persons under legal disabilities, can the act be enforced against them or against their property? To these suppositions and questions we answer that it will be time enough to reply when a case arises in which they are presented, and to determine then the operation of the act upon the persons enumerated.

Judgment reversed with directions to reverse the judgment of the Supreme Court, quashing the tax, and to dismiss the petition.

Mr. Justice White did not hear the argument, and took no part in the decision.

*TEXAS & PACIFIC RAILWAY[153] COMPANY and J. M. Tucker, Plffs. in Err.,

v.

EASTIN & KNOX, a Firm Composed of S. W. Eastin and D. L. Knox, and St. Louis & San Francisco Railroad Company.

(See S. C. Reporter's ed. 153-160.)

Removal of causes — case involving Federal question — joint action.

1. An action brought jointly against a corporation chartered under an act of Congress and a local defendant, upon a joint liability, is a suit arising under the laws of the United States, and, as such, is removable

from a state court to a Federal circuit court on petition of both defendants.

[For other cases, see Removal of Causes, 216a-221, in Digest Sup. Ct. 1908.]

Removal of causes — determination of right of removal.

2. The state courts have no jurisdiction to pass finally upon the facts stated in a petition for the removal of a cause from a state to a Federal circuit court, which show a cause properly removable, since that is the exclusive province of the Federal court.

[For other cases, see Removal of Causes, 287-293, in Digest Sup. Ct. 1908.]

Removal of causes — further proceedings in state courts — waiver.

3. The right of a Federal corporation, when sued in a state court, to remove the cause to a Federal circuit court, as being one arising under the Federal laws, is lost by its action in bringing into the suit a cause of action against another corporation, with which the plaintiff has no concern, and recovering judgment therein.

[For other cases, see Removal of Causes, 462-469, in Digest Sup. Ct. 1908.]

[No. 177.]

Argued April 23, 1909. Decided May 17, 1909.

IN ERROR to the Supreme Court of the State of Texas to review a judgment which, on a second writ of error, affirmed a judgment of the Court of Civil Appeals, in that state, for the Second Judicial District, affirming a judgment of the District Court of Parker County, in favor of plaintiffs in an action against a corporation created by act of Congress, in which a petition to remove the cause to a Federal circuit court was denied. Affirmed.

See same case below, 100 Tex. 556, 102 S. W. 105.

Statement by Mr. Justice McKenna:

This action was instituted by defendant in error against plaintiff in error, the Texas & Pacific Railway Company, hereinafter called the Texas & Pacific Company, and J. M. Tucker, its agent, for wrongfully billing and shipping 712 head of cows and calves *via* one road, though they were requested to be shipped *via* another, whereby they were required to go twice as far, and were seriously injured and damaged thereby.

NOTE. — On removal of causes where the Federal Constitution, statute, or treaty comes in question—see notes to Little York Gold Washing & Water Co. v. Keyes, 24 L. ed. U. S. 656; Ferguson v. Ross, 3 L.R.A. 322; Austin v. Gagan, 5 L.R.A. 476; Butler v. National Home, 36 L. ed. U. S. 346; and Torrence v. Shedd, 36 L. ed. U. S. 528.

On the waiver of right to remove a cause to a Federal court—see note to Atlanta, K. & N. R. Co. v. Southern R. Co. 66 C. C. A. 612.

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It is alleged in the original petition that plaintiffs in the action, defendants here, were residents of the county of Jack, state of Texas; that Tucker resided in the county of Palo Pinto in said state, and that the Texas & Pacific Company "is a body corporate, duly incorporated under the Federal statutes, with an office and station in the counties of Palo Pinto and Parker, in the state of Texas."

*The Texas & Pacific Company filed [154 an answer, and, at the same time, filed a petition and bond to remove the cause to the circuit court of the United States for the northern district of Texas, sitting at Fort Worth. The petition alleged as the ground of removal that Tucker was improperly and wrongfully joined with the company for the sole and only purpose of preventing it from removing the cause to the United States circuit court. That the suit against the company was a suit arising under the laws of the United States, and more especially under the law of the United States constituting the charter of the company, under which it was incorporated. Tucker adopted the statements of the petition and joined in the application for removal. The application was denied, and an exception was entered to the ruling. The Texas & Pacific Company, protesting against the right of the court to hear and determine the suit, filed its amended original answer, among other defenses alleging that "it carried and delivered the cattle to Paris, Texas, safely and carefully on reasonable time," and further alleging that the St. Louis & San Francisco Company was duly incorporated and operated its line of railway in Lamar county, Texas, and had a local agent at Paris, and that most of the damage complained of by plaintiff (defendant in error) occurred on the line of that road. The Texas & Pacific Company asked that the St. Louis & San Francisco Railroad Company be made a party defendant, and that citation be served on it; that it be required to answer in the cause, and that, if plaintiff should recover against the Texas & Pacific Company, the latter have judgment against the St. Louis & San Francisco Company for all such damages as were caused by it.

Subsequently, a second amended original answer was filed by the Texas & Pacific Company, in which it enlarged its defenses, and, in what it called a "special and separate answer," averred its careful transportation of the cattle, and again averred the negligence of the St. Louis & San Francisco Company, and that, but for such negligence, the damages of *which plaintiffs com-[155 plain would not have occurred. The prayer of the answer was as follows:

"Wherefore, this defendant prays that citation be issued to the said St. Louis &

San Francisco Railroad Company, by service upon its local agent herein aforesaid, as the law directs, and that upon hearing hereof that the damages and injuries sustained by plaintiffs in the shipment of said cattle be, according to law, apportioned between the defendant and the St. Louis & San Francisco Railroad Company, and that this defendant be held liable only for such damages as occurred to said cattle while the same were in its possession, and that such damages and injuries as accrued to said cattle while same were in the possession of the St. Louis & San Francisco Railroad Company and its connecting carriers be charged to it. But, if this defendant be mistaken in this, then it prays that, upon hearing hereof, that it have judgment over and against the said St. Louis & San Francisco Railroad Company for the full amount of any judgment that may be rendered against this defendant upon the trial hereof, and that it recover its costs in this behalf expended, as it will ever pray, etc., and for such general and special relief in law or equity as it may be entitled to under the law and the facts."

A citation was issued in accordance with this prayer, and the St. Louis & San Francisco Company was summoned to appear "to answer the said amended answer of the Texas & Pacific Railway Company, filed as aforesaid on the 7th day of April, A. D. 1904." The citation was duly served, together with certified copies of plaintiff's original petition and the amended answer of the Texas & Pacific Company, as directed by the citation. The St. Louis & San Francisco Company appeared in the action. In what is called its first amended original answer it demurred "generally to the answer and cross action" of the Texas & Pacific Company, on the ground that the same failed to show a cause of action. The answer also denied all the allegations of the "said pleadings of the Texas & Pacific Company," set up other defenses, and alleged that, if the cattle were damaged by delay in shipment, "that the fault or liability" was that "of the Texas & Pacific Railway Company in not routing said cattle as requested by the plaintiffs and as demanded by the exigencies of the shipment," and "prayed to be hence dismissed with its costs." The issue thus made up was tried by the court, and resulted in a judgment against the Texas & Pacific Company and Tucker for \$3,600, and a judgment against the St. Louis & San Francisco Company in favor of the Texas & Pacific Company for \$1,800. All the defendants appealed to the court of civil appeals for the second judicial district, sitting at Fort Worth. That court reversed the decision, and remanded the

case holding that the trial court erred in overruling the application for removal, and entertaining jurisdiction of the case. A motion for rehearing was made and denied, and the plaintiffs (defendants in error here) applied to the supreme court of Texas for a writ of error, which was dismissed for want of jurisdiction, but was, on motion for rehearing, granted, and, on the 2d of May, 1906, the supreme court reversed the court of civil appeals, deciding that the case was not removable, and remanded the case for decision on the other questions.

On the return of the case to the court of civil appeals, that court, on the 16th of June, 1906, affirmed the judgment of the district court. A motion for rehearing was denied, and, on writ of error to the supreme court, the latter court affirmed the judgment of the court of civil appeals.

Messrs. W. L. Hall, and Rush Taggart argued the cause, and, with Mr. John F. Dillon, filed a brief for plaintiffs in error:

The Texas & Pacific Railway Company, being a corporation chartered under an act of Congress, when sued alone in the state court for an amount exceeding \$2,000, exclusive of interest and costs, has the right to remove the cause to the Federal court; and, when sued with a local defendant, to establish a joint liability of all defendants, it is a suit arising under the Constitution and laws of the United States, and, if all defendants join in the application to remove, the cause should be removed to the United States court.

Osborn v. Bank of United States, 9 Wheat. 738, 6 L. ed. 204; *Smith v. Union P. R. Co.* 2 Dill. 278, Fed. Cas. No. 13,121; *Pacific R. Removal Cases*, 115 U. S. 1, 22, 29 L. ed. 319, 326, 5 Sup. Ct. Rep. 1113; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. ed. 1132, 17 Sup. Ct. Rep. 703; *Re Dunn*, 212 U. S. 374, ante, 558, 29 Sup. Ct. Rep. 299; *Texas & P. R. Co. v. Young* (Tex. Civ. App.) 27 S. W. 145; *New York v. Independent S. B. Co.* 21 Fed. 593; *Chicago, R. I. & P. R. Co. v. Martin*, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854.

Where the facts presented in a petition for removal show a cause of action properly removable from a state to a Federal court, the state court must take the facts as stated in the record and petition, and has no jurisdiction to pass upon any such questions. The right to pass upon the issues of fact made by the petition for removal is one for the Federal court, it having the exclusive province of passing upon such questions of facts.

Black's Dillon, Removal of Causes, § 191; *Baltimore & O. R. Co. v. Koontz*, 104 U. S.

5, 26 L. ed. 643; *Stone v. South Carolina*, 117 U. S. 430, 29 L. ed. 962, 6 Sup. Ct. Rep. 799; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 30 L. ed. 1159, 7 Sup. Ct. Rep. 1262; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 34 L. ed. 963, 11 Sup. Ct. Rep. 306.

Upon the filing of the petition and bond for removal in this cause the state court lost jurisdiction of the case. The subsequent defense in that court by the Texas & Pacific Railway Company in no way affected the result of the filing of its petition and bond for removal.

Powers v. Chesapeake & O. R. Co. 169 U. S. 92, 42 L. ed. 673, 18 Sup. Ct. Rep. 264; *National S. S. Co. v. Tugman*, 106 U. S. 118, 27 L. ed. 87, 1 Sup. Ct. Rep. 58; *Baltimore & O. R. Co. v. Koontz*, supra; *New Orleans, M. & F. R. Co. v. Mississippi*, 102 U. S. 135, 26 L. ed. 96; *Kern v. Huidekoper*, 103 U. S. 485, 26 L. ed. 354; *Home L. Ins. Co. v. Dunn*, 19 Wall. 214, 22 L. ed. 68.

Mr. Thomas D. Sporer argued the cause, and, with Mr. H. C. McClure, filed a brief for defendants in error:

It is a familiar doctrine that a corporation possessing a Federal charter can sue in the Federal circuit court (*Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. ed. 204), and also, that it has been extended so that, if such a corporation is sued in a state court alone, it can remove the case to the Federal court (*Pacific R. Removal Cases*, 115 U. S. 1, 29 L. ed. 319, 5 Sup. Ct. Rep. 1113).

But it was not supposed that the doctrine would be still further extended, to allow such a corporation to remove a case to the Federal court where it was sued jointly with one who had no right dependent on the Constitution or a Federal law, and who had no right to remove.

Chicago, R. I. & P. R. Co. v. Martin, 178 U. S. 245, 44 L. ed. 1055, 20 Sup. Ct. Rep. 854.

While Congress may have intended to allow the removal of a suit when the very foundation of the suit was a Federal law, it did not intend to authorize a removal where the cause of action depended solely on a law of the state, and the Federal law came in only incidentally.

New Orleans, M. & F. R. Co. v. Mississippi, 102 U. S. 135, 26 L. ed. 96.

This is also in accord with the general principles so often enunciated by this court, that a substantial dispute as to the construction of the Constitution or laws is essential.

Western U. Teleg. Co. v. Ann Arbor R. Co. 178 U. S. 243, 244, 44 L. ed. 1053, 1054, 53 L. ed.

20 Sup. Ct. Rep. 867; *New Orleans v. Benjamin*, 153 U. S. 411, 38 L. ed. 764, 14 Sup. Ct. Rep. 905; *Little York Gold-Washing & Water Co. v. Keyes*, 96 U. S. 199, 203, 24 L. ed. 656, 658; *California Oil & Gas Co. v. Miller*, 96 Fed. 16.

The plaintiff in error, after filing its petition and bond for removal, waived its right to remove by voluntarily appearing in the state court, and filing its answer, by which it voluntarily impleaded and made the St. Louis & San Francisco Railway Company a party defendant in the suit below, and sought to recover a judgment over against it, as this latter proceeding was an affirmative action on its own part, by which it elected to retain defendants in error in the state court, not for the purpose of defending itself, but to have the matter litigated, and, at the same time, to prosecute its rights and enforce them by obtaining a judgment of the state court against a party whom defendants in error had not sued.

Chicago, I. & N. P. R. Co. v. Minnesota & N. W. R. Co. 29 Fed. 341; *Hudson River R. & Terminal Co. v. Day*, 54 Fed. 545; *Case v. Olney*, 106 Fed. 433; *First Nat. Bank v. Conway*, 67 Wis. 210, 30 N. W. 215; *West Virginia v. King*, 112 Fed. 369; *Hanover Nat. Bank v. Smith*, 13 Blatchf. 224, Fed. Cas. No. 6,035; *Brooks v. Clark*, 119 U. S. 502, 30 L. ed. 482, 7 Sup. Ct. Rep. 301.

In analogous cases, the courts of Texas have uniformly held that a plea of personal privilege could be waived, and was waived when the defendant sought, by plea of reconvention, affirmative relief against the plaintiff, or by cross bill introduced a new party into the suit, and sought to recover against him, independently of the plaintiff's cause of action; and that the jurisdiction of the court attached.

Douglas v. Baker, 79 Tex. 505, 15 S. W. 801; *Slator v. Trostel* (Tex. Civ. App.) 21 S. W. 285; *Benchoff v. Stephenson* (Tex. Civ. App.) 72 S. W. 106.

Mr. Justice McKenna, after stating the facts as above, delivered the opinion of the court:

The assignments of error present the question of the right of the Texas & Pacific Company to a removal of the case to the circuit court of the United States (1) Because, being a corporation chartered under an act of Congress, the suit was one arising under the laws of the United States, and that this character was not taken from it by joining a local defendant when it was an action to establish a joint liability. (2) Where the facts stated in the petition for removal show a cause properly removable from a state to a Federal court, the state

court has no jurisdiction to pass finally upon them; that right is one for the Federal court, it having exclusive province of passing upon such questions of fact.

159] *The first proposition is sustained in *Re Dunn*, 212 U. S. 374, ante, 558, 29 Sup. Ct. Rep. 299; the second proposition is sustained in *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, ante, 765, 29 Sup. Ct. Rep. 430. The latter case also decides that, if an application for removal be denied, the petitioner loses no right by being compelled to stay in the state court. In other words, that the petitioner may stay in the state court and defend the action against him, and, if the judgment go against him, bring the case to this court, and have the question of removal determined. But plaintiffs in error did not defend only against the cause of action. They instituted a cause of action against the St. Louis & San Francisco Railroad Company, in which the defendant in error had no concern, and recovered a judgment against that company in the sum of \$1,800. By doing so they invoked the jurisdiction of the state court on their own account and for their own purpose, and the case is brought within the ruling in *Merchants' Heat & Light Co. v. J. B. Clow & Sons*, 204 U. S. 286, 51 L. ed. 488, 27 Sup. Ct. Rep. 285.

The single question in this court in that case was the jurisdiction of the circuit court from which the case came. The Merchants Heat & Light Company, an Indiana corporation, contended that no jurisdiction had been obtained over it by the service which was made upon one Schodd, who, it was asserted by the plaintiff in the action, was an agent of the company. A motion to quash the return of service was made and overruled, and thereupon the company, after excepting, appeared as ordered and pleaded the general issue, and also a recoupment or set-off of damages under the same contract sued upon, and overcharges in excess of the amount ultimately found due to the plaintiff. There was a finding for the plaintiff of \$9,082.21.

Whether the company was doing business in the state of Illinois within the meaning of the statutes of that state under which service was made, this court did not decide; but it did decide that the company, "by setting up its counterclaim . . . became a plaintiff in its turn, invoked **160]** the jurisdiction of the *court in the same action, and, by invoking, submitted to it." And this, notwithstanding the counterclaim arose, as it was said, "out of the same transaction that the plaintiff sued upon, and so to have been in recoupment rather than in set-off proper." It was further said: "There is some difference in the

decisions as to when a defendant becomes so far an actor as to submit to the jurisdiction, but we are aware of none as to the proposition that when he does become an actor in a proper sense he submits." And the Texas & Pacific Company was an actor against the St. Louis & San Francisco Company upon a cause of action upon which it was its own choice to bring into the suit. On that cause of action it obtained a judgment against the St. Louis & San Francisco Company, and succeeded in having it affirmed by the supreme court of the state.

It would be carrying too far the right of a party who has petitioned for removal of a case to extend it beyond what is necessary to defend against the cause of action asserted against him. He should not be permitted to invoke the jurisdiction for affirmative relief and deny it afterwards. It must be remembered how amply his right of removal is protected. He may file the record in the circuit court of the United States, and thereby completely take jurisdiction from the state court.

Judgment affirmed.

Mr. Justice Peckham and Mr. Justice Day dissent.

*MOLLIE E. DUPREE and William **[161]**
E. Dupree, Petitioners,
v.
C. W. MANSUR.

(See S. C. Reporter's ed. 161-167.)

Federal courts—following state court decisions—limitations.

A Federal court of equity will apply, in a suit to quiet title as against the purchaser of notes for the purchase price of which a vendor's lien has attached, the rule of local law that, when a debt is barred by the statute of limitations, an action to foreclose a lien or mortgage given as security for the debt is also barred.

[For other cases, see *Courts*, 2025-2050, in *Digest Sup. Ct.* 1908.]

[No. 124.]

Argued April 6, 7, 1909. Decided May 17, 1909.

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 554; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 584; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 335; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree which, reversing a decree of the Circuit Court for the Western District of Texas enjoining proceedings to have certain land sold to satisfy a vendor's lien, ordered a foreclosure of such lien. Reversed.

See same case below, 80 C. C. A. 213, 150 Fed. 329.

The facts are stated in the opinion.

Mr. J. J. Darlington argued the cause, and, with Messrs. Sleeper & Kendall, filed a brief for petitioners:

All three of the notes were barred by the Texas statute of limitations; and under the laws of that state, as established by its own supreme court, the bar of the statute, which was duly pleaded, was a bar also to the respondent's recovery under either the deed of trust or the vendor's lien.

Duty v. Graham, 12 Tex. 437, 62 Am. Dec. 534; *Perkins v. Sterne*, 23 Tex. 561, 76 Am. Dec. 72; *Ross v. Mitchell*, 28 Tex. 154.

The Texas statute of limitations, as construed by its courts, does not bar the claim of the vendor of land under an express vendor's lien reserved in the deed of sale. Notwithstanding the fact that the deferred purchase-money notes are barred by the statute, the vendor may still retake the land if the notes are unpaid; but this right is one personal to himself, and does not pass to an assignee or indorsee of the notes.

Elliott v. Blane, 54 Tex. 218; *Hale v. Baker*, 60 Tex. 217; *Stephens v. Mathews*, 69 Tex. 344, 6 S. W. 567.

Had the statute of limitations run against the notes during and because of the pendency of the consolidated suit, the result would not have been to relieve the bar, since, under the Texas decisions, even an injunction against sale under a trust deed does not suspend the running of the statute.

Davis v. Andrews, 88 Tex. 524, 30 S. W. 432, 32 S. W. 513.

The decisions of the supreme court of Texas upon these questions of purely local state law are conclusive upon the Federal courts in cases arising in and governed by the laws of the state.

Louisiana v. Pilsbury, 105 U. S. 278, 294, 26 L. ed. 1090, 1095; *Morley v. Lake Shore & M. S. R. Co.* 146 U. S. 162-166, 36 L. ed. 925-928, 13 Sup. Ct. Rep. 54; *Elmendorf v. Taylor*, 10 Wheat. 152, 159, 6 L. ed. 289, 292; *Bank of United States v. Daniel*, 12 Pet. 32, 9 L. ed. 989; *Sioux City Terminal R. & Warehouse Co. v. Trust Co. of N. A.* 173 U. S. 99, 107, 43 L. ed. 628, 631, 19 Sup. Ct. Rep. 341; *Ewell v. Daggs*, 108 U. S. 147, 27 L. ed. 683, 2 Sup. Ct. Rep. 408; *Cordova v. Hood*, 17 Wall. 9, 21 L. ed. 587.

53 L. ed.

The cause of action being the debt, and its recovery the sole purpose sought to be accomplished, the case is one of concurrent jurisdiction between the courts of law and of equity, and therefore one in which the statute of limitations is binding in the latter forum.

Bank of United States v. Daniel, 12 Pet. 32, 56, 9 L. ed. 989, 998; *Bacon v. Howard*, 20 How. 22, 26, 15 L. ed. 811, 813.

Even if the respondent's cause of action were based upon a purely equitable right, the statute would be applied by analogy, and would be equally conclusive.

Miller v. McIntyre, 6 Pet. 61, 66, 67, 8 L. ed. 320, 322; *Willard v. Wood*, 1 App. D. C. 59, affirmed in 164 U. S. 502, 520, 41 L. ed. 531, 538, 17 Sup. Ct. Rep. 176.

Mr. Hannis Taylor argued the cause, and, with **Mr. J. M. McCormick**, filed a brief for respondent:

Federal courts adopt state statutes of limitation, as such, only so far as they regulate remedies on the common-law side of the court.

1 Foster, Fed. Pr. 3d ed. pp. 15, 16; *Fogg v. St. Louis, H. & K. R. Co.* 5 McCrary, 449, 17 Fed. 873; *Story*, Eq. Jur. § 1521; *Kirby v. Lake Shore & M. S. R. Co.* 120 U. S. 130, 30 L. ed. 569, 7 Sup. Ct. Rep. 430; *Payne v. Hook*, 7 Wall. 430, 19 L. ed. 261; *Burdon Cent. Sugar Ref. Co. v. Ferris Sugar Mfg. Co.* 78 Fed. 422; *Gregg v. Sanford*, 12 C. C. A. 525, 28 U. S. App. 313, 65 Fed. 157; *Brown v. French*, 80 Fed. 169.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought by the petitioner to quiet title to a lot of land in Waco, Texas. A cross bill was filed by the respondent to establish and foreclose a vendor's lien and mortgage upon the same land. The facts, so far as necessary to a decision, are these. One Bailey conveyed one undivided half of the land in question to William E. Dupree, partly in consideration of five notes, for \$900 each, maturing in one, two, three, four and five years respectively, from December 31, 1894, the date of the conveyance. By the words of the deed, "the vendor's lien is hereby reserved on the said property to secure the above-described notes." On the same date Dupree made a mortgage in the form of a trust deed of one-undivided half of the premises to secure the same notes. These deeds were recorded the next year, and later Dupree conveyed the land to his wife, whose title is not assailed except *as[165 subject to the lien or the notes. Then Dupree conveyed other property in trust for creditors in three classes, in the first of which was included one Slayden in respect of the above-mentioned notes, of four of which he had be-

come the holder. Forthwith certain creditors brought a bill to get the benefit of other securities held by one of the preferred creditors, and for a receiver. Neither the petitioner nor Slayden were made parties, nor was this property mentioned in the bill. On the same day another similar bill was brought by W. B. Belknap & Company, unsecured creditors, in which Slayden was one of the defendants. The petitioner also was joined in respect of a vendor's lien on other land, which she was alleged fraudulently to assert. It was ordered that on the trial the two suits should be consolidated, the same person having been appointed receiver in each. Then Slayden answered and intervened for three of the notes, one having been paid. By the final decree, made on June 30, 1897, it was decided that the plaintiffs in the Belknap bill, to which the petitioner was a party, take nothing by their bill; but, among many other things, the claim of Slayden on his intervention was allowed, it was adjudged that he recover the amount of Dupree, and be paid out of funds in the hands of the court, and it was ordered that thereupon he should indorse the notes, described as secured by vendor's lien on the land in question, to the receiver, without recourse, and that the receiver should sell them and pay the net proceeds into court, to be applied with the other funds. The decree was carried out and the notes were sold to one Duke for \$300. He afterwards sold them to Mansur, the respondent, who attempted by proceedings unnecessary to state to have the land sold. Then this bill was filed. The circuit court granted an injunction. This decree was reversed, and a decree of foreclosure in favor of the respondent ordered by the circuit court of appeals.

The circuit court of appeals proceeded upon the ground that the decree was conclusive upon the petitioner, though for what purposes or with what results is not entirely clear, *and is not necessary to inquire. We shall assume that the purchaser took the notes as unpaid, with the vendor's lien attached to the same extent as if Slayden had sold them without coming into court. That certainly is the most that can be attributed to the decree. But since the date of that decree, and before the date of the bill, the notes have been barred by the Texas statute of limitations. It is established law in Texas that, when a debt is barred, an action to foreclose a lien or mortgage given as security for it is barred also. *Hale v. Baker*, 60 Tex. 217; *Goldfrank v. Young*, 64 Tex. 432, 434; *Stephens v. Mathews*, 69 Tex. 341, 344, 6 S. W. 567; *Davis v. Andrews*, 88 Tex. 524, 30 S. W. 432, 32 S. W. 513; *Brown v. Cates*, 99 Tex. 133, 87 S. W. 1149. The former

decree afforded no possible ground for not applying the Texas law in the present case.

The respondent argues that the vendor's lien is equitable; that the statute of limitations does not govern equitable proceedings, and that a court of equity will not be governed by the analogy of the statute unless it seems equitable to follow it; that the equity jurisdiction of the United States is not to be affected by state laws; that therefore the United States courts are unincumbered by the Texas decisions, and that they ought to say that it is inequitable to deny a remedy on the security when a suit is based upon the debt. We will not consider in how many points we disagree with this argument, but will confine ourselves to what we deem a sufficient answer.

A vendor seems to have greater rights than are enjoyed by a purchaser of notes for the price of land to which a vendor's lien is attached. If not inequitable, the vendor may resolve the sale for nonpayment, whereas a later holder of the notes only can have the lands sold and the proceeds applied in satisfaction, and this right is lost when the notes are barred. *Stephens v. Mathews*, supra. (These notes, it will be remembered, had been sold by the vendor long before the sale under the decree.) In one case a lien, expressly reserved seems to be regarded as equivalent to a mortgage. *Wilcox v. First Nat. Bank*, 93 Tex. 322, 331, 55 S. W. 317. Whether this be true or *not, we[167 hardly see how a court of law could disregard an express reservation of security, or how a lien so reserved can be called a purely equitable right. But, equitable or not, it is a creation not of the United States, but of the local law of Texas. If that law should declare the words in Bailey's deed purporting to reserve a lien unavailing, it would not be for the courts of the United States to say otherwise when sitting in equity any more than when sitting at law. It appears to us equally their duty, when the local law decides that the words create a right, to take the measure of that right from the same source. The notes are barred, as well in equity as at law. By the law of Texas the security is incident to the note, and does not warrant a foreclosure when the note does not warrant a judgment. This is not a matter of procedure or jurisdiction, but of substantive rights concerning land. It seems to us that it should be governed by the decisions of the state where the land lies. See *Slide & S. Gold Mines v. Seymour*, 153 U. S. 509, 516, 38 L. ed. 802, 805, 14 Sup. Ct. Rep. 842.

We should add, as an independent consideration, that it cannot be admitted for a moment that for a debtor to rely upon the statute of limitation is inequitable of itself,

without some special circumstance, wanting here. That would be for courts, and, in this case, courts of a different power, to undertake to declare wrong or discreditable what the proper authority, the legislature of the state, had declared right. There are other questions in the case, but we deem the foregoing reasons sufficient to show that the decree must be reversed.

Decree reversed.

Mr. Justice Holmes (June 1, 1909):

To prevent misapprehension, there should be added to the opinion, at the end, the following words:

"We have considered only the question of the foreclosure on the cross bill. The case will be remanded to the circuit court for further proceedings in accordance with the opinion, without prejudice to the question whether the bill can be maintained."

168]*BUENAVENTURA UBARRI y YRAMATEGUI, Plff. in Err.,
v.

JACINTO LORENZO LOPEZ LABORDE,
Marie Consolación Lopez Laborde, Manuel
Demetrio Lopez Laborde, et al.

(See S. C. Reporter's ed. 168-173.)

Evidence — sufficiency — fraud.

1. Fraud in connection with purchases of land at tax and execution sales is not established by questionable evidence of value, and the fact that the purchaser was a man of great power and influence, and bought the land at much less than the value set by the owners, from which it was sought to be inferred that judges, mayors, appraisers, and possible purchasers, all were frightened or corrupt.

[For other cases, see Evidence, XII. c, in Digest Sup. Ct. 1908.]

Descent — liability of heir for ancestor's debts.

2. The liability of the succession after the inheritance has been divided is, by virtue of Porto Rico Civ. Code, 1889, arts. 1003, 1023, 1084, at an end, and gives place to a personal liability of each heir for the whole debt to the extent of the assets received by him, if he has accepted with benefit of inventory, or, otherwise, in full.

[For other cases, see Descent and Distribution, 37, 38, in Digest Sup. Ct. 1908.]

Evidence — presumption — waiver.

3. There is no presumption that the heirs waived the benefit of inventory, and hence, under Porto Rico Civ. Code, 1889, arts. 1003, 1023, 1084, were liable after the inheritance

was divided, for the entire debt of the succession.

[Presumptions generally, see Evidence, II., in Digest Sup. Ct. 1908.]

[No. 137.]

Argued April 7, 8, 1909. Decided May 17, 1909.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment in favor of plaintiffs in an action to recover damages for fraud. Reversed.

See same case below, on motion for new trial, 3 Porto Rico Fed. Rep. 163.

The facts are stated in the opinion.

Messrs. Walter D. Davidge and Clifford S. Walton argued the cause and filed a brief for plaintiff in error:

Inadequacy of price of itself does not establish fraud.

Erwin v. Parham, 12 How. 197, 13 L. ed. 952; Slater v. Maxwell, 6 Wall. 268, 18 L. ed. 796.

No harm can be done to another by a person exercising his rights.

Supreme Court of Madrid, Sentencia of May 3, 1883; Sentencia of May 5, 1883; Sentencia, June 10, 1884; Sentencia, June 27, 1896.

Messrs. Willis Sweet and George H. Lamar argued the cause and filed a brief for defendants in error:

The instruction given by the court on the subject of inheritance without benefit of inventory was correct.

Supreme Court of Spain, Decision 13th Nov. 1895; 5 Manresa, p. 329; 12 Manresa, p. 892; 8 Manresa, p. 200.

To have brought in a verdict for the defendants in error, the jury must have found the wrong to have been Ubarri's; and this court will not disturb the verdict of a jury as far as the same relates to passing upon the facts involved.

Mr. Justice Holmes delivered the opinion of the court:

This is an action by children of one Jacinto Lopez against one of the heirs of one Pablo Ubarri, alleging fraud on the part of the said Pablo in dealing with the estate of Lopez. It is alleged that as the result Pablo Ubarri became the owner of more than 4,000 acres of land that had belonged to Lopez, and *otherwise damaged and de- [169] frauded the estate to the extent of over \$150,000. There was a trial and a verdict and judgment for the plaintiffs, the defend-

NOTE. — On the liability of heirs for obligations of their ancestor—see note to Muldoon v. Moore, 21 L.R.A. 89,

ants in error. Many errors were alleged by exception and otherwise, and the case was brought by writ of error to this court.

The facts relied upon as establishing fraud are as follows: Pablo Ubarri received from the widow of Lopez a power of attorney to administer the estate, and appointed as his substitute one Tomas Cabellero. The probate proceedings went on amicably, the heirs were declared, and the estate was appraised and apportioned to them, the widow receiving property that by valuation was sufficient to pay the scheduled debts in addition to her personal share. Among these debts was one to Pablo Ubarri of \$24,000. When the probate proceedings were ended, this debt was disputed by the widow, who asked for documentary evidence; Ubarri thereupon showed some irritation, and wrote to her in a manner that might be taken to imply a threat. She persisting, he began a suit with an attachment, the above-named Cabellero being his *procurador*. Before and afterward some of the property was attached for taxes, and ultimately it was sold. Ubarri became the purchaser, no other bidders appearing at the sale. Then his action went to judgment, and, finally, the land belonging to the estate, or a large part of it, was adjudicated to him upon execution. Ubarri was the richest, and, politically, the most powerful man in Porto Rico. Circumstances are stated suggesting the inference that even the judges might have been afraid of him. It is said that the representative of the minor heirs, the appraisers of the estate, and pretty much everyone concerned in the probate proceedings were in such relations to him as to be likely to be his tools; that the appraisal was much too low, that the sale for taxes brought a wholly inadequate price, that the attachment tied up the estate so that no money could be got to pay any debt, and that he was an official superior of the municipal authorities ordering the collection of the taxes, and practically the head of those *affairs. The inference sought to be drawn from his powers and the result is that he pressed the collection of the taxes after he had made it impossible for the estate to pay them; that no one would dare to oppose when it was made known that he wished to buy, and that, by his pressure at both ends, he was able ultimately to appropriate and exhaust an estate appraised by his own appointees at \$123,000, for a claim of \$24,000 and a comparatively small debt for taxes. It seems to have been argued at the trial that he helped out this result by causing the property attached to be appraised at too low a value, and thus enabling himself to bid it in, as he did, at two thirds of that value-

tion, under arts. 1497, 1502, of the Code of Civil Procedure then in force.

As a further circumstance it was alleged and proved that the widow was alleged against criminally for cutting a few trees from the estate after Ubarri's attachment and was acquitted in the court of first instance, but that Ubarri, as private prosecutor, took the case to a higher court, being represented there by the above-named Cabellero, and got a sentence of fine or imprisonment imposed upon her. We do not perceive the relevancy of the fact, except possibly as showing the animus with which Ubarri pressed his rights.

On the other hand we start with the fact that the debt to Ubarri is admitted, and that in the argument it was stated that no objections have been made to the probate proceedings. Certainly no ground appears for suggesting that anything in those proceedings contributed in any way to the alleged fraud. But, if this be so, any special duty or burden of proof arising out of confidential relations disappears. We have simply the case of a creditor enforcing his debts after the division of the estate. He had to bid at the tax sale in order to save his attachment. There is no evidence except the fact of his power to show that other bids were deterred, and none to show that he tried to deter them. On the contrary, it appears that some of the personal property, at least, was bought by another. So as to the sale on execution. Both transactions *were[171 regular in form. It seems from the correspondence that, so far from his having stirred up the collection of the taxes, they were in arrears for some time, and that the officials had been pressing for them before it reasonably could be imagined that he had any hand in what was done. The widow had shown a readiness to suspect him, without grounds, so far as appears, two years before his suit was begun, and he had expressed his willingness to have her withdraw the power of attorney whenever she pleased. When the suit was brought they were at arms' length. It was argued that he procured the property attached to be appraised at too low a value, as we have said. But there is no evidence that he did; no sign of any protest on the part of the appraiser that the debtor was authorized to appoint; nothing to show that the judge did not do his duty in appointing a third competent and disinterested man. Arts. 1492, 1481, 1482. The appraisal seems to have agreed with that in the probate proceedings. It is said that that was fraudulent. But it appears that all the parties, after discussion, agreed to the appraisers appointed and to the appraisal, and it does not appear that they were misled in any way. Neither does

it appear that the appraisal before execution was not the result of independent judgment, whether it agreed with the former appraisal or not. The whole property was sold by the heirs of Ubarri between 1898 and 1902 for little more than the amount of the judgment. In short, on questionable evidence as to the value of the estate, and the fact that Ubarri was a man of great power and influence, and bought the land, when sold for taxes and on execution, at much less than the value set by the plaintiffs, the case was sent to the jury, with liberty for them to find, upon suspicion, that judges, mayors, appraisers, and possible purchasers all were frightened or corrupt. We are of opinion that this was wrong, and that the exceptions taken by the plaintiff in error should be sustained.

It is not likely that we shall hear of this case again, and therefore we leave many [172] points untouched that would have *to be considered seriously before the judgment could be sustained, but we shall advert to one other matter. The court instructed the jury that because the defendant had not shown the contrary, it was to be presumed that the heirs of Pablo Ubarri took without benefit of inventory, and that therefore service upon one of them authorized the court to give judgment against the succession for whatever the verdict might be. In the light of this instruction and the prayer of the complaint, which was for judgment against the succession, it would seem that the judgment should be construed to follow the prayer. It reads that the plaintiffs "recover of and from the defendant Buenaventura Ubarri Yramategui of the succession of Pablo Ubarri," etc. This is ambiguous, but we assume it to be against the succession. But, if so, we do not perceive the bearing of the presumed waiver of the benefit, of inventory. The effect of such a waiver was to make the heir personally liable without limit, as he was in the early law of Rome, of England, and of France. Civil Code of 1889, art. 1084. Glanville, Lib. 7, chap. 8. Viollet, Hist. du Droit Civil Français, 2d ed. 829, 830. But, as this was a suit against the succession, that was immaterial, so far as the form or scope of the judgment was concerned. It was material, however, with reference to the nature of the suit. For, unless we entirely misunderstand the meaning of the Code of 1889, and of the proceedings under the civil law in case of succession, after the inheritance has been divided, the liability the succession is at an end, and gives place to a personal liability of each heir for the whole debt to the extent of the assets received by him, if he has accepted with benefit of inventory, or, otherwise, in full. Arts. 1084, 1023, 1003. It is

for this reason, we presume, that creditors "recognized as such" were given the right to oppose the division until they were paid or secured. § 1082. If this suit is to be regarded as we have supposed and as the defendants in error say, it seems to be misconceived. If, on the other hand, it should be regarded as a suit against Buenaventura Ubarri personally, in respect of a liability of his ancestor, the complaint *does not al- [173] lege that he inherited any property, or how much, or that the inheritance had been divided, or whether it was accepted with or without benefit of inventory. If we assume a division to have taken place, we see no ground for presuming that the defendant accepted his share without benefit of inventory, or is liable for anything beyond the unascertained value of what he received. Whether he waived the benefit of inventory or not is a pure question of fact. It was not material to a suit against the succession, and therefore was not mentioned in the pleadings. Even the division of Pablo's inheritance was mentioned only incidentally in the evidence, and it does not appear whether it took place under the Code of 1889 or that of 1902. But, if the supposed waiver were to be considered, we know of no reason for presuming what probably is the exception, not the rule, to have happened in this case. For the foregoing reasons, also, the judgment was wrong.

Judgment reversed.

JACINTO LORENZO LOPEZ LABORDE
et al., Plffs. in Err.,
v.

PABLO UBARRI and Modesto Ubarri.

(See S. C. Reporter's ed. 173-175.)

This case is governed by the decision in Ubarri y Yramategui v. Laborde, ante, 953.

[No. 194.]

Argued April 30, 1909. Decided May 17, 1909.

IN ERROR to the District Court of the United States for Porto Rico to review a judgment dismissing, as to two nonresident defendants, the complaint in an action for fraud, and dissolving the attachment against their property. Affirmed.

See same case below, 2 Porto Rico Fed. Rep. 95.

The facts are stated in the opinion.

Messrs. Willis Sweet and George H. Lamar argued the cause and filed a brief for plaintiffs in error.

Mr. John Maynard Harlan argued the cause and filed a brief for defendants in error.

Mr. Justice Holmes delivered the opinion of the court:

This is the same suit that has been decided already. *Ubarri y Yramategui v. Laborde*, 213 U. S. 168, ante, 953, 29 Sup. Ct. Rep. 549. There is presented here a subordinate question as to the right of the plaintiffs in error, who were also the plaintiffs below, to retain an attachment against property alleged to belong to two nonresident heirs of Pablo Ubarri. The district court ordered the complaint to be dismissed as to these heirs, and the attachment against any of their property to be dissolved, on the principle that has been laid down more than once by this court, that, in the courts of the United States, "attachment is but an incident to a suit, and, unless the suit can be maintained, the attachment must fall." *Ex parte Des Moines & M. R. Co.* 103 U. S. 794, 796, 26 L. ed. 461, 462. "Unless the suit can be maintained" means, of course, unless the court has jurisdiction over the person of the defendant. See further *Toland v. Sprague*, 12 Pet. 300, 330, 336, 9 L. ed. 1093, 1105, 1107; *Chaffee v. Hayward*, 20 How. 208, 15 L. ed. 804; *Clark v. Wells*, 203 U. S. 164, 51 L. ed. 138, 27 Sup. Ct. Rep. 43.

It was admitted at the argument before us that, if the suit against the other defendant should fail, as it has, there was no need to decide this case. But it must be disposed of in some way, and we are of opinion that the judgment below should be affirmed. The suit purports to be against the succession. Yet the property sought to be attached is alleged in the petition to belong to the defendants, and is not alleged even to have belonged to the succession in the past. It seems from what was admitted at the argument that a part, at least, never did. But, if it had belonged to the succession, we gather from incidental testimony in the main case, from the allegations of separate titles in the petition for attachment, and from admissions at the bar, that it had been divided, and thereafter the liability of the heirs, if any, was personal, as explained 175] in the *other case. Even if a suit still could be maintained against the succession when there was no property left in the inheritance, the private property of the heirs could not be held to answer the judgment. On the other hand, if this could be regarded as a suit to enforce personal liability of such heirs as could be caught, it would fail for reasons stated in *Ubarri y Yramategui v. Laborde*. In view of the disposition of that case we deem it needless to say more.

Judgment affirmed.

JOHN LEECH, Plff. in Err.,
v.
STATE OF LOUISIANA.

(See S. C. Reporter's ed. 175-178.)

Pilots — state regulation — effect of Federal legislation.

The state of Louisiana may make it a criminal offense for a pilot not duly qualified under its laws to pilot a foreign vessel from the Gulf of Mexico to New Orleans, Louisiana, although he holds a license issued under the authority of the state of Mississippi; since New Orleans, although upon the Mississippi river, is not "situate upon waters which are the boundary between two states," within the meaning of U. S. Rev. Stat. § 4236, U. S. Comp. Stat. 1901, p. 2903, authorizing the master of any vessel coming into or going out of any port so situated to employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters to pilot a vessel to or from such port, the limit of the waters so referred to being the point at which they cease to be a boundary between the two states.

[For other cases, see *Pilots*, 3-18, in *Digest Sup. Ct.* 1908.]

[No. 152.]

Submitted April 15, 1909. Decided May 17, 1909.

IN ERROR to the Supreme Court of the state of Louisiana to review a judgment which affirmed a conviction in the District Court of the Parish of Plaquemines, in that state, for piloting a vessel without a license. Affirmed.

See same case below, 119 La. 522, 44 So. 285.

The facts are stated in the opinion.

Mr. George H. Terriberry submitted the cause for plaintiff in error:

A regulation of pilots is a regulation of commerce, within the grant of power to Congress in the Constitution of the United States.

Cooley v. Port Wardens, 12 How. 299, 13 L. ed. 996.

The act of August 7, 1789, is not a grant of power to the states to pass pilot laws, but a legislative recognition that the power is concurrent in the states and the United States until exercised by the latter.

The Panama, Deady, 27, Fed. Cas. No. 10,702.

The provisions of a state law regulating pilots and pilotage, which are in direct and manifest conflict with act of Congress of March 2, 1837, concerning pilots, are inoperative and void.

The South Cambria, 27 Fed. 525.

A pilot licensed by the state of Delaware

is entitled to recover for services in piloting a vessel up the Delaware bay and river to Philadelphia, notwithstanding a law of Pennsylvania prohibiting anyone from acting as such pilot without a Pennsylvania license.

The *Clymene*, 9 Fed. 164, 12 Fed. 346.

The act of Congress of March 2, 1837, authorizing the master of a vessel bound to or from a port situate on waters which are the boundary between two states, to employ a pilot licensed by the laws of either state, applies to the laws of coterminous states situate upon a navigable river which is not a separating boundary between them.

The *Clymene*, *supra*.

A statute of the state of Louisiana which purports to give to that state absolute authority over the subject of pilots and pilotage on the Mississippi river, to the exclusion of other states bordering thereon, is inoperative and void for the reason that it conflicts with act of Congress of March 2, 1837.

The *Glenearne*, 7 Sawy. 200, 7 Fed. 604; The *Clymene*, *supra*; The *Charles A. Sparks*, 16 Fed. 480; The *Abercorn*, 26 Fed. 877; The *South Cambria*, *supra*; The *Alcalde*, 12 Sawy. 268, 30 Fed. 133; *Dryden v. Com.* 16 B. Mon. 598; *Cribb v. State*, 9 Fla. 409.

Messrs. **Walter Guion** and **J. R. Beckwith** submitted the cause for defendant in error. Mr. N. H. Nunez was on the brief:

The only authority that can interfere with Louisiana in the control of this long stretch of inland Louisiana water is the Federal Congress. The Federal government, through Congress, can only act or interfere with this water and dominion to the extent of assuming such direction over the use of the river as may be necessary to regulate its use as a water way used in commerce between the states and foreign nations, and can assume no other dominion or control, nor can Congress delegate that limited power or control to be exercised by Mississippi or any other state or nation.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *Wilson v. Black Bird Creek Marsh Co.* 2 Pet. 245, 7 L. ed. 412.

Where Congress has not acted, the states have full legislative power over state waters.

Gilman v. Philadelphia, 3 Wall. 713, 18 L. ed. 96; *Pollard v. Hagan*, 3 How. 212-230, 11 L. ed. 565-574; *Pacific Mail S. S. Co. v. Joliffe*, 2 Wall. 450, 17 L. ed. 805.

The states may adopt pilotage laws, subject to the limitations imposed by Congress.

Ex parte *McNiel*, 13 Wall. 236, 20 L. ed. 624; *Wilson v. McNamee*, 102 U. S. 572, 26 L. ed. 234; 2 Story, Const. § 1071; *Gibbons v. Ogden*, 9 Wheat. 1-207, 6 L. ed. 23-72; 53 L. ed.

Atkins v. Fibre Disintegrating Co. 18 Wall. 272, 21 L. ed. 841; *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Martin v. Wadell*, 16 Pet. 367, 10 L. ed. 997; *Pollard v. Hagan*, 3 How. 212, 11 L. ed. 565; *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. ed. 1058; *Barney v. Keokuk*, 94 U. S. 324, 24 L. ed. 224; *Packer v. Bird*, 137 U. S. 666, 34 L. ed. 820, 11 Sup. Ct. Rep. 210; *Gibson v. United States*, 166 U. S. 269, 41 L. ed. 996, 17 Sup. Ct. Rep. 578; *Cardwell v. American River Bridge Co.* 113 U. S. 205, 28 L. ed. 959, 5 Sup. Ct. Rep. 423; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157; *Lake Shore & M. S. R. Co. v. Ohio*, 165 U. S. 365, 41 L. ed. 747, 17 Sup. Ct. Rep. 357; *Willamette Iron Bridge Co. v. Hatch*, 125 U. S. 1, 31 L. ed. 629, 8 Sup. Ct. Rep. 811; *Monongahela Nav. Co. v. United States*, 148 U. S. 312, 37 L. ed. 463, 13 Sup. Ct. Rep. 622; *Hardin v. Jordan*, 140 U. S. 371, 35 L. ed. 428, 11 Sup. Ct. Rep. 808, 838.

Mr. Justice **Holmes** delivered the opinion of the court:

This is an information charging the plaintiff in error with piloting a foreign vessel from the Gulf of Mexico to New Orleans, the port to which she was bound, he not being a duly qualified pilot under the laws of Louisiana. He was convicted after a trial, and the supreme court of the state pronounced the judgment correct. 119 La. 522, 44 So. 285. By demurrer, motion to quash, and motion in arrest of judgment, he raised the objection that the power of Louisiana was not exclusive, and that a license from the board of pilot commissioners for the harbor of Natchez, Mississippi, was a sufficient authority under the act of Congress of March 2, 1837, chap. 22, 5 Stat. at L. 153, Rev. Stat. § 4236, U. S. Comp. Stat. 1901, p. 2903.

The Mississippi river, it will be remembered, is a boundary between Mississippi and Louisiana from below the port of Natchez as far north as Louisiana extends. On the other hand, all the southernmost portion of the river is wholly within Louisiana. The destination of the vessel which the plaintiff in error undertook to pilot was to a point within this southernmost portion,—New Orleans,—as the information charged. *For the purposes of decision it may[178 be assumed, although it is disputed, that the state of Mississippi has attempted to authorize the plaintiff in error to do what he did, while Louisiana has made his conduct criminal if it has power to do so under the United States law.

The section of the Revised Statutes reads as follows: "The master of any vessel com-

ing into or going out of any port situate upon waters which are the boundary between two states may employ any pilot duly licensed or authorized by the laws of either of the states bounded on such waters, to pilot the vessels to or from such port."

The case for the plaintiff in error depends upon the assumption that the "waters which are the boundary between two states" are, in this case, the whole Mississippi river so far as navigable. We are of opinion that the assumption is wrong, and that the limit of the waters referred to is the point at which they cease to be a boundary between two states. Neither continuity of water nor identity of name will carry them beyond that point. If the plaintiff in error had undertaken to pilot from the Gulf to Natchez, a different question would have been presented, and it may be that in that case the Mississippi license would have been good. But New Orleans, although upon the Mississippi, is not situate upon waters which are the boundary between two states, and therefore the section relied upon does not apply. That being out of the way, Louisiana had power to pass her local regulations. Rev. Stat. § 4235, act of August 7, 1789, chap. 9, § 4. 1 Stat. at L. 54, U. S. Comp. Stat. 1901, p. 2903.

Judgment affirmed.

179]*CITY OF DES MOINES, Appt.,

v.

DES MOINES CITY RAILWAY COMPANY.

(See S. C. Reporter's ed. 179-184.)

Federal courts — jurisdiction — Federal question.

The jurisdiction of a Federal circuit court of a suit by a street railway company to enjoin the enforcement of a municipal ordinance as impairing contract rights cannot be sustained, where such ordinance, after reciting that questions as to the company's rights have been raised, orders it to remove its tracks, and directs the city solicitor to take action to enforce the city's position, since such direction must contemplate enforcement by suit, and not the forcible removal of the tracks.

[For other cases, see Courts, 513-525, in Digest Sup. Ct. 1908.]

[No. 171.]

Argued April 21, 22, 1909. Decided May 17, 1909.

NOTE. — As to Federal question as conferring jurisdiction on United States courts — see notes to *Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & S. Min. Co.* 35 C. C. A. 7, and *Bailey v. Mosher*, 11 C. C. A. 308,

APPPEAL from the Circuit Court of the United States for the Southern District of Iowa to review a decree enjoining the enforcement of a municipal ordinance directing the removal of the tracks of a street railway company from the city streets. Reversed, with directions to dismiss the bill.

See same case below, 151 Fed. 854.

The facts are stated in the opinion.

Messrs. William H. Bailly, William H. Bremner, and Howard J. Clark argued the cause, and, with Mr. R. O. Brennan, filed a brief for appellant:

Whether a case presents a Federal question must be determined from the allegations of fact in the bill, giving them their natural and logical meaning and application, without regard to the arguments, conclusions, and surmises stated.

Devine v. Los Angeles, 202 U. S. 313-333, 50 L. ed. 1046-1053, 26 Sup. Ct. Rep. 652; *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66-78, 44 L. ed. 673-680, 20 Sup. Ct. Rep. 545; *St. Joseph & G. I. R. Co. v. Steele*, 167 U. S. 659-662, 42 L. ed. 315, 316, 17 Sup. Ct. Rep. 925; *Chappell v. Waterworth*, 155 U. S. 102-108, 39 L. ed. 85-87, 15 Sup. Ct. Rep. 34; *Arkansas v. Kansas & T. Coal Co.* 183 U. S. 185-188, 46 L. ed. 144-146, 22 Sup. Ct. Rep. 47; *Western U. Telg. Co. v. Ann Arbor R. Co.* 178 U. S. 243, 44 L. ed. 1054, 20 Sup. Ct. Rep. 867; *Hamblin v. Western Land Co.* 147 U. S. 531, 532, 37 L. ed. 267, 268, 13 Sup. Ct. Rep. 353; *Galveston, H. & S. A. R. Co. v. Texas*, 170 U. S. 226-236, 42 L. ed. 1017-1020, 18 Sup. Ct. Rep. 603; *Simkins, Suit in Equity*, p. 95.

If it appears from the entire record that a case does not really and substantially involve a dispute or controversy within the jurisdiction of the circuit court, jurisdiction must be denied.

Williams v. Nottawa, 104 U. S. 209-212, 26 L. ed. 719, 720; *Morris v. Gilmer*, 129 U. S. 315, 32 L. ed. 690, 9 Sup. Ct. Rep. 289; *Wetmore v. Rymer*, 169 U. S. 115-120, 42 L. ed. 682-684, 18 Sup. Ct. Rep. 293; *Barry v. Edmunds*, 116 U. S. 550, 29 L. ed. 729, 6 Sup. Ct. Rep. 501; *Deputron v. Young*, 134 U. S. 241, 33 L. ed. 923, 10 Sup. Ct. Rep. 539; *Simon v. House*, 46 Fed. 317; *Maxwell v. Atchison, T. & S. F. R. Co.* 34 Fed. 286; *Holden v. Utah & M. Machinery Co.* 82 Fed. 209; *Bank of Arapahoe v. David Bradley & Co.* 19 C. C. A. 206, 36 U. S. App. 519, 72 Fed. 867.

Law, in its regular course of administration, is due process; and, when secured by the law of the state, the constitutional requirement is satisfied.

2 Kent, Com. 13; *Davidson v. New Or.* 214 U. S.

leans. 96 U. S. 97, 24 L. ed. 616; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *Marehant v. Pennsylvania R. Co.* 153 U. S. 380, 38 L. ed. 751, 14 Sup. Ct. Rep. 894; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 43 L. ed. 552, 19 Sup. Ct. Rep. 281; *Caldwell v. Texas*, 137 U. S. 692-697, 34 L. ed. 816-818, 11 Sup. Ct. Rep. 224; *Leeper v. Texas*, 139 U. S. 462, 468, 35 L. ed. 225, 227, 11 Sup. Ct. Rep. 579.

The resolution shows that the city only intended to proceed by due process of law.

Cape May v. Cape May, D. B. & S. P. R. Co. 60 N. J. L. 224, 39 L.R.A. 609, 37 Atl. 892.

Mr. Nathaniel T. Guernsey argued the cause, and, with Messrs. William L. Read, George H. Carr, Alonzo C. Parker, and William E. Miller, filed a brief for appellee:

This case presents a Federal question and the jurisdiction is clear.

Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341; see also *Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311-322, 51 L. ed. 198-203, 27 Sup. Ct. Rep. 83; *Shoshone Min. Co. v. Rutter*, 177 U. S. 507, 44 L. ed. 865, 20 Sup. Ct. Rep. 726; *Saginaw Gaslight Co. v. Saginaw*, 28 Fed. 529; *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65, 46 L. ed. 808, 22 Sup. Ct. Rep. 585; *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 117, 48 L. ed. 898, 24 Sup. Ct. Rep. 586; *City R. Co. v. Citizens' Street R. Co.* 166 U. S. 562, 41 L. ed. 1116, 17 Sup. Ct. Rep. 653; *Walla Walla v. Walla Walla Water Co.* 172 U. S. 1, 43 L. ed. 341, 19 Sup. Ct. Rep. 77; *Iron Mountain R. Co. v. Memphis*, 37 C. C. A. 410, 96 Fed. 113; *Riverside & A. R. Co. v. Riverside*, 118 Fed. 736.

The argument that this enactment should be by ordinance, and that it is merely administrative, is beside the point, as is the argument that the city did not mean what it said.

Old Colony Trust Co. v. Wichita, 123 Fed. 779.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill brought in the circuit court by an Iowa corporation against a city of Iowa. The ground of jurisdiction is that a resolution of the city council of that city is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and, if carried out, will take the property of the corporation without due process of law, contrary to the 53 L. ed.

14th Amendment. The circuit court granted an injunction against the enforcement of the resolution, and the defendant appealed to this court.

The plaintiff, the appellee, sets up, under a certain ordinance, a right, unlimited as to time, to construct, maintain, and operate an electric street railway in and over the streets, alleys, and bridges of Des Moines. The resolution alleged to impair these rights is as follows:

"Whereas: Questions have been raised as to the rights of the Des Moines City Railway Company and the Interurban Railway Company to maintain their tracks and operate their lines upon and along and over the streets and bridges and public places of the city of Des Moines; and

"Whereas: It is essential to the preservation of the rights of the city of Des Moines that such questions be determined as speedily as possible,

"Be it resolved by the city council of [184 the city of Des Moines: That said companies be, and they are hereby, ordered to remove all of their tracks, poles, and wires from the streets, bridges, and public places of the city of Des Moines, and to restore and repair the surface and pavement, where paved, of all of the streets along which they are now operating their lines, and said companies are hereby ordered to commence said removal within twenty-five days after the passage of this resolution.

"Be it further resolved: That should the said railway companies fail to commence such removal within the time above specified the city solicitor be, and he is hereby, instructed to take such action as he shall deem advisable and necessary to secure the enforcement of the above resolution.

"Be it further resolved: That the city clerk be, and he is hereby, instructed to serve a certified copy of this resolution upon the Des Moines City Railway Company and the Interurban Railway Company forthwith."

We are of opinion that this is not a law impairing the rights alleged by the appellee, and therefore that the jurisdiction of the circuit court cannot be maintained. Leaving on one side all questions as to what can be done by resolution, as distinguished from ordinance, under Iowa laws, we read this resolution as simply a denial of the appellee's claim, and a direction to the city solicitor to resort to the courts if the appellee shall not accept the city's views. The resolution begins with a recital that questions as to the railway company's rights have been raised, and ends with a direction to the city solicitor to take action to enforce the city's position. The only action to be expected from a city solicitor is a suit in

court. We cannot take it to have been within the meaning of the direction to him that he should take a posse and begin to pull up the tracks. The order addressed to the companies to remove their tracks was simply to put them in the position of disobedience, as ground for a suit, if the city was right.

Decree reversed, with direction to dismiss the bill.

185]*ELIZABETH PECK, Petitioner,
v.
TRIBUNE COMPANY.

(See S. C. Reporter's ed. 185-190.)

Libel — photograph — mistaken identity.

1. The publication of a woman's portrait in an advertisement for whisky, in connection with a signed statement purporting to be made by her, to the effect that she is a nurse, and has used the whisky for herself and patients, and recommends it, is a publication of and concerning her, although the name appended to such statement is that of an entirely different person.

Libel — photograph — mistaken identity as defense.

2. The publication of the portrait of an entirely different person from the one to whom the annexed libelous article refers is not excused because it was by mistake, and without knowledge that it was not what it purported to be.

[Defenses to libel, see *Libel and Slander*, III. in *Digest Sup. Ct. 1908.*]

NOTE.—As to the liability of a newspaper proprietor for a libel published without his knowledge or consent—see note to *State v. Mason*, 26 L.R.A. 779.

Libel by publication of photograph as that of other person.

What little authority exists upon this question is in accord with the holding in *PECK v. TRIBUNE Co.* that the publication of a portrait in connection with a libelous article purporting to refer to the original of the portrait is a libel upon such person, although the name used in such article, and printed under the portrait, is that of an entirely different person.

Thus, the printing of a reproduced photograph in connection with an article stating that a certain person is a suicide fiend, and that, after a number of attempts when she usually went to the hospital to get the poison removed, she finally succeeded in killing herself, is a libel upon the original of the photograph, although the name used in the article does not belong to her. *Wandt v. Hearst's Chicago American*, 129 Wis. 419, 6 L.R.A. (N.S.) 919, 116 Am. St. Rep. 959, 109 N. W. 71, 9 A. & E. Ann. Cas. 864.

So, publishing, as a part of a newspaper account of a homicide, a portrait of a person as that of the one who had done the

Libel — injuring standing with general public.

3. A publication cannot be held, as a matter of law, not to be libelous, because it may not injure the plaintiff's standing with the general public, if it may injure her in the estimation of a considerable and respectable class of the community.

[What actionable as libel, see *Libel and Slander*, II. in *Digest Sup. Ct. 1908.*]

Libel — injuring standing with general public.

4. The publication in an advertisement for a brand of whisky, of the portrait of a woman, in connection with a signed statement purporting to have been made by her, that she is a nurse, and has used the whisky for herself and patients, and recommends it, cannot be said, as a matter of law, not to be libelous, because such publication may not injure her standing with the general public. [What actionable as libel, see *Libel and Slander*, II. in *Digest Sup. Ct. 1908.*]

[No. 191.]

Argued April 29, 30, 1909. Decided May 17, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Northern District of Illinois, directing a verdict for the defendant in an action for libel. Reversed.

See same case below, 83 C. C. A. 202, 154 Fed. 330.

The facts are stated in the opinion.

killing, is a libel upon the person whose portrait was so published, although the name printed thereunder, and used in the article itself, is that of an entirely different person. *James v. Ft. Worth Telegram Co.* (Tex. Civ. App.) 117 S. W. 1028.

The publication of a photograph in connection with an article which is libelous, and which refers specifically to the photograph which accompanies it, entitles the person whose photograph is so published to maintain an action for libel, although another person's name is printed beneath the photograph, and the article states facts tending to show that he was not the person referred to. *De Sando v. New York Herald Co.* 88 App. Div. 492, 85 N. Y. Supp. 111.

In *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725, the court apparently took it for granted that the publication of a photograph with no name attached, in connection with an advertisement of a book purporting to narrate the "experience of a giddy typewriter girl," imputed such experience to the original of the portrait.

Where a picture of a person was published in connection with an article, in regard to a person of the same name, purporting to contain an account of his career as a strike breaker, and which stated that

Mr. S. C. Irving argued the cause, and, with Messrs. Rufus S. Simmons and Frank J. R. Mitchell, filed a brief for petitioner:

The article declared upon was libelous and actionable *per se*.

Morrison v. Smith, 177 N. Y. 368, 69 N. E. 725; *Pavesieh v. New England L. Ins. Co.* 122 Ga. 190, 69 L.R.A. 101, 106 Am. St. Rep. 104, 50 S. E. 68, 2 A. & E. Ann. Cas. 561; *De Sando v. New York Herald Co.* 88 App. Div. 492, 85 N. Y. Supp. 111; *Farley v. Evening Chronicle Pub. Co.* 113 Mo. App. 223, 87 S. W. 565; *Ball v. Tribune Co.* 123 Ill. App. 235; *Wandt v. Hearst's Chicago American*, 129 Wis. 421, 6 L.R.A. (N.S.) 919, 116 Am. St. Rep. 959, 109 N. W. 70, 9 A. & E. Ann. Cas. 864; *Sheibley v. Ashton*, 130 Iowa, 197, 106 N. W. 618.

Words must be construed in their ordinary meaning.

Peake v. Oldham, Cowp. pt. 1, p. 275; *Woolnoth v. Meadows*, 5 East, 463; 2 Erskine's Speeches, p. 91.

The publication which imputes to a person language known to those among whom she lives to contain false statements is libelous.

White v. Nicholls, 3 How. 266, 11 L. ed. 591; *Odgers*, Libel & Slander, ed. from 2d Eng. ed. 293; *Sheahan v. Collins*, 20 Ill. 325, 71 Am. Dec. 271; *Prewitt v. Wilson*, 128 Iowa, 198, 103 N. W. 365; *Hake v. Brames*, 95 Ind. 161; *Monson v. Lathrop*, 96 Wis. 386, 65 Am. St. Rep. 54, 71 N. W. 596; *Lindley v. Horton*, 27 Conn. 58.

It is the province of the jury to decide,

under proper instructions from the court, whether the article was libelous.

Culmer v. Canby, 41 C. C. A. 302, 101 Fed. 197; *Pfitzinger v. Dubs*, 12 C. C. A. 399, 24 U. S. App. 376, 64 Fed. 696; *Townshend, Slander & Libel*, 4th ed. 576; *McDonald v. Woodruff*, 2 Dill. 244, Fed. Cas. No. 8,770.

A witness may be asked what impression the alleged libelous words made upon him.

Nelson v. Borehenius, 52 Ill. 238; *Chlatovich v. Hanehett*, 96 Fed. 686.

Introduction of a libelous article in evidence and proof of publication establishes the cause of action.

Kraus v. Sentinel Co. 60 Wis. 430, 19 N. W. 384.

Even though the libel does not name the person injured, it is sufficient if it can be shown that it refers to him.

Pavesieh v. New England L. Ins. Co. supra; *Barron v. Smith*, 19 S. D. 54, 101 N. W. 1105; *Morrison v. Smith*, 177 N. Y. 366, 69 N. E. 725; *Palmer v. Bennett*, 83 Hun, 220, 31 N. Y. Supp. 567.

Mistake is no excuse for the publication of a libel.

Hanson v. Globe Newspaper Co. 159 Mass. 299, 20 L.R.A. 856, 34 N. E. 462; *R. v. Woodfall*, Loft, 782; *Dexter v. Spear*, 4 Mason, 117, Fed. Cas. No. 3,867; *Post Pub. Co. v. Hallam*, 8 C. C. A. 201, 16 U. S. App. 613, 59 Fed. 536; *Clark v. North American Co.* 203 Pa. 351, 53 Atl. 237; *Ransom v. McCurley*, 140 Ill. 636, 31 N. E. 119.

he was the foe of organized labor, and had accepted a bribe from a labor organization on an agreement to leave a city during a strike, and, having gone outside the corporate limits, immediately returned,—such statements, though true in regard to the person about whom the article was written, being false as to the person whose portrait was published,—the jury was fully justified in finding that the article was published of and concerning the original of the photograph. *Farley v. Evening Chronicle Pub. Co.* 113 Mo. App. 216, 87 S. W. 565.

Printing the picture of one woman, in connection with a libelous article relating to the death of another, with the statement that such likeness is the latest photograph of the one to whom the article refers, does not necessarily establish that the words used in the article were published of the original of the portrait, but the question is one for the jury to determine, taking into consideration the facts and circumstances surrounding the two women, and those attendant upon the death of the one to whom the article refers. *Ball v. Evening American Pub. Co.* 237 Ill. 592, 86 N. E. 1097. But the court said that, if the declaration had averred that the printed account of the

death was published by it, and that, in connection with such article, the portrait of the plaintiff was published as a likeness of the dead woman, and had charged libel in publishing the picture in connection with the article, instead of charging that the publication of the words in and of itself constituted a libel,—a very different question would have been presented.

Reasonable care in publishing the wrong picture is suggested as a possible defense in *Farley v. Evening Chronicle Pub. Co.* supra, but mistake, as is plainly indicated by the foregoing cases, is ordinarily no excuse.

The fact that the person whose portrait is so published may not be injured in the estimation of those who know her well only affects the extent of the injury, and mitigates the damage. *Wandt v. Hearst's Chicago American*, supra.

To the same effect is *De Sando v. New York Herald Co.* supra, where the court said that the fact that persons who knew the plaintiff's real name, and who read the article through would be lead to the conclusion that he was not the person referred to, would not affect the libelous character of the act, though it might mitigate the damages.

Mr. John Barton Payne argued the cause, and, with Mr. William G. Beale, filed a brief for respondent:

The publication of the advertisement, together with the picture of the petitioner, was not libelous *per se*.

White v. Nicholls, 3 How. 266, 11 L. ed. 591; Pollard v. Lyon, 91 U. S. 225, 23 L. ed. 308; Com. v. Clap, 4 Mass. 168, 3 Am. Dec. 212; Sterling v. Jugenheimer, 69 Iowa, 210, 28 N. W. 559; Broughton v. McGrew, 5 L.R.A. 406, 39 Fed. 672; Stone v. Cooper, 2 Denio, 293; Goldberger v. Philadelphia Grocer Pub. Co. 42 Fed. 42; Walker v. Tribune Co. 29 Fed. 827.

Mr. Justice Holmes delivered the opinion of the court:

This is an action on the case for a libel. The libel alleged is found in an advertisement printed in the defendant's newspaper, The Chicago Sunday Tribune, and, so far as is material, is as follows: "Nurse and Patients Praise Duffy's. Mrs. A. Schuman, One of Chicago's Most Capable and Experienced Nurses, Pays an Eloquent Tribute to the Great Invigorating, Life-Giving, and Curative Properties of Duffy's Pure Malt Whisky." Then followed a portrait of the plaintiff, with the words, "Mrs. A. Schuman," under it. Then, in quotation marks, "After years of constant use of your Pure Malt Whisky, both by myself and as given to patients in my capacity as nurse, I have no hesitation in recommending it as the very best tonic and stimulant for all weak and run-down conditions," etc., etc., with the words, "Mrs. A. Schuman, 1576 Mozart st., Chicago, Ill.," at the end, not in quotation marks, but conveying the notion of a signature, or at least that the words were hers. The declaration alleged that the plaintiff was not Mrs. Schuman, was not a nurse, and was a total abstainer from whisky and all spirituous liquors. There was also a count for publishing the plaintiff's likeness without leave. The defendant pleaded not guilty. At the trial, subject to exceptions, the judge excluded the plaintiff's testimony in support of her allegations just stated, and directed a verdict for the defendant. His action was sustained by the circuit court of appeals, 83 C. C. A. 202, 154 Fed. 330.

Of course, the insertion of the plaintiff's picture in the place and with the concomitants that we have described imported that she was the nurse and made the statements 189]set forth, as *rightly was decided in Wandt v. Hearst's Chicago American, 129 Wis. 419, 421, 6 L.R.A. (N.S.) 919, 116 Am. St. Rep. 959, 109 N. W. 70, 9 A. & E. Ann. Cas. 864; Morrison v. Smith, 177 N. Y. 366, 69 N. E. 725. Therefore the publica-

tion was of and concerning the plaintiff, notwithstanding the presence of another fact, the name of the real signer of the certificate, if that was Mrs. Schuman, that was inconsistent, when all the facts were known, with the plaintiff's having signed or adopted it. Many might recognize the plaintiff's face without knowing her name, and those who did know it might be led to infer that she had sanctioned the publication under an alias. There was some suggestion that the defendant published the portrait by mistake, and without knowledge that it was the plaintiff's portrait, or was not what it purported to be. But the fact, if it was one, was no excuse. If the publication was libelous, the defendant took the risk. As was said of such matters by Lord Mansfield, "Whenever a man publishes, he publishes at his peril." R. v. Woodfall, Lofft, 776, 781. See further, Hearne v. Stowell, 12 Ad. & El. 719, 726; Shephard v. Whitaker, L. R. 10 C. P. 502; Clarke v. North American Co. 203 Pa. 346, 351, 352, 53 Atl. 237. The reason is plain. A libel is harmful on its face. If a man sees fit to publish manifestly hurtful statements concerning an individual, without other justification than exists for an advertisement or a piece of news, the usual principles of tort will make him liable if the statements are false, or are true only of someone else. See Morasse v. Brochu, 151 Mass. 567, 575, 8 L.R.A. 524, 21 Am. St. Rep. 474, 25 N. E. 74.

The question, then, is whether the publication was a libel. It was held by the circuit court of appeals not to be, or, at most, to entitle the plaintiff only to nominal damages, no special damage being alleged. It was pointed out that there was no general consensus of opinion that to drink whisky is wrong, or that to be a nurse is discreditable. It might have been added that very possibly giving a certificate and the use of one's portrait in aid of an advertisement would be regarded with irony, or a stronger feeling, only by a few. But it appears to us that such inquiries are beside the point. It may *be that[190 the action for libel is of little use, but, while it is maintained, it should be governed by the general principles of tort. If the advertisement obviously would hurt the plaintiff in the estimation of an important and respectable part of the community, liability is not a question of a majority vote.

We know of no decision in which this matter is discussed upon principle. But obviously an unprivileged falsehood need not entail universal hatred to constitute a cause of action. No falsehood is thought about or even known by all the world. No conduct is hated by all. That it will be

known by a large number, and will lead an appreciable fraction of that number to regard the plaintiff with contempt, is enough to do her practical harm. Thus, if a doctor were represented as advertising, the fact that it would affect his standing with others of his profession might make the representation actionable, although advertising is not reputed dishonest, and even seems to be regarded by many with pride. See *Martin v. The Picayune* (*Martin v. Nicholson Pub. Co.*) 115 La. 979, 4 L.R.A. (N.S.) 861, 40 So. 376. It seems to us impossible to say that the obvious tendency of what is imputed to the plaintiff by this advertisement is not seriously to hurt her standing with a considerable and respectable class in the community. Therefore it was the plaintiff's right to prove her case and go to the jury, and the defendant would have got all that it could ask if it had been permitted to persuade them, if it could, to take a contrary view. *Culmer v. Canby*, 41 C. C. A. 302, 101 Fed. 195, 197; *Twombly v. Monroe*, 136 Mass. 464, 469. See *Gates v. New York Recorder Co.* 155 N. Y. 228, 49 N. E. 769.

It is unnecessary to consider the question whether the publication of the plaintiff's likeness was a tort *per se*. It is enough for the present case that the law should at least be prompt to recognize the injuries that may arise from an unauthorized use in connection with other facts, even if more subtilty is needed to state the wrong than is needed here. In this instance we feel no doubt.

Judgment reversed.

191]*CHESAPEAKE & OHIO RAILWAY COMPANY and Maysville & Big Sandy Railroad Company, Plffs. in Err.,

v.

J. W. McDONALD, Administrator of Nancy J. Wilson, Deceased.

(See S. C. Reporter's ed. 191-196.)

Error to state court — Federal question — how raised and decided.

The refusal by an inferior state court of an application to remove a cause to a Federal circuit court presents no Federal question which will sustain a writ of error un-

der U. S. Rev. Stat. § 709, U. S. Comp. Stat. 1901, p. 575, from the Supreme Court of the United States, to review a judgment of the highest state court, affirming the judgment below, where there is nothing in the record to indicate that the question of the right of removal was brought to the attention of the highest state court, and that court could not have considered the question even if presented, because, at the time the appeal from the final judgment was taken, it was too late to review the order refusing the removal.

[For other cases, see Appeal and Error, 1168-1430, in Digest Sup. Ct. 1908.]

[No. 158.]

Argued April 19, 1909. Decided May 17, 1909.

IN ERROR to the Court of Appeals of the State of Kentucky to review a judgment which, on a second appeal, affirmed a judgment of the Lewis Circuit Court, in that state, in favor of plaintiff in an action to recover damages for an alleged wrongful death. Dismissed for want of jurisdiction.

See same case below on first appeal, 27 Ky. L. Rep. 778, 86 S. W. 690; on second appeal, 31 Ky. L. Rep. 500, 102 S. W. 810.

The facts are stated in the opinion.

Mr. E. L. Worthington argued the cause, and, with Messrs. W. H. Wadsworth, W. D. Cochran, and LeWright Browning, filed a brief for plaintiffs in error.

Mr. Allan D. Cole argued the cause, and, with Messrs. Thomas R. Phister, R. D. Wilson, and W. T. Cole, filed a brief for defendant in error.

Mr. Justice Day delivered the opinion of the court:

The defendant in error, J. W. McDonald, as administrator of Nancy J. Wilson, deceased, on March 23, 1900, brought *suit [192 in the Lewis circuit court of Kentucky against the Chesapeake & Ohio Railway Company and the Maysville & Big Sandy Railroad Company, and certain employees of the former, to recover damages for the alleged wrongful death of Nancy J. Wilson. On May 29, 1900, the Chesapeake & Ohio Railway Company, a corporation of Virginia, filed a petition for removal of the case to

NOTE. — On how and when questions must be raised and decided in a state court in order to make a case of a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

On what the record must show respecting the presentation and decision of a Federal question in order to confer jurisdiction on 53 L. ed.

the Supreme Court of the United States of a writ of error to a state court—see note to *Hooker v. Los Angeles*, 63 L.R.A. 471.

As to when the Federal question is raised in time to sustain the appellate jurisdiction of the Federal Supreme Court over state courts—see note to *Chicago, I. & L. R. Co. v. McGuire*, 49 L. ed. U. S. 414.

the United States circuit court for the eastern district of Kentucky, and an order of removal was made accordingly. On September 3, 1902, the case having been remanded by the United States circuit court, it was redocketed in the state court. On January 19, 1903, the plaintiff discontinued the action as against the five individual defendants. On January 21, 1903, the Chesapeake & Ohio Railway Company filed another petition to remove the case to the United States circuit court on the ground of separable controversy. This motion for removal was overruled by the Lewis circuit court, and, thereafter, on May 19, 1904, the case went to trial in the Lewis circuit court, and that court directed a verdict for the railroad companies. Upon appeal to the court of appeals of Kentucky, that judgment was reversed. 27 Ky. L. Rep. 778, 86 S. W. 690.

A second trial of the case in the Lewis circuit court, on September 27, 1906, resulted in a verdict and judgment for the defendant in error. From that judgment an appeal was taken to the Kentucky court of appeals, and it was there affirmed. 31 Ky. L. Rep. 500, 102 S. W. 810.

The Federal question attempted to be presented grows out of the alleged error in refusing, upon the second application, to remove the cause from the Lewis circuit court to the United States circuit court for the eastern district of Kentucky.

The right to review a judgment of a state court by error proceedings in this court is regulated by § 709 of the Revised Statutes of the United States (U. S. Comp. Stat. 1901, p. 575). To lay the foundation for such right of review it is necessary to bring the Federal question in some proper manner to the consideration of the state court whose judgment it is sought to review; if this is not done, the Federal question cannot be [193]originated by assignments of error *in this court. The Federal right asserted in this case comes within the third class named in § 709 of the Revised Statutes, wherein a right, title, privilege, or immunity is claimed under the United States, and the decision is against such right, title, privilege, or immunity. In this class of cases the statute requires that such right or privilege must be specifically set up and claimed in the state court; and in any of the classes of cases mentioned in § 709 it is essential that the record disclose that the Federal question involved was decided, or that the judgment necessarily involved the Federal right, and decided it adversely to the claim of the plaintiff in error. *Columbia Water Power Co. v. Columbia Electric Street R. Light & P. Co.* 172 U. S. 475, 43 L. ed. 521, 19 Sup. Ct. Rep. 247; *Fowler v. Lamson*, 164

U. S. 252, 41 L. ed. 424, 17 Sup. Ct. Rep. 112; *Clarke v. McDade*, 165 U. S. 168, 172, 41 L. ed. 673, 674, 17 Sup. Ct. Rep. 284; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 248, 46 L. ed. 171, 176, 22 Sup. Ct. Rep. 120, 124. In the latter case this court said:

"It is settled that this court, on error to a state court, cannot consider an alleged Federal question when it appears that the Federal right thus relied upon had not been, by adequate specification, called to the attention of the state court, and had not been by it considered, not being necessarily involved in the determination of the cause. *Green Bay & M. Canal Co. v. Patten Paper Co.* 172 U. S. 58, 67, 43 L. ed. 364, 368, 19 Sup. Ct. Rep. 97; *F. G. Oxley Stave Co. v. Butler County*, 166 U. S. 648, 655, 41 L. ed. 1149, 1151, 1152, 17 Sup. Ct. Rep. 709, and cases cited."

In the opinion of the Kentucky court of appeals in this case the question of the correctness of the order of removal is not considered, nor is there anything in the record to indicate that the alleged error in refusing to remove the case on the second application was brought to the attention of the Kentucky court of appeals. In this court the assignments of error concern the alleged error in refusing to remove the case upon the second application, and avers that the Kentucky court of appeals erred in holding, in substance and effect, that the plaintiff in error had no such right of removal. But, as we have said, the assignments of error in this court cannot enlarge the right of review. Moreover, it is apparent that, if the question of the right of removal was brought before the Kentucky *court of [194] appeals upon the judgment to which this writ of error is prosecuted, it would not have considered the question. The refusal to remove upon the second application was in January, 1903. The judgment which was taken to the court of appeals for review in the present case was rendered on September 27, 1906.

The Kentucky Civil Code of Practice provides that an appeal from judgments and final orders, which includes such orders as the one now under consideration (*Hall v. Ricketts*, 9 Bush, 366, 370), shall not be granted except within two years after the right of appeal first accrued. No appeal was taken from the order refusing to remove within two years. At the time when the appeal in the present case was made to the Kentucky court of appeals it was too late to review the order refusing to remove. In the case of *Maysville & B. S. R. Co. v. Willis*, 31 Ky. L. Rep. 1249, 1252, 104 S. W. 1016, 1018, the court of appeals of Kentucky, dealing with the question, said:

"It is further insisted that it was error

not to grant request of appellant to remove the action to the Federal court. This motion was based upon the ground that the original petition did not state a good cause of action against either the Chesapeake & Ohio Railway Company, which is a foreign corporation, or the resident defendant, the Maysville & Big Sandy Railroad Company. . . . The action of the lower court, refusing to transfer the action, was made and entered in July, 1903, and it is now too late to raise any question as to the regularity of this ruling. In fact, this appeal is prosecuted alone from the judgment rendered in October, 1906, and, under no state of case, could this court review an error of the character complained of, committed in 1903."

It is contended, however, that, if the case were a removable one, the effect of filing a petition and bond was to divest the jurisdiction of the state court; and this has been said in decisions of this court upon the subject. This does not mean, however, that the right to review the judgment of a state court only by proper proceedings under § 709 195] of the Revised Statutes *is in anywise altered or modified. When the state court, upon the second application, refused to remove the case, it was the privilege of the railroad company to take a transcript of the record, and make an application to file it in the Federal circuit court; and, if that court sustained its jurisdiction, it might have protected the same by injunction against further proceedings in the state court, or if the latter court refused to surrender the record, a writ of certiorari could issue to require its transfer to the circuit court of the United States (*Chesapeake & O. R. Co. v. McCabe*, decided April 5, 1909, 213 U. S. 207, ante, 765, 29 Sup. Ct. Rep. 430); or, remaining in the state court after that court refused to remove, it might, after final judgment, have brought the case here for review; but this does not mean that it could have a review of the judgment of the state court when it has failed to invoke the judgment of that court within the time prescribed by the statute of the state for the review of such orders. Under the statute in Kentucky the review of the order refusing to remove could only be had within two years. Within that time the plaintiffs in error could have taken the question to the Kentucky court of appeals, and, if the ruling was against it, after final judgment, could have brought the case here for review. But it could not remain in the state court, without any attempt to have the order refusing the removal reviewed within the statutory period, and escape its judgment on the ground that it was void, if against it, because the case was a removable one.

53 L. ed.

In *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 934, 25 Sup. Ct. Rep. 176, it was held that a Federal constitutional objection might be waived, so far as having the right of review of a judgment in a state court was concerned, where the record in the case disclosed that the question was not made in the state court by proper procedure or argument in support of the assertion of the Federal question, and the state court had, for that reason, held the right to review the Federal question waived.

We are of the opinion that this case presents no valid exception to the ruling of the state court upon a Federal question duly reserved by some proper form of procedure, as is required by *§ 709 of the Revised [196 Statutes of the United States, in order to be reviewable here.

It follows that the writ of error must be dismissed.

Dismissed.

W. O. ROGERS, JR., Ellen G. M. Rogers,
John B. Martin, et al., Plffs. in Err.,

v.

JOSEPH T. JONES, the County of Harrison, et al.

(See S. C. Reporter's ed. 196-204.)

Error to state court—Federal question—decision on non-Federal grounds.

A decree of a state court dismissing the bill in a suit to remove a cloud on title is not reviewable in the Federal Supreme Court because of a ruling that an execution sale by a Federal marshal, relied upon as the foundation of title, was made at the wrong place, where the decree is also based upon the grounds that the alleged return on the writ of fieri facias did not describe the lands in controversy, that title had not been deraigned as required by the state statute under which the suit was

NOTE.—On the general subject of writs of error from United States Supreme Court to state courts—see notes to *Martin v. Hunter*, 4 L. ed. U. S. 97; *Williams v. Norris*, 6 L. ed. U. S. 571; *Hamblin v. Western Land Co.* 37 L. ed. U. S. 267; *Kipley v. Illinois*, 42 L. ed. U. S. 998; and *Re Buchanan*, 39 L. ed. U. S. 884.

On what adjudications of state courts can be brought up for review in the Supreme Court of the United States by writ of error to those courts—see note to *Apex Transp. Co. v. Garbade*, 62 L.R.A. 513.

On how and when questions must be raised and decided in a state court in order to make a case for a writ of error from the Supreme Court of the United States—see note to *Mutual L. Ins. Co. v. McGrew*, 63 L.R.A. 33.

brought, and that the suit was barred by the state statute of limitations.

[For other cases, see Appeal and Error, 1465-1528, in Digest Sup. Ct. 1908.]

[No. 196.]

Submitted April 27, 1909. Decided May 24, 1909.

IN ERROR to the Supreme Court of the State of Mississippi to review a decree which, on a second appeal, affirmed a decree of the Chancery Court for Harrison County, in that state, dismissing the bill in a suit to remove a cloud on title. Dismissed for want of jurisdiction.

See same case below on 1st appeal, 85 Miss. 802, 38 So. 742.

Statement by Mr. Chief Justice Fuller:

This was a bill in equity brought by Rogers and others, plaintiffs in error, November 11, 1903, in the chancery court for Harrison county, Mississippi, to remove certain alleged clouds from the title to lands situated in that county, and to be put in possession of said lands, against J. T. Jones, Harrison county, and the persons constituting the board of supervisors of the county, as individuals and as composing that board.

Defendants demurred, and the demurrer was overruled by the chancellor. An appeal was taken from this decree to the supreme court of Mississippi, where the decree of the lower court was reversed and the cause remanded. *Jones v. Rogers*, 85 Miss. 802, 38 197] So. 742. *Thereupon plaintiffs in error filed an amended bill. To the amended bill Jones and the county severally filed demurrers and also answers denying certain allegations of fraud. On rehearing, the chancellor sustained the demurrers, and plaintiffs in error refusing to amend or plead further, the amended bill was dismissed December 23, 1905. From this decree plaintiffs in error appealed to the state supreme court, where it was affirmed October 22, 1906, and from this judgment plaintiffs in error have prosecuted the pending writ of error.

The material averments of the amended bill were that plaintiffs in error claimed title to certain lands described in the bill, by virtue of a purchase of said lands by "their ancestor," John Martin, at a sale of said lands on October 28, 1839, made by the United States marshal under an execution on a judgment of the United States circuit court for the southern district of Mississippi, against one James McLaren.

That plaintiffs in error are the "legal descendants and sole surviving heirs at law of John Martin, deceased, who died intestate in the city of New Orleans and state of Louisiana, during the year 1848." That Mar-

tin, at the time of his death, was seised and possessed of, in fee simple, in addition to other lands, certain described lands or parcels of land, which include the lands in controversy, situated in the town of Gulfport, county of Harrison (Hancock county at the time of the sale), and state of Mississippi. That plaintiffs in error are tenants in common, and all derived their title "from their common ancestor, John Martin, by descent." That James McLaren acquired said lands by sales from the United States government, dated December 11, 1834, and a patent dated January 5, 1841.

That, at the sale of the land under an execution on the judgment against McLaren, Martin became the highest and best bidder at and for the sum of \$760, and the same was knocked off to him by the United States marshal, and the purchase money was then and there paid by Martin to the marshal, and *he was then and there put into [198 possession, and so remained until his death, in the year 1848.

The amended bill further averred that the land was in Harrison county, Mississippi, and that John Martin never sold nor made any disposition of any kind of the lands; that plaintiffs in error have been all the while in constructive possession of the lands since the death of John Martin, in 1848, and that no person or persons ever went into actual possession of the lands until the county of Harrison or the board of supervisors thereof took possession under deed of June 4, 1902, from J. T. Jones.

The bill alleged upon belief that, at the sale, a deed to the lands was made by the marshal to John Martin, and, in this connection, the bill further alleged that another sale of lands was made on the same execution, and the deeds were made by the marshal to the purchasers at said sale.

That McLaren died intestate, leaving no heirs at law, either lineal or collateral, and that the lands never escheated to the state of Mississippi.

The bill further alleged that, while plaintiffs in error were minors, the administrator of McLaren procured a certified copy of the judgment and execution and proceedings of the sale, and, with the purpose of depriving plaintiffs in error of their legal right and title to the lands, organized a company to take charge of the lands, concealing the facts of the said sale. That the company kept the facts of the real ownership from the plaintiffs in error, and sold some of the lands without knowledge of their legal rights to said property until the last four or five years. That as soon as the fact of the purchase and ownership of the lands by John Martin was made known to them, plaintiffs in error at once began to take the neces-

sary legal steps to begin suit to establish the claim.

The bill also alleged that defendants in error had full notice of the claim to the title of plaintiffs in error, but they accepted the gift of the land in controversy from J. T. Jones, and had full knowledge of the fraud that had been practised upon them from its beginning to the present time. That on June 199]4, 1902, *Jones conveyed by deed the land in Gulfport, as a gift, to the board of supervisors of Harrison county, with the condition that, should the county of Harrison at any time cease to use the lands for the courthouse, they should revert to Jones.

The bill further stated that if the supreme court of Mississippi should decide against the validity of the marshal's sale under the judgment and execution, plaintiffs in error "claim the right and benefit of an appeal from the final decree to the Supreme Court of the United States."

The original bill had averred, "*par parenthesis*, that they are claiming their rights and title to this property under a marshal's sale made under and by virtue of the laws and Constitution of the United States of America, and they now and here desire to lay the proper predicate, so that they may have these proceedings in this case revised and reviewed by the Supreme Court of the United States, in case the decision of the supreme court of the state of Mississippi is adverse to their lawful, just, and bona fide claim, having derived the same from the patentee of these lands."

The answers of the supervisors and of Jones denied notice or knowledge of any fraud on complainants, and, having answered the bill for the purposes of that denial, prayed the judgment of the court on the demurrers.

Mr. Frank Johnston submitted the cause for plaintiffs in error. Mr. A. Y. Harper was on the brief:

The writ of error will lie in this case on the ground that the supreme court of Mississippi erroneously held that the judicial sale, made by the United States marshal under a judgment rendered by the United States circuit court for the southern district of Mississippi, and under which the plaintiffs in error claim title to the lands in controversy, was irregular and void, and conferred no title upon the purchaser at such sale.

Collier v. Stanbrough, 6 How. 14, 12 L. ed. 324; Erwin v. Lowry, 7 How. 172, 12 L. ed. 655; Clements v. Berry, 11 How. 398, 13 L. ed. 745; Freeman v. Howe, 24 How. 450, 16 L. ed. 749; Buck v. Colbath, 3 Wall. 334, 18 L. ed. 257; Etheridge v. Sperry, 139 U. S. 266, 35 L. ed. 171, 11 Sup. Ct. Rep. 563; Bock v. Perkins, 139 U. S. 628, 35 L. ed. 53 L. ed.

314, 11 Sup. Ct. Rep. 677; Day v. Gallup (Derby v. Gallup) 2 Wall. 97, 17 L. ed. 855; Dupasseur v. Rochereau, 21 Wall. 130, 22 L. ed. 588; McKenna v. Simpson, 129 U. S. 506, 32 L. ed. 771, 9 Sup. Ct. Rep. 365; O'Brien v. Weld, 92 U. S. 81, 23 L. ed. 675; Factors' & T. Ins. Co. v. Murphy, 111 U. S. 738, 28 L. ed. 582, 4 Sup. Ct. Rep. 679; Stanley v. Schwalby, 162 U. S. 255, 40 L. ed. 960, 16 Sup. Ct. Rep. 754; Pittsburgh, C. C. & St. L. R. Co. v. Long Island Loan & T. Co. 172 U. S. 493, 43 L. ed. 528, 19 Sup. Ct. Rep. 238; Tullock v. Mulvane, 184 U. S. 497, 507, 46 L. ed. 657, 664, 22 Sup. Ct. Rep. 372; Avery v. Popper, 179 U. S. 305, 310, 45 L. ed. 203, 205, 21 Sup. Ct. Rep. 94; Crescent City L. S. L. & S. H. Co. v. Butchers' Union, S. H. & L. S. L. Co. 120 U. S. 141, 30 L. ed. 614, 7 Sup. Ct. Rep. 472; Meyers v. Block, 120 U. S. 206, 30 L. ed. 642, 7 Sup. Ct. Rep. 525; Commercial Pub. Co. v. Beckwith, 188 U. S. 567, 569, 47 L. ed. 598, 599, 23 Sup. Ct. Rep. 382; Sharpe v. Doyle, 102 U. S. 686, 688, 26 L. ed. 277, 278; McNulta v. Lochridge, 141 U. S. 327, 331, 35 L. ed. 796, 799, 12 Sup. Ct. Rep. 11; Nutt v. Knut, 200 U. S. 12, 19, 50 L. ed. 348, 352, 26 Sup. Ct. Rep. 216; Illinois C. R. Co. v. McKendree, 203 U. S. 514, 526, 51 L. ed. 298, 303, 27 Sup. Ct. Rep. 153.

A Federal question is sufficiently set up or claimed when it appears that the contentions involving it were raised by the pleadings, or called to the attention of the court in some proper way.

Tullock v. Mulvane, 184 U. S. 497, 503, 46 L. ed. 657, 662, 22 Sup. Ct. Rep. 372; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15 Sup. Ct. Rep. 777; Chouteau v. Gibson, 111 U. S. 200, 28 L. ed. 400, 4 Sup. Ct. Rep. 340; Yates v. Jones Nat. Bank, 206 U. S. 158, 167, 51 L. ed. 1002, 1009, 27 Sup. Ct. Rep. 638.

The decision of the supreme court of Mississippi, on the first appeal (Jones v. Rogers, 85 Miss. 802, 38 So. 742), has been expressly overruled in the subsequent case of Kennedy v. Sanders, 90 Miss. 524, 43 So. 913, which held that the real ground of the decision was the question of the validity of the title of plaintiffs in error, and that that part of the opinion in respect to the statute of limitations was a mere *dictum*, and, furthermore, was incorrectly decided.

If, therefore, the question of the statute of limitations were in this case (which we deny), the decision of it by the supreme court, on the first appeal, would have to be held by this court to be palpably erroneous.

Johnson v. Risk, 137 U. S. 300, 307, 34 L. ed. 683, 686, 11 Sup. Ct. Rep. 111; Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Maguire v. Tyler, 8 Wall. 650, 664, 665, 19 L. ed. 320, 324, 325; Berea College

v. Kentucky, 211 U. S. 45, ante, 81, 29 Sup. Ct. Rep. 33.

It is elementary that a certificate of a court of last resort may serve to elucidate the determination whether a Federal question exists.

Illinois C. R. Co. v. McKendree, 203 U. S. 514, 525, 51 L. ed. 298, 303, 27 Sup. Ct. Rep. 153.

Where, on error to the supreme court of the state, the record shows a decision of the state court on a Federal question properly presented, and to which this court could take jurisdiction, and shows also the decision of the local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the Federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment, even if the Federal question was erroneously decided.

Baltimore & O. R. Co. v. Maryland, 20 Wall. 643, 22 L. ed. 446.

It is the duty of the state courts to decide Federal questions; if errors supervene, the remedy is open to the aggrieved party.

Arkansas v. Kansas & T. Coal Co. 183 U. S. 185, 190, 191, 46 L. ed. 144, 147, 22 Sup. Ct. Rep. 47; Defiance Water Co. v. Defiance, 191 U. S. 184, 193, 194, 48 L. ed. 140, 144, 145, 24 Sup. Ct. Rep. 63; Robb v. Connolly, 111 U. S. 624, 28 L. ed. 542, 4 Sup. Ct. Rep. 544.

Messrs. James H. Neville and Walter A. White submitted the cause for defendants in error:

The bare averment of a Federal question is not sufficient; there must, at least, be color or ground for such averment.

Hamblin v. Western Land Co. 147 U. S. 531, 37 L. ed. 267, 13 Sup. Ct. Rep. 353.

The fact that a party to a suit is a receiver of a United States court does not necessarily create a Federal question authorizing a review of the case by the Supreme Court of the United States.

Bausman v. Dixon, 173 U. S. 113, 43 L. ed. 633, 19 Sup. Ct. Rep. 316; Capital Nat. Bank v. First Nat. Bank, 172 U. S. 425, 43 L. ed. 502, 19 Sup. Ct. Rep. 202.

Nor does the fact that plaintiffs in error claim lands under a patentee of the United States create such Federal question.

Blackburn v. Portland Gold Min. Co. 175 U. S. 571, 44 L. ed. 276, 20 Sup. Ct. Rep. 222; McStay v. Friedman, 92 U. S. 723, 23 L. ed. 767; Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 24 L. ed. 656; Shoshone Min. Co. v. Rutter, 177 U. S. 505, 44 L. ed. 864, 20 Sup. Ct. Rep. 726.

The determination by a state court of a Federal question adversely to the plaintiff in error will not sustain the jurisdiction of the Supreme Court of the United States, if another question, not Federal, was also raised and decided against him, and the decision thereof is sufficient, notwithstanding the Federal question, to sustain the judgment.

Harrison v. Morton, 171 U. S. 38, 43 L. ed. 63, 18 Sup. Ct. Rep. 742; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Egan v. Hart, 165 U. S. 188, 41 L. ed. 680, 17 Sup. Ct. Rep. 300; Castillo v. McConnico, 168 U. S. 674, 42 L. ed. 622, 18 Sup. Ct. Rep. 229; Pierce v. Somerset R. Co. 171 U. S. 641, 43 L. ed. 316, 19 Sup. Ct. Rep. 64; Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co. 172 U. S. 465, 43 L. ed. 517, 19 Sup. Ct. Rep. 265; Brooks v. Missouri, 124 U. S. 394, 31 L. ed. 454, 8 Sup. Ct. Rep. 443; Union Nat. Bank v. Louisville, N. A. & C. R. Co. 163 U. S. 325, 41 L. ed. 177, 16 Sup. Ct. Rep. 1039.

It is not enough to give the Supreme Court of the United States jurisdiction over the judgment of a state court for the record to show that a Federal question was argued or presented to that court for decision. It must appear that such Federal question was necessary to the determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it.

Moore v. Mississippi. 21 Wall. 636, 22 L. ed. 653; Bolling v. Lersner, 91 U. S. 594, 23 L. ed. 366; Brown v. Atwell, 92 U. S. 327, 23 L. ed. 511; Citizens' Bank v. Board of Liquidation (Louisiana ex rel. Citizens' Bank v. Board of Liquidation) 98 U. S. 140, 25 L. ed. 114; Endowment & Benev. Asso. v. Kansas, 120 U. S. 103, 30 L. ed. 593, 7 Sup. Ct. Rep. 499; Marrow v. Brinkley, 129 U. S. 178, 32 L. ed. 654, 9 Sup. Ct. Rep. 267; Church v. Kelsey, 121 U. S. 282, 30 L. ed. 960, 7 Sup. Ct. Rep. 897; De Saussure v. Gaillard, 127 U. S. 216, 32 L. ed. 125, 8 Sup. Ct. Rep. 1053; Blount v. Walker, 134 U. S. 607, 33 L. ed. 1036, 10 Sup. Ct. Rep. 606; Johnson v. Risk, 137 U. S. 300, 34 L. ed. 683, 11 Sup. Ct. Rep. 111; Cook County v. Calumet & C. Canal & Dock Co. 138 U. S. 635, 34 L. ed. 1110, 11 Sup. Ct. Rep. 435; Walter A. Wood Mowing & Reaping Mach. Co. v. Skinner, 139 U. S. 293, 35 L. ed. 193, 11 Sup. Ct. Rep. 528.

Where one of the points decided in the supreme court of a state against the plaintiff in error would be a sufficient ground for the exercise of jurisdiction by the Supreme Court of the United States, yet, if the decree is also based on another and distinct

ground over which the national court has no jurisdiction,—as the statute of limitations of the state,—the decree is beyond the revisory power of the Supreme Court of the United States.

Rector v. Ashley, 6 Wall. 142, 18 L. ed. 733.

Mr. Chief Justice Fuller delivered the opinion of the court:

In entering the decree of December 23, 1905, the chancellor manifestly proceeded on the decision of the supreme court of Mississippi, reported 85 Miss. 802, 38 So. 742, as did the supreme court in affirming, October 22, 1906, the chancellor's decree. To this decree the pending writ of error was allowed and issued September 18, 1907.

The contention is that, in determining the rights of plaintiffs in error, the Mississippi supreme court put a wrong construction upon the special act of Congress of February 16, 1839 [5 Stat. at L. 317, chap. 27], referring to the time and place for the making of judicial sales in Mississippi, in that it held that the marshal's sale relied on as the foundation of title was made at the wrong place. But the supreme court made other and decisive rulings, as well as that in reference to the place of the alleged sale.

In the first place, that court held that the alleged return on the writ of fieri facias did not describe the lands in controversy, and therefore could not confer title, even though regular and valid. The act of Congress of February 16, 1839, did not attempt to define what is and what is not a good and valid description of real estate, or to make any rule by which a purchaser at a marshal's sale could take possession of lands other [204]*than those specifically described in the process. The question of a sufficient description was a question of general law.

In the second place, the court held that, under the Mississippi statute authorizing suits of the character then before the court, plaintiffs in error had not deraigned a title to the lands in controversy, which, under the Mississippi statute under which the suit was instituted, was a fatal objection to the bill.

In the third place, the court held that the claim of plaintiffs in error was barred by the Mississippi statute of limitations, in that it failed to show possession by the plaintiffs, or their ancestor, during the sixty-four years that intervened between the marshal's sale and the bringing of the suit, and did not, as required by the rules of practice in courts of equity in Mississippi, show that it was the defendants or those in privity with them who had fraudulently canceled from plaintiffs the evidence of their claim.

It is true that the supreme court of Mississippi in the subsequent case of *Kennedy* 53 L. ed.

v. Sanders, 90 Miss. 524, 43 So. 913, decided May 20, 1907, overruled the ruling in *Jones v. Rogers*, applying the ten-year statute of limitations, and quoting what the court then observed in that regard, said that "this announcement was not necessary to the decision in *Jones v. Rogers*, for the court had already held that the complainants in that case had deraigned no title." And it will have been perceived that this writ of error runs to the judgment of the supreme court of October 22, 1906.

The result is, therefore, that this writ of error comes within the rule that where the disposition of a Federal question was not necessary to the determination of the cause, and the judgment is based on a distinct ground or grounds broad enough to sustain it, over which this court has no jurisdiction, the writ of error cannot be maintained.

Writ of error dismissed.

Mr. Justice White took no part in the consideration and disposition of this case.

*STATE OF WASHINGTON [205 v.

STATE OF OREGON.

(See S. C. Reporter's ed. 205-218.)

Boundaries — between states — middle of channel.

1. The middle of the north ship channel of the Columbia river, described as the boundary between Oregon and Washington in the act of February 14, 1859 (11 Stat. at L. 383, chap. 33), admitting Oregon into the Union, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel because the latter, in the course of years, becomes the more important, and is properly called the main channel of the river.

[For other cases, see *Boundaries*, III. b, in *Digest Sup. Ct. 1908.*]

Boundaries — between states — middle of channel.

2. The middle of the main channel of the river is what is meant by the words "the middle channel of said river," in the act of February 14, 1859, admitting Oregon into the Union, with the Columbia river as its northern boundary.

[For other cases, see *Boundaries*, 29-34, in *Digest Sup. Ct. 1908.*]

Boundaries — between states — widest channel.

3. The widest expanse of water which can reasonably be called a channel is what is

NOTE.—On rivers and lakes as state boundaries—see note to *Buck v. Ellenbolt*, 15 L.R.A. 187.

On jurisdiction over boundary rivers—see note to *Roberts v. Fullerton*, 65 L.R.A. 953.

meant by the words "widest channel" in the act of February 14, 1859, admitting Oregon into the Union, with the Columbia river as its northern boundary.

[For other cases, see *Boundaries*, 29-34, in *Digest Sup. Ct.* 1908.]

Boundaries — between states — islands.

4. Desdemona sands and Snag island are within the territorial limits of the state of Oregon, admitted into the Union by the act of February 14, 1859, with its northern boundary described as a point due west and opposite the middle of the north ship channel of the Columbia river, thence easterly to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel.

[For other cases, see *Boundaries*, 46-50, in *Digest Sup. Ct.* 1908.]

[No. 3, Original.]

Decided May 24, 1909.

PETITION for rehearing in a suit in equity between the states of Washington and Oregon, to determine the boundary line between those states, in which such boundary was adjudged to be the center of the north channel of the Columbia river, subject to certain changes from accretions. Denied.

The facts are stated in the opinion.

Messrs. George Turner, E. C. MacDonald, S. H. Piles, and W. P. Bell for complainant.

Messrs. A. M. Crawford, C. W. Fulton, I. H. Van Winkle, Harrison Allen, and A. M. Smith for defendant.

214] *Mr. Justice Brewer delivered the opinion of the court:

This case was decided on November 16, 1908, substantially in favor of the state of Oregon. 211 U. S. 127, ante, 118, 29 Sup. Ct. Rep. 47. On February 17 of this year a petition for rehearing was presented by the state of Washington. On examination of that petition we entered an order directing that the parties have leave to file briefs upon the questions. They have done so, and we have re-examined the case with great care.

There are practically two matters presented: One, whether the boundary near the mouth of the Columbia river was and is the channel north of Sand island. We held that it was, and with that conclusion we are still satisfied. It is unnecessary to restate the reasons therefor. We may, however, refer to *Missouri v. Kentucky*, 11 Wall. 395, 20 L. ed. 116, as much in point. That was a controversy between those two states as to the title of Wolf island. The treaty between France, Spain, and England in February, 1763, stipulated that the middle of the Mississippi should be the boundary between

the British and French territories on the continent of North America. This was recognized by the treaty of peace with Great Britain in 1783 [8 Stat. at L. 80], and different treaties since then. The boundaries of Missouri when she was admitted into the Union as a state in 1820 [3 Stat. at L. 545, chap. 22] were fixed on this basis. Kentucky had succeeded in 1792 to the right and possession of Virginia, which, by virtue of the treaties referred to, extended to the middle of the bed of the Mississippi. The main channel of the Mississippi had been, up to at least 1820, west of the island. There was testimony that since then it had changed to the east side. Nevertheless the court held that the island remained still a part of Kentucky, saying (p. 401):

"It follows, therefore, that if Wolf island in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the *river aban- [215] doned remains, as before, the boundary between the states, and the island does not, in consequence of this action of the water, change its owner."

So, whatever changes have come in the north channel, and although the volume of water and the depth of that channel have been constantly diminishing, yet, as all resulted from processes of accretion, or, perhaps, also of late years, from the jetties constructed by Congress at the mouth of the river, the boundary is still that channel, the precise line of separation being the varying center of that channel. *Jefferies v. East Omaha Land Co.* 134 U. S. 178, 33 L. ed. 872, 10 Sup. Ct. Rep. 518; *Nebraska v. Iowa*, 143 U. S. 359, 36 L. ed. 186, 12 Sup. Ct. Rep. 396; *Iowa v. Illinois*, 147 U. S. 1, 37 L. ed. 55, 13 Sup. Ct. Rep. 239; *Missouri v. Nebraska*, 196 U. S. 23, 49 L. ed. 372, 25 Sup. Ct. Rep. 155; *Louisiana v. Mississippi*, 202 U. S. 1, 50 L. ed. 913, 26 Sup. Ct. Rep. 408, 571.

The other question arises in this way. The act admitting Oregon, after naming as the commencement of the boundary "a point due west and opposite the middle of the north ship channel of the Columbia river," adds "thence easterly, to and up the middle channel of said river, and, where it is divided by islands, up the middle of the widest channel thereof to a point near Fort Walla-Walla." [11 Stat. at L. 383, chap. 33.] With reference to this we said: "The testimony fails to show anything calling for consideration in respect to the last clause in the quotation from the boundary of Oregon.

The channel is not divided by islands." Now, it is alleged that there is set forth in the bill of complaint, and admitted in the answer, that a controversy has arisen as to the boundary lines, and that both of said states claim and assume to exercise jurisdiction over numerous islands and sands in said Columbia river, sixteen of which are enumerated by name.

While sixteen islands and sands are mentioned, yet, in the brief filed by the plaintiff on the application for a rehearing, it is stated that outside of Sand island, the title to which is, as shown in the former opinion, settled by the decision of the first question, only two, Desdemona sands and Snag island, can be called islands, the remainder being entirely submerged and only visible at low tide. These two, therefore, are all that can come within the definition in the boundary. 216] *That speaks of "the middle channel of said river," and counsel contend that there is no pretense of three channels, and therefore the language should properly be construed as the middle of the main channel of said river, and we are inclined to think that that is the true construction. But it must be remembered that the boundary in the first instance passes around the north of Sand island, in what was known as the north channel, and it does not strike any channel which deserves to be called the main channel until it has passed to the eastward of Sand Island. While the testimony is not satisfactory as to the point, at the time of the admission of the state of Oregon, at which this north channel, after passing Sand island, touched any other channel, we are of the opinion that it must have been at a point east and north of Desdemona sands. Of course, in considering this matter, we assume that the contention of the state of Washington is correct,—that Desdemona sands could have then properly been termed an island.

With reference to Snag island, the question is a difficult one. We agree with counsel that the term "widest channel" does not mean the broadest expanse of water. There must be, in the first instance, a channel,—that is, a flow of water deep enough to be used, and in fact used, by vessels in passing up and down the river; but it does not mean the deepest channel, but simply the widest expanse of water which can reasonably be called a channel. Now, close to Snag island there appear several channels, the principal ones being Woody Island channel and Cordell channel, both used at different times by vessels navigating the river. The Cordell channel runs to the north of Snag island, the Woody channel to the south, while the boundary claimed by the state of Oregon runs in a channel far to the north of both Woody island and Cordell channels.

Further, it appears that in December, 1877, the state of Oregon conveyed Snag island, in consideration of the sum of \$143.75, to J. W. and V. Cook. While of course this is not conclusive, yet, taken in connection with the fact that the *state of [217 Washington has never attempted to interfere with the jurisdiction of the state of Oregon over Snag island, and the doubt that hangs about the position and depths and width of the various channels in the vicinity at the time of the admission of the state of Oregon, we hold that that island is within its territorial limits.

It must be borne in mind that an inquiry of this kind is attended with much difficulty. Here is a river of great width, 3 miles or so at certain places, whose bed is largely of sand, and whose channels have been naturally affected by the flow of the water, and also of late years by the jetties constructed by the government in order to facilitate navigation. Congress, evidently recognizing the difficulty which attended the location of the exact boundaries, provided that the states of Washington and Oregon should have concurrent "jurisdiction in civil and criminal cases upon the Columbia river." Yet this provision does not determine the boundaries between the two states, and has proved insufficient to settle the disputes between them as to things done upon the Columbia river. *Nielsen v. Oregon*, 212 U. S. 315, ante, 528, 29 Sup. Ct. Rep. 383.

We may be pardoned if, in closing this opinion, we refer to the following:

Joint Resolution to Enable the States of Mississippi and Arkansas to Agree upon a Boundary Line and to Determine the Jurisdiction of Crimes Committed on the Mississippi River and Adjacent Territory.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent of the Congress of the United States is hereby given to the states of Mississippi and Arkansas to enter into such agreement or compact as they may deem desirable or necessary, not in conflict with the Constitution of the United States, or any law thereof, to fix the boundary line between said states, the Mississippi river now, or formerly, formed the said boundary line, and to cede respectively, each to the other, such *tracts or parcels of the territory of [218 each state as may have become separated from the main body thereof by changes in the course or channel of the Mississippi river, and also to adjudge and settle the jurisdiction to be exercised by said states, respectively, over offenses arising out of the

violation of the laws of said states upon the waters of the Mississippi river.

Approved January 26, 1909.

Similar ones have passed Congress in reference to the boundaries between Mississippi and Louisiana and Tennessee and Arkansas. We submit to the states of Washington and Oregon whether it will not be wise for them to pursue the same course, and, with the consent of Congress, through the aid of commissioners, adjust, as far as possible, the present appropriate boundaries between the two states, and their respective jurisdiction.

The petition for rehearing is denied.

ADAMS EXPRESS COMPANY, Plff. in Err.,
v.
COMMONWEALTH OF KENTUCKY.

(See S. C. Reporter's ed. 218-223.)

**Commerce — state regulation — furnish-
ing intoxicating liquors to inebriate.**

The provision for the punishment of knowingly furnishing intoxicating liquor to an inebriate, which is made by Ky. Stat. 1903, § 1307, is, as applied to the transportation of liquor by an express company from state to state, an unconstitutional regulation of interstate commerce.

[For other cases, see Commerce, 178-184, in Digest Sup. Ct. 1908.]

[No. 144.]

Argued April 8, 1909. Decided May 24, 1909.

IN ERROR to the Circuit Court of Hart County in the State of Kentucky to review a judgment convicting an express company of knowingly furnishing liquor to an inebriate. Reversed and remanded for further proceedings.

Statement by Mr. Justice Brewer:

Section 1307, Kentucky Statutes 1903, provides:

"Any person who shall sell, lend, give, procure for or furnish, spirituous, vinous, or malt liquors, or any mixture of either, knowingly, to any person who is an inebriate or in the habit of becoming intoxicated or drunk by the use of any such liquors,

NOTE.—On state regulation of sales of intoxicating liquors—see note to Rhodes v. Iowa, 42 L. ed. U. S. 1089.

On state regulation generally of interstate or foreign commerce—see notes to Norfolk & W. R. Co. v. Com. 13 L.R.A. 107; McCanna & F. Co. v. Citizens' Trust & Surety Co. 24 C. C. A. 13; and Gloucester Ferry Co. v. Pennsylvania, 29 L. ed. U. S. 158.

or who shall suffer or permit any such person to drink any such liquors in his bar-room, saloon, or upon the premises under his control or in his possession, shall be fined, for each offense, \$50," etc.

The Adams Express Company was prosecuted in the circuit court of Hart county for a violation of that statute. The facts were agreed upon. It was a company engaged in the express business. W. G. Tharp was a resident of Hart county, Kentucky, who bought and paid for liquor in Nashville, Tennessee, and New Albany, Indiana. The sellers were licensed dealers in those places, and shipped the liquors to him, by the defendant, prepaying the express charges. Tharp was in the habit of becoming intoxicated, and the defendant's agent in *Hart[220 county knew of this fact when he delivered the liquors. On the trial the court ruled "that the said transportation and delivery of said liquor to said Tharp by defendant did not constitute interstate commerce within the meaning of the clause of the Federal Constitution which gives to the Congress of the United States power to regulate commerce between the states, and that the defendant is guilty of knowingly furnishing liquor to an inebriate, as charged in the information herein."

The defendant prayed an appeal to the court of appeals of Kentucky, which was denied, and thereupon the case was brought here directly from the circuit court of Hart county, the highest court of the state in which a decision could be had. Ky. Stat. 1903, § 950.

Mr. Lawrence Maxwell argued the cause, and, with Mr. Joseph S. Graydon, filed a brief for plaintiff in error:

The transaction was interstate commerce.

American Exp. Co. v. Iowa, 196 U. S. 133, 49 L. ed. 417, 25 Sup. Ct. Rep. 182; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 31 L. ed. 700, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062; Leisy v. Hardin, 135 U. S. 100, 34 L. ed. 128, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Vance v. W. A. Vandercook Co. 170 U. S. 433, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674; Adams Exp. Co. v. Kentucky, 206 U. S. 129, 51 L. ed. 987, 27 Sup. Ct. Rep. 606; Rhodes v. Iowa, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664.

The business of an interstate carrier cannot be subjected at any stage to state regulation under the Wilson act.

Rhodes v. Iowa, supra; Bowman v. Chicago & N. W. R. Co. 125 U. S. 465, 486, 31 L. ed. 700, 707, 1 Inters. Com. Rep. 823, 8 Sup. Ct. Rep. 689, 1062.

The Kentucky statute is an illegal regulation of interstate commerce.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; Vance v. W. A. Vandercook Co. 170 U. S. 438, 444, 42 L. ed. 1100, 18 Sup. Ct. Rep. 674; Leisy v. Hardin, 135 U. S. 100, 110, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121; Central R. Co. v. Murphey, 196 U. S. 194, 49 L. ed. 444, 25 Sup. Ct. Rep. 218, 2 A. & E. Ann. Cas. 514; Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; McNeill v. Southern R. Co. 202 U. S. 543, 40 L. ed. 1142, 26 Sup. Ct. Rep. 722; Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126.

No brief was filed for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

The jurisdiction of this court is not open to dispute. Defendant contended that the 222]Kentucky statute, as applied to *the transportation of liquor from state to state, was in conflict with the section of the Federal Constitution vesting jurisdiction in Congress over interstate commerce. This contention was denied by the state court, and thus a question arose under the Federal Constitution, decided adversely to the plaintiff in error. *Western Turf Asso. v. Greenberg*, 204 U. S. 359, 51 L. ed. 520, 27 Sup. Ct. Rep. 384.

Liquor, however obnoxious and hurtful it may be in the judgment of many, is a recognized article of commerce. *License Cases*, 5 How. 504, 577, 12 L. ed. 256, 289; *Leisy v. Hardin*, 135 U. S. 100-110, 34 L. ed. 128-132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681.

In *Vance v. W. A. Vandercook Co.* 170 U. S. 438, 444, 42 L. ed. 1100, 1103, 18 Sup. Ct. Rep. 674, 676, Mr. Justice White, delivering the opinion of the court, said:

"Equally well established is the proposition that the right to send liquors from one state into another, and the act of sending the same, is interstate commerce, the regulation whereof has been committed by the Constitution of the United States to Congress, and, hence, that a state law which denies such a right, or substantially interferes with or hampers the same, is in conflict with the Constitution of the United States."

That the transportation is not complete until delivery to the consignee is also settled.

In *Rhodes v. Iowa*, 170 U. S. 412, 426, 42 L. ed. 1088, 1096, 18 Sup. Ct. Rep. 664, 669, it was held that the *Wilson* act [26 Stat. 53 L. ed.

at L. 313, chap. 723, U. S. Comp. Stat. 1901, p. 3177] "was not intended to and did not cause the power of the state to attach to an interstate commerce shipment, whilst the merchandise was in transit under such shipment, and until its arrival at the point of destination, and delivery there to the consignee."

This legislation is in the exercise of the police power,—a power which, generally speaking, belongs to the state,—and is an attempt, in virtue of that power, to directly regulate commerce; but, in case of conflict between the powers claimed by the state and those which belong exclusively to Congress, the former must yield, for the Constitution of the United States and the laws made in pursuance thereof are "the supreme law of the land."

*Section 5258 of the Revised Stat-[223 utes of the United States (U. S. Comp. Stat. 1901, p. 3564) provides:

"Every railroad company in the United States . . . is hereby authorized to carry upon and over its road . . . all passengers . . . freight, and property on their way from any state to another state, and to receive compensation therefor." *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.* 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4.

In *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 334, 52 L. ed. 230, 234, 28 Sup. Ct. Rep. 121, 123, it was declared "that any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution."

In *Adams Exp. Co. v. Kentucky*, 206 U. S. 129, 135, 51 L. ed. 987, 991, 27 Sup. Ct. Rep. 606, 607, it was said:

"The testimony showed that the package, containing a gallon of whisky, was shipped from Cincinnati, Ohio, to George Meece, at East Bernstadt, Kentucky. The transaction was therefore one of interstate commerce, and within the exclusive jurisdiction of Congress. The Kentucky statute is obviously an attempt to regulate such interstate commerce. This is hardly questioned by the court of appeals, and is beyond dispute under the decisions of this court."

Clearly, within the cases above cited, the statute before us, as applied to transportation from state to state, cannot be sustained.

The judgment of the Circuit Court of Hart County, Kentucky, is reversed, and the case remanded to that court for further proceedings not inconsistent with the views expressed in this opinion.

Mr. Justice **Harlan** dissents.

224]*MARIA DE LAS NIEVES CABRERA and Magdalena de la Cruz, Appts.,
v.
AMERICAN COLONIAL BANK.

(See S. C. Reporter's ed. 224-235.)

Evidence — to explain writing — consideration.

1. Evidence to show that a bill of sale which appears on its face to have been given in discharge of a debt was really intended to give the creditor additional security is admissible under the Porto Rico law of evidence, § 101, declaring that the rule which raises a conclusive presumption of the truth of the facts recited in a written instrument does not apply to the recital of a consideration.

[For other cases, see Evidence, 1649-1665, in Digest Sup. Ct. 1908.]

Guaranty — discharge.

2. The taking of additional security cannot affect the liability of a guarantor upon a mortgage executed by her to secure the debt.

[For other cases, see Guaranty, V. in Digest Sup. Ct. 1908.]

Mortgage — what property mortgageable.

3. The accrued interest of an heir in the estate of a decedent, although undivided, is not a property right to be "owned in the future," within the meaning of the provisions of the Porto Rico mortgage law, art. 108, defining things which are not mortgageable.

[For other cases, see Mortgage, I. d, in Digest Sup. Ct. 1908.]

Mortgage — what property mortgageable.

4. The right of an heir to mortgage an accrued undivided interest in a decedent's estate is not affected by the provisions of the Porto Rico mortgage law, arts. 110, 111, which only define the incidents of an estate to which the mortgage of it extends.

[For other cases, see Mortgage, I. d, in Digest Sup. Ct. 1908.]

Mortgage — debt secured.

5. The liability of a mortgagor under a mortgage executed to secure a debt extends to the whole debt, whether such mortgage was executed by her as principal or as surety.

[For other cases, see Mortgage, I. c, in Digest Sup. Ct. 1908.]

[No. 136.]

Submitted April 7, 1909. Decided May 24, 1909.

A PPEAL from the District Court of the United States for the District of Porto

Rico to review a decree for the foreclosure of a mortgage. Affirmed.

See same case below, 3 Porto Rico Fed. Rep. 14.

Statement by Mr. Justice McKenna:

This is a suit to foreclose a mortgage given by the appellant Maria de las Nieves Cabrera y Pruna to the appellee bank, executed by her on certain property in Porto Rico, to secure a promissory note for 8,000 pesos, provincial money, made *in favor [225 of the bank by a mereantile firm in San Juan, known as Sucesores de J. M. Suarez y Compañia, as principals, and the appellant above named as surety. The Banco Territorial y Agrícola was also made a party, but, as it disclaimed any interest in the controversy, no further proceedings were taken against it. Magdalena de la Cruz Cabrera y Pruna was made a party because, as it is alleged in the bill, the property mortgage was conveyed to her by Maria de las Nieves Cabrera y Pruna, who was her sister, for the purpose of depriving the plaintiff (appellee here) of the benefit of its security, and that the conveyance was made without consideration. She answered, denying the allegations, and averred that the conveyance was made upon certain valuable considerations, which were set out.

The answer of Maria de las Nieves Cabrera y Pruna set up that her signature to the mortgage had been obtained by fraud, and that Suarez & Company had paid the debt secured thereby, that the original note signed by her had been renewed without her knowledge or consent, that the bank had accepted a bill of sale of the stock of merchandise belonging to Suarez & Company in full payment of the indebtedness, and had executed a public document acknowledging the same. She also averred the good faith of the conveyance to her sister.

The principal contention of appellants in this court turns entirely on the truth of the allegation that the bank had accepted the bill of sale of the stock of Suarez & Company in full payment of the indebtedness. Of this bill of sale we may say at the outset that the district court found, and we concur in that finding, that it was not executed with such intention. Appellants, therefore, are limited to the proposition that it had such effect by operation of law. They so contend, insisting that it was a conveyance of property on its face, and that it could not be varied or changed by parol testimony. The district court, having admitted such testimony, it is further contended, committed error. The ruling that parol evidence will not be received to vary a written instrument is elementary, *but the in-[226 quiry is, Is that ruling so far imperative in

NOTE. — On parol evidence as applicable to written contracts—see notes to *Durkin v. Cobleigh*, 17 L.R.A. 270; *Bradley v. Washington, A. & G. Steam Packet Co.* 10 L. ed. U. S. 72; and *Fire Ins. Asso. v. Wickham*, 35 L. ed. U. S. 860.

Porto Rico that an instrument, though an absolute conveyance on its face, may not be shown as only intended for security?

A statement of some of the facts will exhibit the situation of the parties and their relations to the indebtedness. Previous to the year 1900 José Maria Suarez carried on a mercantile business in San Juan, Porto Rico. Shortly before that date he died, and two of his brothers, including his widow, Maria de las Nieves Cabrera y Pruna, one of the appellants, continued the business under a partnership, organized in the early part of 1900, under the firm name and style of Sucesores de J. M. Suarez y Compañia. Suarez had bought the store with his wife's private funds, and owed her at the time of his death 8,000 pesos, and she became a silent partner to that extent, but took no part in the management generally. The partnership, being in need of money, borrowed from appellee, on the 21st of February, 1900, the sum of 8,000 pesos, equivalent to \$4,800 in United States currency, and gave its promissory note to secure the sum, payable in six months, at 9 per cent interest. The note was in the following words:

\$8,000 Pesos } Either on demand.
\$4,900 Dollars }

San Juan, Porto Rico, February 21, 1900.

Six months after date, for value received, we promise to pay to the American Colonial Bank of Porto Rico, at the office of the said company, in the city of San Juan, 8,000 pesos M. C. or 4,800 dollars U. S. cy., having deposited with said company as collateral security for payment of this or any other liability or liabilities of ours to said company, now existing, or which hereafter may be contracted, the following property, viz.:

A cession of all the interests of the signers of this in the estate of Nieves Pruna y Vanrosi, and a mortgage on house on Sol street. This note can be renewed with the consent of the cashier of the American Colonial Bank, without prejudice to the security or collateral, with full power and authority to said company to sell, assign, and deliver the whole, or any part thereof, or any substitutes therefor, or any additions thereto, at any brokers' board, or at any public or private sale, at the option of said company, or its president or treasurer, or its or their or either of their assigns, on the nonperformance of this promise, or the nonpayment at maturity of any of the other liabilities aforesaid, or at any time or times thereafter, without demand of payment, advertisement, or notice of sale, which are hereby expressly waived; and, after deducting all costs and expenses for collection, sale, and delivery, to apply the residue of the proceeds of such sale or sales, to pay

any or all of said liabilities to said company, or its assigns, as its president or treasurer or assigns shall deem proper, returning the overplus to the undersigned; and upon any sale at public auction or at brokers' board the holder thereof may purchase the whole or any part of such securities, discharged from any right of redemption. And the undersigned agrees to be and remain liable to the holder hereof for any deficiency.

The company is hereby given a lien upon all moneys held by it on deposit or otherwise, to the credit of the undersigned, and is authorized at any time to appropriate all of said moneys to the payment of whatever may be due on this note, or any other obligations of the undersigned now existing or hereafter contracted, whether the same be then due or not due.

In case of depreciation in the market value of the security hereby pledged, or which may hereafter be pledged for this loan, a payment is to be made on account, so that the said market value shall always be at least — per cent more than the amount unpaid of this note. In case of failure to do so this note shall be due and payable forthwith, anything hereinbefore expressed to the contrary notwithstanding, and the company may immediately reimburse itself by sale of the security as hereinbefore provided.

(Sgd.) Maria de las Nieves de Suarez.

(Sgd.) Suc. de J. M. Suarez & Co.

*The note was signed by her as a principal, but the bill alleges that the firm signed as principal, and that she signed as surety, and, to further secure the note, that she executed the mortgage in this suit. It is recited in the mortgage that the note was given by the firm "as direct debtors," and that she executed the mortgage as surety "for the debtors and principal guarantor of the debtors." The mortgage was recorded.

On the 13th of March, 1901, a bill of sale upon which the controversy in the case turns was executed before a notary. The instrument recites that it was made by the Mercantile Society, Ltd., doing business under the firm name and style of Sucesores de J. M. Suarez y Compañia, owner of the establishment, the bazaar "Europa," Don Manuel and Ramon Suarez y Cordero, represented by its managing and active partners as parties of the first part, and Mr. Edwin L. Arnold, cashier of the American Colonial Bank of Porto Rico, party of the second part. The bill of sale further recites as follows:

"First. The Society Sucesores de J. M. Suarez y Cia. now is debtor to the American Colonial Bank of Porto Rico in the sum of \$4,800, due on the 21st of August, last, ac-

ording to the promissory note which they executed, and, not being able to deliver the amount thereof, have offered to make payment thereof in mercantile stocks, according to the detailed inventory which they exhibit, subscribed by the society, and which they take with them bearing my signature and seal, and to which the creditor bank has manifested its conformity.

"Second. That carrying into effect the sale of the stocks set forth in the inventory exhibited, Messrs. Suarez y Cordero, in the representation by which they act, transfer all of the said effects set forth in the said inventory to the creditor bank for the sum of \$4,800, leaving the same in the possession of the bank, in payment of the said amount of the promissory note above mentioned.

"Third. Mr. Edwin L. Arnold accepts this deed, receives the inventory above mentioned, and in consequence thereof *says that he leaves in the said establishment of the sellers, the 'Bazaar Europa,' all the stock and goods which such persons have sold to him in payment for the \$4,800 which they owe to the American Colonial Bank, in order that, for the account and commission of the latter, they proceed to realize from the said goods, prices not to be less than those fixed in the inventory, and they are obliged to present to the bank weekly account of sales they may make, together with the value in cash thereof, until the complete realization of the same takes place."

It was signed by Ramon Suarez y Cordero, Manuel Suarez y Cordero, and Edwin L. Arnold, cashier.

The district court found, as we have already said, that the bill of sale was taken as additional security, and that there was no agreement or understanding that it should be considered as full payment of the main loan or debt; that Arnold never saw the stock of goods or any part of it, nor went to the store of the firm, and that the firm retained possession of the goods. Neither of the appellants took part in the execution of the instrument, and it is found that no testimony was offered charging them or any of the members of the company with fraudulent conduct. It is also found by the district court that subsequently the firm went into bankruptcy, that the stock of goods was scheduled as part of the assets of the firm, and that the bank received no part of the assets collected by the trustee in bankruptcy, and distributed among the general creditors of the firm. The district court adjudged that the bank was entitled to foreclose its mortgage, and entered a decree accordingly.

Mr. Francis H. Dexter submitted the cause for appellants:

When the clauses of a contract are clear and explicit, there is no necessity to have recourse to the rules for interpretation.

Decisions, Supreme Court, Madrid, April 11, June 19, 1865, March 1, 1862, March 21, 1900, October 12, 1900, January 10, 1901, April 24, 1901, July 6, 1901.

It cannot be successfully contended that the acceptance by the appellant bank of the stock of goods transferred to it by its debtor was simply an additional security. On the contrary, it was, in fact and law, a substitution of the debt.

4 Derecho Civil, Sanchez Roman, pp. 428, 431.

Appellee acquired no specific right or interest in the inheritance or participations of appellant Maria de las Nieves Cabrera y Pruna in the estate of her deceased mother.

3 Galindo, Legislación Hipotecaria, p. 199, p. 279.

Mr. N. B. K. Pettingill submitted the cause for appellee:

Any court with equity jurisdiction not only possesses the right, but must perform the duty, in a proper case, in order to ascertain the real transaction, to go behind the recitals of an instrument of conveyance, and construe it according to its true consideration and significance.

Hughes v. Edwards, 9 Wheat. 489, 6 L. ed. 142; Peugh v. Davis, 96 U. S. 332, 24 L. ed. 775; Morris v. Nixon, 1 How. 118, 11 L. ed. 69; Russell v. Southard, 12 How. 139, 147, 13 L. ed. 927, 930; Babcock v. Wyman, 19 How. 289, 299, 15 L. ed. 644, 648; Risher v. Smith, 131 U. S. clvi., Appx. 24 L. ed. 808; Morgan v. Shinn (McLellan v. Shinn) 15 Wall. 105, 21 L. ed. 87.

The law of evidence of Porto Rico requires the insular courts, which have no equity jurisdiction, to receive the same evidence and reach the same result.

Horton v. Robert, 3 Castro Dec. de Puerto Rico, 415.

An heir or devisee not only has a right to sell or mortgage his interest in the inheritance before the division, but such lien or alienation follows the portion of the inheritance subsequently set apart to him.

66 Jurisprudencia Civil, p. 684; 96 id. p. 853; 101 id. p. 15.

The action of the trial court herein in admitting evidence of the circumstances of the alleged "release," and of the real agreement and intent of the parties in executing it, is supported by a long line of authorities from the Supreme Court of Spain itself.

78 Jurisprudencia Civil, p. 494; 79 id. pp. 232-568; 86 id. p. 408; 89 id. p. 121; 93 id. p. 311; 97 id. p. 441; 101 id. p. 615.

Mr. Justice McKenna delivered the opinion of the court:

Appellants, to sustain their contention that 230] the bill of sale *was an absolute conveyance and accomplished payment of the debts to the bank, quote provisions of the Spanish Civil Code which, it is said, was in force in Porto Rico until 1902, which provides that the obligations of contracts must be complied with according to their terms, that their provisions, when clear and explicit, must control, and that there can be no evidence of the terms of the agreement other than the contents of the writing, unless "a mistake or imperfection of the writing is put in issue by the pleadings," or its "validity" is the fact in dispute.†

But these are also the principles of the common law, and absolutely necessary if the written instrument is to be given a distinctive sanction of the agreement of the parties. But there are well-recognized exceptions. The face of an instrument is not always conclusive of its purpose. In equity, extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be 231] *proved. This court said in *Pengh v. Davis*, 96 U. S. 336, 24 L. ed. 776, and repeated it in *Brick v. Brick*, 98 U. S. 514, 25 L. ed. 256: "As the equity upon which the court acts in such cases arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible." The rule which excludes parol testimony, the court further said, has reference to the language used by the parties, and does not forbid an inquiry into their object in executing and receiving the instrument. *Hughes v. Edwards*, 9 Wheat. 489, 6 L. ed. 142; *Russell v. Southard*, 12 How. 139, 13 L. ed. 927; *Babcock v. Wyman*, 19 How. 289, 15 L. ed. 644. In *Morgan v. Shinn* (*McLellan v. Shinn*) 15 Wall. 105, 21 L. ed. 87, the rule of equity was enforced against the

bill of sale of a vessel, though it was enrolled and also insured in the name of the transferee. See *Livingston v. Story*, 11 Pet. 351, 9 L. ed. 746.

It is not contended that the equitable rule is explicit in the Porto Rican Code; but it is contended that the power to enforce the rule is given by § 34 of the act of Congress of April 12, 1900 [31 Stat. at L. 84, chap. 191], which conferred upon district courts of Porto Rico, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States," and that they should "proceed therein in the same manner as a circuit court." The deduction from this is that the district court, having the "ordinary jurisdiction" of both circuit and district courts, may "proceed in the consideration of any case within that jurisdiction on the same principles," depending on the nature of the case, as those courts may.

Appellee, however, says that it is not necessary to insist upon that proposition because the question presented is the "kind of evidence" which the court was entitled to receive and consider, and the case of *Horton v. Robert*, 3 Castro's Dec. de Puerto Rico, 410, 415, is adduced to sustain the decision of the district court in admitting evidence to explain the bill of sale in controversy. The English translation of the decision, given by the appellee, is as follows:

"It seems that the defendant believes, and his whole contention *is based on this [232] belief that, for a mortgage to be declared usurious, the usury must appear from the document itself. Such an affirmation would convert the law of usury into a dead letter, and is directly in conflict with § 25 of the Law of Evidence of Porto Rico. The appellee also presumes that the object of a written contract cannot constitute the subject of investigation by a court, upon examining into its validity, but that the court must presume that it has been stated correctly in the contract itself. This presumption of the appellee is contrary to the second subdivision of § 101 of the Law of Evidence of Porto Rico, and to the law established by the American courts. No matter what motive

†"Obligations arising from contracts have legal force between the contracting parties, and must be fulfilled in accordance with their stipulations." Article 1091.

"Contracts shall be binding, whatever may be the form in which they may have been executed, provided the essential conditions required for their validity exist." Article 1278.

"If the terms of a contract are clear and leave no doubt as to the intentions of the contracting parties, the literal sense of its 53 L. ed.

stipulations shall be observed." Article 1281.

"Commercial contracts shall be executed and complied with in good faith, according to the terms in which they were made and drafted, without evading the honest, proper, and usual signification of written or spoken words with arbitrary interpretations, nor limiting the effects which are naturally derived from the manner in which the contractors may have explained their wishes and contracted their obligations." Article 57, Code of Commerce.

or consideration is expressed in a written contract, the truth of its provisions is not conclusively presumed, but the same can always be the subject of investigation before a court, and therefore proof can always be proposed and received in order to demonstrate what was the true motive or consideration of the obligation which may be established. See also paragraph 38 of § 102 of the Law of Evidence of Porto Rico."

The law of evidence referred to is inserted in the margin.†

Horton v. Robert seems to interpret the 233] Code as permitting *the application of the equitable rule, and defines the word "consideration" in § 101 to comprehend the *motive* or *purpose* of the instrument. If there is any decision or statute which militates with this conclusion, we feel sure that appellants would have cited it. But we need not distinguish between motive and consideration. The testimony was addressed to the consideration of the bill of sale in its strictest sense. On the face of the instrument the bank engaged to give up its debt for the stock of goods. This, then, constituted the consideration as expressed, but the testimony explaining it showed that it was not the real consideration, that the real consideration was to keep Suarez & Company a going concern, and to give the bank additional security. More than this it is not necessary to decide; and we shall not consider, therefore, the contention of appellee and the citations to support it, that the law

of Spain "permits what our own does not—the admission of oral *testimony regarding all the terms of a contract upon equal footing with the writing which evidences it."

It is, however, contended that, if it should be held that the bill of sale did not pay or discharge the debt, appellant Maria de las Nieves was (a) but a guarantor, and her liability must be determined as such. (b) The deed of sale was but a novation. (c) It constituted, under all the circumstances, a modification of the security, and released her, the guarantor.

All these objections seem (we say seem, because the argument to support them is somewhat involved) to rest on the contention that the bill of sale was not taken as an additional security, and is, therefore, answered by what has been said. Whether she was a guarantor or not, that could not make a mortgage of her real estate any less effective, or make the bill of sale something other than what it was. *Joyce v. Auten*, 179 U. S. 591, 45 L. ed. 332, 21 Sup. Ct. Rep. 227.

It is next contended by appellants that the bank "acquired no specific right or interest in the inheritance or participations of appellant Maria de las Nieves Cabrera y Pruna in the estate of her deceased mother," because, as it is further contended, "that her interest in the estate of her mother had not yet been divided or assigned." There was an allegation in the bill that such interest was covered by the mortgage, which was

†Sec. 25. When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement, other than the contents of the writing, except in the following cases:

1. Where a mistake or imperfection of the writing is put in issue by the pleadings.

2. Where the validity of the agreement is the fact in dispute.

But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in section twenty-eight, or to explain an intrinsic ambiguity, or to establish illegality or fraud. The term "agreement" includes deeds and wills, as well as contracts between parties.

Sec. 28. For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument, and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret.

Sec. 101. The following presumptions, and no others, are deemed conclusive.

2. The truth of the facts recited, from the recital in a written instrument between the parties thereto, or their successors in interest by a subsequent title; but this rule does not apply to the recital of a consideration.

Sec. 102. All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind:

38. That there was a good and sufficient consideration for a written contract.

Sec. 107. No evidence shall be considered as conclusive or unanswerable unless so declared by this act. Laws of Porto Rico, 1905, pages 73, 74, 87, 88, 90.

In the same connection should be considered article 1186 of the Civil Code of Porto Rico, which reads as follows:

"Public instruments are evidence, even against a third person, of the fact which gave rise to their execution, and of the date of the latter.

"They shall also be evidence against the contracting parties and their legal representatives with regard to the declarations the former may have made therein." Revised Statutes & Codes of Porto Rico, 1902.

not denied. Besides, it does not appear that the point was made in the lower court, and counsel say here, after quoting some very general provisions of the Civil Code of Porto Rico, and articles 110 and 111 of the mortgage law, "as we more confidently rely upon the other points in this case, we do not enter into a discussion of the law bearing on this point." We leave the point where counsel has left it. We do not feel called upon to compare the provisions which he has cited with those cited by counsel for appellee, which, it is contended, have a contrary effect, and establish that an heir or devisee has an interest in the inheritance before the division, which he may sell or mortgage.

It is enough to say that the provisions 235]quoted by appellants *do not sustain their contention. They quote article 1874 of the Civil Code, in force at the time the mortgage was given, as confining a mortgage contract to real property and to rights in real estate which can be alienated according to law. There is no attempt to define such rights other than to quote article 108 of the mortgage law, as follows:

"Article 108. The following are not mortgageable:

"5. The property right in things which, although they will be owned in the future, are not yet recorded in the name of the person who will have a right to own them."

But the interest of Maria de las Nieves in her mother's estate had accrued, and because it was an undivided interest did not make it a "property right" to be owned in the future."

Articles 110 and 111 of the mortgage law are clearly not applicable. They only refer to what incidents of an estate the mortgage of it extends, as improvements, crops, rents, etc.

It is finally contended that, if Maria de las Nieves is responsible at all, it is only for a part of the debt. This contention is answered in effect by what we have already said. Whether as principal or surety, she bound herself to the bank for the whole debt,—mortgaged her property for the whole debt,—and her liability extends to the whole debt.

Decree affirmed.

236]*RICHARD BONG, Plff. in Err.,
v.
ALFRED S. CAMPBELL ART COMPANY.

(See S. C. Reporter's ed. 236-248.)

Copyright—transfer of right.

1. An author of a painting, who, not being a citizen or subject of a foreign state 53 L. ed.

with which the United States has copyright relations, is excluded by the act of March 3, 1891 (26 Stat. at L. 1107, chap. 565, U. S. Comp. Stat. 1901, p. 3406), § 13, from the benefit of copyright, cannot convey such right to a person whose citizenship is such as to satisfy the provisions of that section. [For other cases, see Copyright, 11. b, in Digest Sup. Ct. 1908.]

Copyright—who may have—aliens.

2. The action of the President is a condition of the right of a foreign citizen to the benefits of the act of March 3, 1891, § 13, giving the right of copyright to citizens of a foreign state when such state permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens, or is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party, the existence of such condition to be determined by the President by proclamation, made from time to time, as the purposes of the act may require.

[Persons entitled to copyright, see Copyright, 1. d, in Digest Sup. Ct. 1908.]

[No. 150.]

Argued and submitted April 15, 1909. Decided May 24, 1909.

IN ERROR to the United States Circuit Court of Appeals for the Second Circuit, to review a judgment which affirmed a judgment of the Circuit Court for the Southern District of New York, directing a verdict for defendant in an action for the infringement of a copyright. Affirmed.

See same case below, 83 C. C. A. 576, 155 Fed. 116.

The facts are stated in the opinion.

Mr. Max J. Kohler argued the cause and filed a brief for plaintiff in error:

Since § 4952, of U. S. Rev. Stat. U. S. Comp. Stat. 1901, p. 3406, was first enacted in the revision of July 8, 1870, the "proprietor" or "assign" of the author, as well as the author himself, has been permitted to take out a copyright in his own name, the act of 1870 expressly interpolating the word "proprietor" when paintings were first made copyrightable.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 296-299, 52 L. ed. 208, 216-218, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595, affirming 76 C. C. A. 647, 146 Fed. 375; Werckmeister v. Pierce & B. Mfg. Co. 63 Fed. 449; Werckmeister v. Springer Lithographing Co. 63 Fed. 810; Werckmeister v. American Lithographic Co. 142 Fed. 830; Mifflin v. R. H. White Co. 190 U. S. 260, 262, 47 L. ed. 1040, 1042, 23 Sup. Ct. Rep. 769; Lawrence v. Dana, 4 Cliff. 1, Fed. Cas. No. 8,136; Parton v. Prang, 3 Cliff. 537,

Fed. Cas. No. 10,784; *Callaghan v. Myers*, 128 U. S. 617, 658, 32 L. ed. 547, 559, 9 Sup. Ct. Rep. 177.

If it had been the intention of Congress to limit copyright to the work of authors of the specified countries, it could easily have said so.

United States v. Goldenberg, 168 U. S. 95, 42 L. ed. 394, 18 Sup. Ct. Rep. 3.

The experience and legislation of the rest of the civilized world, antedating the framing of this act, led to the adoption of a policy protecting works published in a country, as well as those by native authors or artists, and it was undoubtedly the purpose of Congress to adopt such policy.

White-Smith Music Pub. Co. v. Apollo Co. 209 U. S. 14, 15, 52 L. ed. 660, 661, 28 Sup. Ct. Rep. 319; *Interstate Commerce Commission v. Baltimore & O. R. Co.* 145 U. S. 263, 36 L. ed. 699, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844.

Construction by the Librarian of Congress, if as contended for by defendant, is obviously wrong, and is not uniform, long established, nor reasonable, so as to be entitled to any weight as an alleged departmental construction.

United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *United States v. Tanner*, 147 U. S. 661, 37 L. ed. 321, 13 Sup. Ct. Rep. 436.

Even before the International Copyright Law Amendment of 1891, it is submitted that the proprietor of a painting who was himself a citizen or resident of the United States could have secured a copyright, even though the artist may have been a nonresident alien, but the rule was different as to books and other articles enumerated in U. S. Rev. Stat. § 4971, U. S. Comp. Stat. 1901, p. 3416, because of the express provisions of that section.

Drone, Copyright, pp. 231, 232; *Darras, Du Droit des Auteurs & des Artistes dans les Rapports Internationaux*, Paris, 1887; *Philipp, Bulletin de l'Association Littéraire et Artistique Internationale*, Series 2, No. 3, p. 102.

This supposed disability of alienage is a personal one, which Congress, of course, could, and doubtless intended to, abolish, as various states have done as to realty, in favor of the acquisition of such property rights by a citizen of the United States or of a country with which we have copyright relations. Even the most familiar examples of this disability, an alien's lack of capacity to own land, was cured by assignment or descent from the alien, even at common law.

Manuel v. Wulff, 152 U. S. 505, 38 L. ed. 532, 14 Sup. Ct. Rep. 651; *United States v.*

Southern P. R. Co. 88 Fed. 832; 2 Am. & Eng. Enc. Law, 2d ed. pp. 70-72.

The common-law copyrights, before publication, of the painter or owner of a painting or other copyrightable objects, are, of course, well established.

Werckmeister v. American Lithographic Co. 68 L.R.A. 591, 69 C. C. A. 553, 134 Fed. 321; *Parton v. Prang*, 3 Cliff. 537, Fed. Cas. No. 10,784; *Werckmeister v. American Lithographic Co.* 142 Fed. 827; *Turner v. Robinson*, 10 Ir. Ch. Rep. 121, 510; *Oertel v. Wood*, 40 How. Pr. 10, *Prince Alhert v. Strange*, 2 DeG. & S. 652; *Press Pub. Co. v. Monroe*, 51 L.R.A. 353, 19 C. C. A. 429, 38 U. S. App. 410, 73 Fed. 196, appeal dismissed in 164 U. S. 105, 41 L. ed. 367, 17 Sup. Ct. Rep. 40; *Palmer v. De Witt*, 47 N. Y. 532, 7 Am. Rep. 480; *Thomas v. Lennon*, 14 Fed. 849; *The Iolanthe Case*, 15 Fed. 439; *The Mikado Case*, 25 Fed. 183; *Globe Newspaper Co. v. Walker*, 210 U. S. 356, 52 L. ed. 1096, 28 Sup. Ct. Rep. 726; see also *Mansell v. Valley Printing Co.* [1908] 1 Ch. 568, affirmed in [1908] 2 Ch. 441.

This rule of law as to common-law copyright is not limited, in any way, under the American authorities, to productions by American authors or painters.

7 Am. & Eng. Enc. Law, 2d ed. p. 519; *Palmer v. De Witt*, supra; *Crowe v. Aiken*, 2 Biss. 208, Fed. Cas. No. 3,441; *Keene v. Wheatley*, 4 Phila. 157, Fed. Cas. No. 7,644; *Thomas v. Lennon*, 14 Fed. 849; *Tompkins v. Halleck*, 133 Mass. 32, 43 Am. Rep. 480; *French v. Maguire*, 55 How. Pr. 471; *Shook v. Daly*, 49 How. Pr. 366.

International copyright arrangements should be most liberally construed and enforced.

Tucker v. Alexandroff, 183 U. S. 424, 437, 46 L. ed. 264, 270, 22 Sup. Ct. Rep. 195; *Osgood v. Felsenheld, LeDroit, d'Auteur*, 1898, pp. 45-49; *Briggs, International Copyright*, p. 522; *Sarpy v. Holland* [1908] 2 Ch. 198.

The court below erred in holding that the statute involved declares a penalty which is a very noxious thing, and requires a strict construction designed to avoid it, if possible.

Werckmeister v. American Lithographic Co. 142 Fed. 827; *Myers v. Callaghan*, 5 Fed. 726, 10 Biss. 139, 20 Fed. 441; *Bleistein v. Donaldson Lithographing Co.* 188 U. S. 239, 47 L. ed. 460, 23 Sup. Ct. Rep. 298; *Bolles v. Outing Co.* 175 U. S. 262, 265, 44 L. ed. 156, 157, 20 Sup. Ct. Rep. 94; *United States v. One Pearl Necklace*, 56 L.R.A. 130, 49 C. C. A. 287, 111 Fed. 172; *United States v. Shapleigh*, 4 C. C. A. 237, 12 U. S. App. 26, 54 Fed. 126; *Atlanta v. Chattanooga Foundry & Pipeworks*, 64 L.R.A. 721, 61 C. C. A. 387, 127 Fed. 23.

The court's argument below that, because

colorable assignments might be resorted to, the statute should be construed to deny copyright to works produced by citizens of countries outside the President's copyright proclamation, is untenable.

Carte v. Evans, 27 Fed. 861; *Black v. Henry G. Allen Co.* 9 L.R.A. 433, 42 Fed. 620.

It is now well settled that a transfer of common-law copyright in a painting entitled the transferee to take out a copyright, though he does not own the physical painting; but the question was still doubtful when this case was tried below.

American Tobacco Co. v. Werckmeister, 207 U. S. 284, 296-299, 52 L. ed. 208, 216-218, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595, affirming 76 C. C. A. 647, 146 Fed. 375.

Surely an assign of the American copyright rights is entitled in his own behalf to copyright the painting.

Goldmark v. Kreling, 35 Fed. 661; *G. & C. Merriam Co. v. United Dictionary Co.* 76 C. C. A. 470, 146 Fed. 354; *Werckmeister v. Springer Lithographing Co.* 63 Fed. 808; *Palmer v. De Witt*, 47 N. Y. 541, 7 Am. Rep. 480.

Such is the usual course with respect to transfer of American rights. Even if the copyright were held in part by him for the benefit of persons other than plaintiff, he would be entitled to take out the copyright in his own name.

Press Pub. Co. v. Falk, 59 Fed. 324; *Lawrence v. Dana*, 4 Cliff. 15, Fed. Cas. No. 8,136; *Wooster v. Crane*, 77 C. C. A. 211, 147 Fed. 515; *Goldmark v. Kreling*, supra; 7 Am. & Eng. Enc. Law, 2d ed. pp. 545, 546; *Mifflin v. R. H. White Co.* 190 U. S. 260, 47 L. ed. 1040, 23 Sup. Ct. Rep. 769; *Ford v. Charles E. Blancy Amusement Co.* 148 Fed. 642; *Harper & Bros. v. M. A. Donohue & Co.* 144 Fed. 494; *Osgood v. Felsenheld*, supra.

Copyright protection is accorded when the fact exists, and the President's proclamation, specified in an independent sentence, is merely made a convenient, directory manner of proclaiming and proving the fact. An erroneous failure to issue the proclamation does not prevent copyright from vesting, as the legislative will cannot thus be disregarded.

Morrill v. Jones, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; *Campbell v. United States*, 107 U. S. 410, 27 L. ed. 594, 2 Sup. Ct. Rep. 759; *United States v. Dominici*, 24 C. C. A. 116, 45 U. S. App. 255, 78 Fed. 334; *Buttfield v. Stranahan*, 192 U. S. 470, 496, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349; *Williamson v. United States*, 207 U. S. 425, 461, 462, 52 L. ed. 278, 296, 297, 28 Sup. Ct. Rep. 163.

The court erred in dismissing the com-

plaint, on the opening of counsel, against plaintiff's objections.

Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; *Hoffman House v. Foote*, 172 N. Y. 348, 65 N. E. 169; *Kennedy v. White*, 91 App. Div. 475, 86 N. Y. Supp. 852; *Barbier v. Connolly*, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; *Van Stone v. Stillwell & B. Mfg. Co.* 142 U. S. 128, 134, 35 L. ed. 961, 963, 12 Sup. Ct. Rep. 181; *Butler v. National Home*, 144 U. S. 64, 72, 73, 36 L. ed. 346, 351, 352, 12 Sup. Ct. Rep. 581.

Mr. George Ryall submitted the cause for defendant in error:

Hernandez, being a citizen and subject of Peru, could not have obtained a copyright in this country, and most assuredly he could not assign a right which never existed.

Werckmeister v. American Lithographic Co. 142 Fed. 831; *Werckmeister v. Springer Lithographing Co.* 63 Fed. 811; *Yuengling v. Schile*, 20 Blatchf. 452, 12 Fed. 97.

The Librarian of Congress has always construed our statute as denying to citizens of Peru copyright protection, and that the assignee of one who could not obtain a copyright could not obtain one; and this construction of the statute is most reasonable, well established, and entitled to great weight as a departmental construction.

United States v. Graham, 110 U. S. 219, 28 L. ed. 126, 3 Sup. Ct. Rep. 582; *United States v. Tanner*, 147 U. S. 661, 37 L. ed. 321, 13 Sup. Ct. Rep. 436.

This is an action for a penalty, and under a statute highly penal in its nature. And the statute should be strictly construed against the plaintiff.

Bolles v. Outing Co. 175 U. S. 262, 44 L. ed. 156, 20 Sup. Ct. Rep. 94.

In order to entitle an assignee to the benefit of the statute of copyright, the assignment must have been made by one himself entitled to copyright.

Koppel v. Downing, 11 App. D. C. 93; *Banks v. Manchester*, 128 U. S. 244, 32 L. ed. 425, 9 Sup. Ct. Rep. 36; *Yuengling v. Schile*, 20 Blatchf. 452, 12 Fed. 103.

When Hernandez assigned to Bong he had no common-law rights of copyright for he had parted with the ownership of the painting, and no application for copyright had been made by him or by the proprietor of the painting.

Wheaton v. Peters, 8 Pet. 591, 8 L. ed. 1055; *Stevens v. Gladding*, 17 How. 447, 454, 15 L. ed. 155, 158; *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 291, 52 L. ed. 208, 214, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595; *Holmes v. Hurst*, 174 U. S. 82, 85, 43 L. ed. 904, 905, 19 Sup. Ct.

Rep. 606; *Banks v. Manchester*, 128 U. S. 244, 252, 32 L. ed. 425, 428, 9 Sup. Ct. Rep. 36; *Thompson v. Hubbard*, 131 U. S. 123, 151, 33 L. ed. 76, 86, 9 Sup. Ct. Rep. 710.

Mr. Justice McKenna delivered the opinion of the court:

This is an action under the copyright statutes to recover penalties and forfeitures for the infringement of a copyright of a painting.

The complaint shows the following facts: Plaintiff in error (as he was plaintiff in the trial court, we shall refer to him hereafter as plaintiff, and to defendant in error as defendant) was a citizen and subject of the German Empire and resident of the city of Berlin, that nation being one which permits to citizens of the United States the benefit of copyright on substantially the same basis as its own citizens. It is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party, 243] the existence of *which condition has been determined by the President of the United States by proclamation duly made. 27 Stat. at L. 1021. The defendant is a New Jersey corporation doing business in New York under the laws of the latter state.

In 1899 one Daniel Hernandez painted and designed a painting called "Dolce Far Niente," he then being a citizen and subject of Spain, which nation permits the benefit of copyright to citizens of the United States on substantially the same basis as its own citizens, as has been determined by the proclamation of the President of the United States. 29 Stat. at L. 871. Prior to November 8, 1902, plaintiff became the sole proprietor of said painting by due assignment pursuant to law. About said date plaintiff applied for a copyright, in conformity with the laws of the United States respecting copyrights, before the publication of the painting or any copy thereof. Plaintiff inscribed, and has kept inscribed, upon a visible portion of the painting, the words "Copyright by Rich. Bong." and also upon every copy thereof. By reason of the premises, it is alleged, plaintiff became and was entitled, for the term of twenty-eight years, to the sole liberty of printing, reprinting, publishing, and vending the painting. A violation of the copyright by defendant is alleged by printing, exposing for sale, and selling, copies of the painting under the name of "Sunbeam," by Hernandez, and that defendant has in its possession over 1,000 copies. By reason of the premises, it is alleged, and under § 4965 of the Revised Statutes of the United States, as amended by the act of March 2, 1895 [28

Stat. at L. 965, chap. 194, U. S. Comp. Stat. 1901, p. 3414], defendant has forfeited the plates on which the painting is copied and every sheet thereof copied or printed, and \$10 for every copy of the same in its possession and by it sold or exposed for sale, not more, however, than \$10,000, whereof one half shall go to plaintiff and the other half to the United States. Judgment of forfeiture is prayed.

Defendant answered, admitting that it was a corporation, as alleged, and was doing business in New York. It denied, either absolutely or upon information and belief, all other allegations.

*The court directed a verdict for the [244 defendant, counsel for the plaintiff having stated in his opening, as it is admitted, that he would offer no evidence to establish the citizenship of Hernandez, and would not controvert the statement made by the defense that he was a citizen of Peru (it was alleged in the complaint that he was a citizen of Spain), as to which country the President had issued no copyright proclamation. It is also admitted that plaintiff never owned the "physical painting." There was introduced in evidence a conveyance of the right to enter the painting for copyright protection in America, and the exclusive right of reproduction in colors, and of engraving, etching, lithography in black and in colors. The right of photography and reproduction by all photographic monochrome processes was reserved.

The ruling of the circuit court, and that of the court of appeals sustaining it, were based on the ground that Hernandez, being a citizen of Peru, and not having the right of copyright in the United States, could convey no right to plaintiff. Plaintiff attacks this ruling, and contends that the act of March 3, 1891 [26 Stat. at L. 1106, chap. 565, U. S. Comp. Stat. 1901, p. 3406], "confers copyright where the person applying for the same as proprietor or assign of the author or proprietor is a subject of a country with which we have copyright relations, whether the author be a subject of one of those countries or not."

Whatever strength there is in the contention must turn upon the words of the statute conferring the copyright. Section 4952 of the Revised Statutes, as amended by the act of March 3, 1891 [26 Stat. at L. 1107, chap. 565, U. S. Comp. Stat. 1901, p. 3406] (1 U. S. Rev. Stat. Supp. 951), reads as follows:

"The author, inventor, designer, or proprietor of any book, map, chart, . . . painting . . . and the executors, administrators, or assigns of any such person, shall, upon complying with the provisions of this chapter, have the sole liberty of print-

ing, reprinting, publishing, completing, copying, executing, finishing, and vending the same," etc.

Other sections prescribe the proceedings to be taken to secure copyright, and § 13 provides as follows:

245] **"That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation, made from time to time, as the purposes of this act may require."* 1 U. S. Rev. Stat. Supp. 954.

Plaintiff urges that he is "the 'assign' of the author and proprietor of the painting . . . and being himself a 'citizen or subject of a foreign nation' with which we have copyright relations," the condition of the statute is satisfied, and his copyright is valid, though Hernandez was not such citizen or subject. In other words, though the author of a painting has not the right to copyright, his assignee has if he is a citizen or subject of a foreign state with which we have copyright relations, these being, it is contended, the conditions expressed in § 13. Counsel's argument in support of this contention is able, but we are saved from a detailed consideration of it by the decision of this court in *American Tobacco Co. v. Werckmeister*, 207 U. S. 284, 52 L. ed. 208, 28 Sup. Ct. Rep. 72, 12 A. & E. Ann. Cas. 595. In that case we said that "the purpose of the copyright law is not so much the protection and control of the visible thing as to secure a monopoly, having a limited time, of the right to publish the production, which is the result of the inventor's thought." In considering who was entitled to such right under the statute, we defined the word "assigns," as used in the statute. We said: "It seems clear that the word 'assigns,' in this section is not used as descriptive of the character of the estate which the 'author, inventor, designer, or proprietor' may acquire under the statute, for the 'assigns' of any such person, as well as the persons themselves, may, 'upon complying with **246]** the provisions *of this chapter,' have the sole liberty of printing, publishing, and vending the same. This would seem to demonstrate the intention of Congress to vest in 'assigns,' before copyright, the same privilege of subsequently acquiring complete

statutory copyright as the original author, inventor, designer, or proprietor," and there was an explicit definition of the right transferred as follows: "While it is true that the property in copyright in this country is the creation of statute, the nature and character of the property grows out of the recognition of the separate ownership of the right of copying from that which inheres in the mere physical control of the thing itself, and the statute must be read in the light of the intention of Congress to protect this intangible right as a reward of the inventive genius that has produced the work." In other words, an assignee within the meaning of the statute is one who receives a transfer, not necessarily of the painting, but of the right to multiply copies of it. And such right does not depend alone upon the statute, as contended by plaintiff, but is a right derived from the painter and secured by the statute to the assignee of the painter's right. Of this the opinion leaves no doubt, for it is further said: "We think every consideration of the nature of the property and the things to be accomplished supports the conclusion that this statute means to give to the assigns of the *original owner of the right to copyright an article* [italics ours] the right to take out the copyright secured by the statute independently of the ownership of the article itself." The same idea was repeated when the court came to consider whether the exhibition of the painting, which was the subject-matter of the case, in the Royal Gallery, constituted a general publication which deprived the painter, as the owner of the copyright, of the benefit of the statutory provision. It was said: "Considering this feature of the case, it is well to remember that the property of the author or painter in his intellectual creation is absolute until he voluntarily parts with the same." And the painter had the right of copyright, he being a subject of Great Britain, that country having copyright relations with *the United States. His as-[**247** signee, Werckmeister, was also a citizen of a country having copyright relations with us. But it was the right of the painter which was made prominent in the case and determined its decision.

It was not an abstract right the court passed on, one that arose simply from ownership of the painting. It was the right given by the statute, and which, when transferred, constituted the person to whom it was transferred an assignee under the statute and of the rights which the statute conferred on the assignor. "It is the physical thing created, or the right of printing, publishing, copying, etc., which is within the statutory protection." It is this right of multiplication of copies that is asserted in

the case at bar, and it is not necessary to consider what right plaintiff might have had under the common law "before he sought his Federal copyright and published the painting." See *White-Smith Music Pub. Co. v. Apollo Co.* 209 U. S. 1, 52 L. ed. 655, 28 Sup. Ct. Rep. 319.

It is next contended that Hernandez, as a subject of Peru, was entitled to a statutory copyright in his own right, because, as it is further contended, Peru belongs to the Montevideo International Union. This contention is based on the words of § 13, *supra*, which gives the right of copyright to a citizen or subject of a foreign state or nation when such state or nation "is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement." If this were all there were in the statute, the contention of the plaintiff might have some foundation. The statute, however, provides that the existence of such condition "shall be determined by the President of the United States by proclamation, made from time to time, as the purposes" of the "act may require." It is insisted, however, that this provision is directory, and a right is conferred independent of the action of the President, his proclamation being only a convenient mode of proving the fact. We cannot concur in this view, nor do the cases 248] cited by plaintiff *sustain it. In *Morrill v. Jones*, 106 U. S. 466, 27 L. ed. 267, 1 Sup. Ct. Rep. 423; *Campbell v. United States*, 107 U. S. 407, 27 L. ed. 592, 2 Sup. Ct. Rep. 759; *Williamson v. United States*, 207 U. S. 425, 52 L. ed. 278, 28 Sup. Ct. Rep. 163, this court decided that where the Secretary of the Treasury or Secretary of the Interior is authorized to make regulations in aid of the law, he cannot make regulations which defeat the law. In *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, a regulation of the Secretary of the Treasury fixed the primary standard of imported tea, and was sustained as an "executive duty to effectuate the legislative policy declared in the statute."

It is admitted that the decision of the state department is adverse to the contention, and it is asserted by defendant, and not denied by plaintiff, that the Librarian of Congress has always construed the statutes as denying to citizens of Peru copyright protection. We think, besides, the statute is clear, and makes the President's proclamation a condition of the right. And there was reason for it. The statute contemplated a reciprocity of rights; and what officer is better able to determine the condi-

tions upon which they might depend than the President?

On the record, we think there was no error in directing a verdict on the opening statement of counsel. We agree, however, with plaintiff, that it is better to let a case be developed by evidence. In *Hoffman House v. Foote*, 172 N. Y. 348, 65 N. E. 169, it was pertinently said: "The practice of disposing of cases upon the mere opening of counsel is generally a very unsafe method of deciding controversies where there is or was anything to decide."

Judgment affirmed.

*EUGENE C. KREIGH, Petitioner, [249
v.
WESTINGHOUSE, CHURCH, KERR, &
COMPANY.

(See 3. C. Reporter's ed. 249-259.)

Removal of causes — nonresidence of both parties — waiver.

1. Making up the issues on the merit, without objection waives the right to object, because of the nonresidence of both parties within the district, to the jurisdiction of a Federal circuit court to which the cause has been removed from the state court for diverse citizenship.

[For other cases, see *Removal of Causes*, 287, 288, in *Digest Sup. Ct.* 1908.]

Trial — sufficiency of evidence of negligence to go to jury.

2. Expert testimony that the proper construction of a derrick required that its boom be rigged with two ropes, or that the mast be provided with a lever by which the swing of the boom can be controlled, is sufficient to carry to the jury the question whether an injury to a workman who was struck by the swinging bucket of a derrick not so equipped was not attributable to faults of construction and equipment as well as to negligent operation by fellow servants. [For other cases, see *Trial*, VI. b, in *Digest Sup. Ct.* 1908.]

NOTE. — As to the proper Federal district for suit—see note to *Roberts v. Lewis*, 33 L. ed. U. S. 579.

On waiver of right as to Federal district in which suit may be brought—see note to *Memphis Sav. Bank v. Houchens*, 52 C. C. A. 192.

As to the relation of the doctrine of proximate cause to the rule of liability of a master for injuries to his servant, caused by combined negligence of the master and a fellow servant—see notes to *Lutz v. Atlantic & P. R. Co.* 16 L.R.A. 819, and *Maupin v. Texas & P. R. Co.* 40 C. C. A. 236.

On contributory negligence as question of law or fact—see note to *Northern P. R. Co. v. Egeland*, 41 L. ed. U. S. 82.

Master and servant—concurrent negligence of master and fellow servant.

3. Concurring negligence of fellow servants does not exclude the master's liability if his negligence in failing to provide and maintain a safe place to work contributed to the injury.

[For other cases, see Master and Servant, II. d, 3, in Digest Sup. Ct. 1908.]

Trial—question of law or fact—contributory negligence.

4. Whether an employee, injured while in the direct line of his duty by the swinging bucket of a derrick, had reason to expect that such bucket might swing across the place where he was at work, without notice or warning, or whether due regard for his own safety required him to keep a constant lookout for its approach, are questions for the jury to determine under proper instructions.

[For other cases, see Trial, 298-417, in Digest Sup. Ct. 1908.]

[No. 188.]

Argued April 27, 28, 1909. Decided May 24, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Kansas, sustaining a demurrer to evidence in an action for negligent injury to an employee, which had been removed to that court from the District Court of Wyandotte County in the state of Kansas. Reversed and remanded for a new trial.

See same case below, 11 L.R.A. (N.S.) 684, 61 C. C. A. 338, 152 Fed. 120.

The facts are stated in the opinion.

Messrs. James S. Botsford and Rees Murpin argued the cause and filed a brief for petitioner:

Plaintiff's injury was the natural and probable result of, and should have been anticipated from the lack of, a code of signals and the lack of a lever on the derrick with which to swing the boom, or of a guy rope on the north side to draw it across the wall. And, as the accident could have been foreseen to be the natural or probable result of the failure to provide signals, lever, or guy ropes, the defendant owed the plaintiff the duty to do so, and was guilty of actionable negligence.

Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 386, 37 L. ed. 772, 780, 13 Sup. Ct. Rep. 914; Louisville & N. R. Co. v. Ward, 10 C. C. A. 166, 18 U. S. App. 683, 61 Fed. 927; Union P. R. Co. v. McDonald, 152 U. S. 262, 38 L. ed. 434, 14 Sup. Ct. Rep. 619; Powers v. Harlow, 53 Mich. 507, 51 Am. Rep. 154, 19 N. W. 257; Colusa-Parrot Min. & Smelting Co. v. Monahan, 89 C. C. A. 256, 162 Fed. 276.

53 L. ed.

The duty of the defendant in the construction of the derrick and provision for signals and warnings could not have been affected by the question whether the roofers were notified or actually knew of the presence of the plaintiff or of his brick men.

Lang v. Terry, 163 Mass. 138, 39 N. E. 802.

Nor only was plaintiff ignorant of the defendant's failure to provide for his safety, but the law cast no obligation upon him to become familiar with it.

Newark Electric Light & P. Co. v. Garden, 37 L.R.A. 725, 23 C. C. A. 649, 39 U. S. App. 416, 78 Fed. 74; Swoboda v. Ward, 40 Mich. 420; United States Smelting Co. v. Parry, 166 Fed. 407.

The absolute duty of the master to provide a safe place is not avoided by the neglect of his representative or servants to do the things which will obviously prevent the known original danger.

Grace & H. Co. v. Kennedy, 40 C. C. A. 69, 99 Fed. 682; National Ref. Co. v. Willis, 74 C. C. A. 301, 143 Fed. 107; F. C. Austin Mfg. Co. v. Johnson, 32 C. C. A. 309, 60 U. S. App. 661, 89 Fed. 677.

If the negligence of the master in failing to provide a sufficient or proper appliance and a safe place is a contributing cause of the injury, the fact that the negligence of fellow servants may also contribute is no defense.

Grand Trunk R. Co. v. Cummings, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; Brice-Nash v. Barton Salt Co. (Kan.) 19 L.R.A. (N.S.) 749, 98 Pac. 768.

Where the servants engaged in a department of work themselves change the condition of the place where they are employed by the work they are doing, and by that work create a peril by reason of which one of their number engaged in the same department of work is injured, the master is not liable.

Armour v. Hahn, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433.

The reason of the rule is that the master should not be liable for an injury caused by the working place becoming "unsafe at the particular time of the accident by causes that could not have been anticipated, or by sudden exigencies created in carrying on the details of the work."

Grace & H. Co. v. Kennedy, supra.

When the plan or method of doing the work directed by the master, or any omission of the master, creates a danger not necessarily attendant upon the work in which the servant is engaged, the master is liable for the results of that danger, although it arises in the progress of the work.

Woods v. Lindvall, 1 C. C. A. 37, 4 U. S. App. 49, 48 Fed. 62.

The reason fails and the rule does not apply to cases where one set of workmen, during the progress of the work, create a dangerous condition, and that condition is permitted to exist, and another servant, in a different department of work, who had nothing to do with the creation of the dangerous condition, and who had no knowledge of it, is injured by it.

Thompson-Starrett Co. v. Fitzgerald, 79 C. C. A. 427, 149 Fed. 721.

The rule in regard to dangers created by the progress of the work is stretched beyond all reasonable limits when the master is relieved from all consequences of a known continuing original danger because the progress of the work leads a servant who has no knowledge of the danger into the path of it.

Grace & H. Co. v. Kennedy, supra; *Western Electric Co. v. Hanselmann*, 70 L.R.A. 765, 69 C. C. A. 346, 136 Fed. 564; *Felice v. New York C. & H. R. R. Co.* 14 App. Div. 345, 43 N. Y. Supp. 922; *Lang v. Terry*, 163 Mass. 138, 39 N. E. 802; *McCauley v. Noreross*, 155 Mass. 584, 30 N. E. 464; *Grand Trunk R. Co. v. Tennant*, 14 C. C. A. 190, 21 U. S. App. 682, 66 Fed. 922; *Alaska Treadwell Gold Min. Co. v. Whelan*, 12 C. C. A. 225, 29 U. S. App. 1, 64 Fed. 462.

Mr. Clifford Histed argued the cause, and, with Mr. James H. Harkless, filed a brief for respondent:

The impelling cause for the issuing of the writ of certiorari no longer existing, and the question which suggested its issue having already been finally determined, the writ should be now dismissed.

Barrington v. Missouri, 205 U. S. 483, 51 L. ed. 890, 27 Sup. Ct. Rep. 582.

In so far as it is claimed that the injury to the plaintiff petitioner was brought about by the other workmen upon the building, the doctrine of fellow servant exempts defendant from liability.

Northern P. R. Co. v. Dixon, 194 U. S. 338, 48 L. ed. 1006, 24 Sup. Ct. Rep. 683; *Northern P. R. Co. v. Peterson*, 162 U. S. 346, 40 L. ed. 994, 16 Sup. Ct. Rep. 843; *Baltimore & O. R. Co. v. Brown*, 76 C. C. A. 482, 146 Fed. 24; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 113.

The duty of the master is not always to furnish the latest or even the most approved means, appliances, and tools. His duty is performed when the appliances which he does furnish are reasonably safe and calculated to perform the function for which they are designed. Neither is it the duty of the master to see, at his peril, that the appliances and means of safety furnished

by him are actually used by his employees. He performs his full duty in that regard when he supplies them.

American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 407, 144 Fed. 605.

Plaintiff's own negligence contributed to his injury.

Ross v. Metropolitan Street R. Co. 113 Mo. App. 600, 88 S. W. 144; *National Biscuit Co. v. Nolan*, 70 C. C. A. 436, 138 Fed. 6.

Mr. Justice Day delivered the opinion of the court:

This case is here upon a writ of certiorari to the United States circuit of appeals for the eighth circuit. The action was originally brought to recover for injuries received by Eugene C. Kreigh, petitioner, hereinafter called the plaintiff, while engaged in the employ of the respondent, Westinghouse, Church, Kerr, & Company, hereinafter called the defendant, superintending the construction of the brickwork in the erection of a brick and steel building for which the defendant was the contractor.

The case was originally commenced in the district court of Wyandotte county, Kansas. On the application of the defendant it was removed to the United States circuit court for the district of Kansas. In the petition for the allowance of the writ of certiorari a question was made as to the jurisdiction of the Federal court, as it appears that at the time of the removal neither party was a resident nor citizen of the Federal district to which the case was removed, and neither of them a resident nor citizen of the state of Kansas. But it appears that no motion was made to remand for want of jurisdiction in the Federal court, and no question as to the jurisdiction was made until the case came here. In that state of the record the defect as to the jurisdiction being simply as to the district to which the suit was removed, the parties being citizens of different states, the *objection as to the juris-[253] diction might be, and, in our opinion, was, waived, by making up the issues on the merits without objection as to the jurisdiction of the court. It is unnecessary to enlarge upon this feature of the case, as it is controlled by the recent cases of *Re Moore*, 209 U. S. 490, 52 L. ed. 904, 28 Sup. Ct. Rep. 585, 706; *Western Loan & Sav. Co. v. Butte & B. Consol. Min. Co.* 210 U. S. 368, 52 L. ed. 1101, 28 Sup. Ct. Rep. 720.

The remaining question in the case concerns the correctness of the ruling of the circuit court, affirmed in the court of appeals, whereby, upon the conclusion of the evidence offered by the plaintiff, a demurrer thereto was sustained and the case taken from the jury.

The testimony shows, and, in deciding a question of this character, the view must be taken of it most favorable to the plaintiff, that he was foreman of the bricklayers engaged in the construction of a large brick building which the defendant, as principal contractor, was erecting in Kansas City. About the time of the plaintiff's injury a gang of workmen, also employees of the defendant, were engaged in cementing the roof of the building, the plaintiff and his men being engaged in laying the brickwork of the north wall of the building. The roofers were laying concrete upon the top of the roof. This was accomplished by means of a derrick with a rope and bucket attachment for raising the material, which was on the ground on the north side of the building, and which, by means of the derrick and motive power, was raised in the bucket suspended from the boom, or arm, of the derrick, to a height slightly above the roof, and then pulled inward by means of a guy rope attached to the boom, and, when the bucket was at the proper place, the bottom of it was opened and the concrete deposited upon the roof. Then, in order to put the bucket in position for lowering it, it was swung out over the north wall by means of an energetic push, carrying the end of the boom over the north wall and in position for lowering the bucket again. The work of bricklaying under the superintendence of the plaintiff had progressed to a height of about 40 feet in the north wall, and the plaintiff, superintending the erection of a scaffolding 254]for *the men to work upon in the further construction of the wall, was standing upon a plank near the wall, when the boom was swung outward by a push from the men operating it, and the plaintiff was struck by the heavy bucket attached to the rope from the end of the boom, and was knocked off the plank and fell a distance of 40 feet to the ground, and thereby severely injured.

The testimony shows that the derrick used for the purposes stated was what is known as a "stiff-legged derrick," having a main staff supported by two stiff legs or braces with a swinging boom with hoisting rope attached to it. The derrick at the time was on the top of the roof, and was operated by an engine furnishing the power for hoisting the bucket in the manner we have already described.

The plaintiff introduced testimony tending to show that the usual method of constructing such derricks was to provide them with two ropes, one attached on either side of the end of the boom, to be used to haul it back and forth, and for the purpose of steadying its operation; or by the attachment of a lever to the mast in such a way that a man operating the lever could control

the swing of the boom. The boom in use had but the one guy rope, and that the testimony shows was used for hauling the loaded bucket over the top of the wall to the place where the load was dumped on the roof. The method of returning the bucket for lowering was by a strong push of the boom, the single guy rope thereof hanging loose at the time.

The testimony of the plaintiff tended to show that while he knew there was a derrick on the roof, he did not know of its method of operation further than he knew that it was operated by hand. He did not know the number of ropes attached to the boom, or whether there was a lever or not; he had not seen the boom in operation from the roof. At the time he was struck, when working on the north wall, he received no warning of the approach of the bucket, and had been there but a very short time when he was struck by the bucket and knocked to the ground.

*In the amended petition it was [255 charged as grounds for recovery that—

"1. The defendants were careless and negligent in furnishing and operating a defective, improper, and unsafe derrick to raise, move, and lower said tub or bucket.

"(a) Said derrick was so constructed and operated that there was no means of moving the arm thereof and said bucket or tub after it was emptied, horizontally to or over the north wall of said building, excepting by the employees of the defendants violently pushing the tub or bucket with sufficient force to cause it to clear the wall of the building, and also move with it said arm.

"(b) Said derrick was so constructed and operated that there were no means of stopping or controlling it or the tub or bucket attached thereto after the bucket or tub was emptied and started toward and over the wall of said building.

"(c) The ropes and pulleys on said derrick were defective, insecure, and improperly arranged and used.

"2. The defendants were careless and negligent in causing and allowing said bucket to be violently pushed and swung against the plaintiff without notice or warning to him.

"3. The defendants were careless and negligent in failing to supply and use a system of signals or warnings to notify persons on the building when the derrick, tub, or bucket were to be moved, raised, or lowered.

The duty of the master to use reasonable diligence in providing a safe place for the men in his employ to work in and to carry on the business of the master for which they are engaged has been so frequently applied in this court, and is now so thoroughly settled, as to require but little reference to the cases in which the doctrine has been declared.

Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 87, 39 L. ed. 624, 629, 15 Sup. Ct. Rep. 491; Union P. R. Co. v. O'Brien, 161 U. S. 451, 40 L. ed. 766, 16 Sup. Ct. Rep. 618; Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24.

The employee is not obliged to examine into the employer's methods of transacting 256] his business, and he may assume, in the absence of notice to the contrary, that reasonable care will be used in furnishing appliances necessary to carrying on the business. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24. But while this duty is imposed upon the master, and he cannot delegate it to another and escape liability on his part, nevertheless, the master is not held responsible for injuries resulting from the place becoming unsafe through the negligence of the workmen in the manner of carrying on the work, where he, the master, has discharged his primary duty of providing a reasonably safe appliance and place for his employees to carry on the work, nor is he obliged to keep the place safe at every moment, so far as such safety depends on the due performance of the work by the servant and his fellow workmen. *Armour v. Hahn*, 111 U. S. 313, 28 L. ed. 440, 4 Sup. Ct. Rep. 433; *Perry v. Rogers*, 157 N. Y. 251, 51 N. E. 1021.

Nevertheless, the duty of providing a reasonably safe place for the carrying on of the work is a continuing one, and is discharged only when the master furnishes and maintains a place of that character. As late as *Santa Fe & P. R. Co. v. Holmes*, 202 U. S. 438, 50 L. ed. 1094, 26 Sup. Ct. Rep. 676, it was declared: "The duty is a continuing one and must be exercised whenever circumstances demand it."

Where workmen are engaged in a business more or less dangerous, it is the duty of the master to exercise reasonable care for the safety of all his employees, and not to expose them to the danger of being hurt or injured by the use of a dangerous appliance or unsafe place to work, where it is only a matter of using due skill and care to make the place and appliances safe. There is no reason why an employee should be exposed to dangers unnecessary to the proper operation of the business of his employer. Choctaw, O. & G. R. Co. v. McDade, 191 U. S. 64, 66, 48 L. ed. 96, 99, 24 Sup. Ct. Rep. 24, and cases there cited.

As we have said, this case was taken from the jury when only the plaintiff's evidence had been introduced, and when the plaintiff had the right to have it submitted to the jury in its most favorable aspect if it fairly 257] tended to show liability on the part of the master. The plaintiff's witnesses, experts in this field of operation, testified that the

proper construction and management of such a derrick required that its boom should be rigged with two guy ropes instead of one, or that the mast should be provided with a lever by means of which the men in control could safely operate the boom. In that view we think it was a question for the jury to determine whether the operation of this derrick, which would swing the bucket into the field of operations where the plaintiff and others were constructing the wall, and might be injured unless the operation of the boom were properly controlled, was not attributable to faults of construction and equipment, as well as to negligent operation at the time of injury.

It is contended by the defendant that the boom could have been safely operated with one rope had the men used care in the operation thereof. But, in view of the testimony referred to, we think it was a question for the jury to determine whether the character of derrick furnished by the master discharged his obligation to furnish and maintain for the plaintiff and his associates a reasonably safe place in which to labor, and whether that kind of derrick was not of itself a dangerous instrumentality when operated where others were likely to labor in the course of their employment.

If the negligence of the master in failing to provide and maintain a safe place to work contributed to the injury received by the plaintiff the master would be liable, notwithstanding the concurring negligence of those performing the work. *Grand Trunk R. Co. v. Cummings*, 106 U. S. 700, 27 L. ed. 266, 1 Sup. Ct. Rep. 493; *Deserant v. Cerillos Coal R. Co.* 178 U. S. 409, 420, 44 L. ed. 1127, 1133, 20 Sup. Ct. Rep. 967, and cases there cited.

It is further argued that the testimony shows that the injuries to the plaintiff were solely caused by the negligence of the men operating the derrick in giving it a sudden and strong push toward the north wall, where the plaintiff was standing when injured, and it is contended that the derrick could not have injured the plaintiff but for the negligent operation *thereof by the [258 fellow servants of the plaintiff using the same. But here again we think the question, was one for the jury to determine.

Questions of negligence do not become questions of law, to be decided by the court, except "where the facts are such that all reasonable men must draw the same conclusion from them; or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish." *Gardner v.*

Michigan C. R. Co. 150 U. S. 349, 361, 37 L. ed. 1107, 1110, 14 Sup. Ct. Rep. 140.

It may be that the jury would have found that the injury to the plaintiff was the result solely of the negligence of his fellow servants, but there was testimony in the case tending to establish the unsafe character of the derrick when operated in the manner it was intended to be operated, so far as the record discloses. Of course, so long as there were no workmen in the probable swing of the bucket attached by the rope to the boom, there was no danger to the bricklayers. But a jury might have found that when the bricklayers came within the plane of operation of the derrick, the swinging bucket became a constant menace to them, and they might consider that, in view of the testimony adduced, the duty of the master had not been discharged in furnishing an appliance the operation of which might make unsafe the place in which the workmen were engaged in carrying in their work. The mere fact that until the workmen came within the plane of operation of the boom and swinging bucket, there was no danger to them, would not affect the case, in view of the continuing duty of the master to use reasonable care to keep the place where the workmen were engaged free from dangers not necessarily incident to the business. In other words, we think that upon this branch of the case it was a question for the jury to determine whether the alleged defective appliances contributed directly to produce the injuries complained of.

But it is insisted that the testimony shows 259] that the plaintiff *was guilty of such contributory negligence as should prevent any recovery. But we think there was enough in the case to take it to the jury upon this branch of it. The testimony shows that the plaintiff was engaged in the direct line of his duty at the time of his injury. Whether he had reason to expect the swinging of the bucket across the place where he was at work, without notice or warning to him, or whether he ought to have expected that the bucket would swing where he was at work, and that his own safety required him to keep a constant lookout for the approach of the same, were questions for the jury to determine under proper instructions as to the care required of the plaintiff as well as of the defendant. *Lang v. Terry*, 163 Mass. 138, 39 N. E. 802.

Upon the whole case, we are of opinion that, as the testimony stood at the time the case was arrested from the jury, there was enough in it to require its submission, under proper instructions from the court, to the jury to determine the questions involved. In this view we think it was error to take

the case from the jury and to instruct for the defendant in the circuit court, and that the circuit court of appeals erred in affirming that judgment.

Judgment reversed and cause remanded to the Circuit Court with directions to grant a new trial.

Reversed.

*JOSÉ ELIAS SANTIAGO and Ana[260
Matilde Gonzales, Plffs. in Err.,
v.

ANTONIO PONS NOGUERAS, Juan Pons Colon, and Amador Pons Colon, Doing Business under the Name of Pons & Company, and the American Colonial Bank.

(See S. C. Reporter's ed. 260-268.)

War—military power in ceded territory—establishing provisional court.

1. The creation of the United States provisional court for Porto Rico between April 11, 1899, when the ratifications of the treaty of peace by which Porto Rico was ceded to the United States were exchanged, and May 1, 1900, when the act of April 12, 1900 (31 Stat. at L. 77, chap. 191), establishing a civil government in Porto Rico, took effect, was within the scope of the military power, acting by the authority of the President as Commander in Chief, although peace then prevailed, and the courts established under the Spanish sovereignty were open.

[For other cases, see War, VI. in Digest Sup. Ct. 1908.]

Courts—jurisdiction of Porto Rico provisional court—diverse citizenship.

2. A controversy between a Porto Rican and a Spaniard furnishes the diversity of citizenship which the order establishing the United States provisional court for Porto Rico made jurisdictional.

[Jurisdiction of insular courts, see Courts, III. c, in Digest Sup. Ct. 1908.]

Writ and process—service.

3. Service of the process of the United States provisional court for Porto Rico by delivering the summons at the usual place of defendant's abode, into the hands of his wife, is sufficient, such service being in strict accordance with the procedure established by that court.

[Service of process, see Writ and Process, III. in Digest Sup. Ct. 1908.]

Judgment—collateral attack.

4. Whether or not the United States provisional court for Porto Rico lost jurisdiction of a cause and of the parties because, in the course of its proceedings, it disre-

NOTE.—On the effect of acquisition of territory by United States on laws and property rights therein—see note to *Re Chavez*, 80 C. C. A. 457.

As to what constitutes personal service of process—see note to *Wilson v. Trenton*, 16 L.R.A. 200.

garded certain provisions of the Code of Civil Procedure which were binding upon it. is a question which cannot be raised by collateral attack on its judgment.
[For other cases, see Judgment, III. 4, in Digest Sup. Ct. 1908.]

[No. 127.]

Submitted April 7, 1909. Decided May 24, 1909.

IN ERROR to the District Court of the United States for the District of Porto Rico to review a judgment in favor of defendants in an action to recover certain parcels of land sold under an execution issued upon a judgment of the United States Provisional Court. Affirmed.

See same case below, 2 Porto Rico Fed. Rep. 468.

The facts are stated in the opinion.

Mr. Francis H. Dexter submitted the cause for plaintiffs in error.

Mr. Charles Hartzell submitted the cause for defendants in error. Mr. Manuel Rodriguez-Serra was on the brief.

Mr. Justice Moody delivered the opinion of the court:

The plaintiffs in error brought in the district court of the United States for Porto Rico an action for the recovery of certain parcels of land held by the defendants in error. There was judgment for the defendants in the court below, and the case is here upon writ of error. We need pay attention only to such facts as will make clear the question which we think is decisive of the case.

One of the plaintiffs once owned the lands in dispute, but they were sold upon an execution issued upon a judgment rendered against him by the United States provisional court. The defendants, by mesne conveyances, hold the title conveyed by the execution sale. The plaintiffs attack that title solely upon the grounds that the United States provisional court had no lawful existence, and if lawfully constituted was entirely without jurisdiction to render the judgment which it did, and that, for the one reason or the other, the judgment is a nullity everywhere.

The ratifications of the treaty of peace by which Porto Rico was ceded to the United States were exchanged April 11, 1899. 30 Stat. at L. 1754. The act of Congress establishing a civil government in Porto Rico, passed April 12, 1900 (31 Stat. at L. 77, chap. 191), took effect on May 1 of that year. 264] Between these two dates, *on June 27, 1899, the United States provisional court, here in question, was established by military authority, with the approval of the Presi-

dent, by general order No. 88, series of 1899. The parts of the order material here follow:

"1. In view of the existing and steadily increasing legal business requiring judicial determination, which does not fall within the jurisdiction of the local insular courts, such as smuggling goods in evasion of revenue laws, larceny of United States property, controversies between citizens of different states and of foreign states, violation of the United States postal law, etc., etc., and pursuant to authority from the President of the United States, conveyed by indorsement of April 14, 1899, from the Acting Secretary of War, and after full conference with the supreme court and members of the bar of the island, a United States provisional court is hereby established for the department of Porto Rico.

"2. The judicial power of the provisional court hereby established shall extend to all cases which would be properly cognizable by the circuit or district courts of the United States under the Constitution, and to all common-law offenses within the restrictions hereinafter specified."

"10. Civil actions when the amount in controversy is fifty dollars (\$50) or over, and in which any of the classes of persons above enumerated in paragraph 8 are parties, or in which the parties litigant by stipulation invoke its jurisdiction, shall be brought in the provisional court: Provided, that, in the determination of all suits to which Porto Ricans are parties, or of suits arising from contracts which have been or shall be made under the provisions of Spanish or Porto Rican laws, the court shall, as far as practicable, conform to the precedents and decisions of the United States courts in similar cases which have been tried and determined in territory formerly acquired by the United States from Spain or Mexico. In all other civil actions the case shall lie within the jurisdiction of the proper insular court as now provided by local law."

By paragraph 11, the losing party is afforded an opportunity *to apply to this [265 court for a "writ of certiorari or other suitable process to review such judgment or decree." At the time this order was issued peace prevailed in Porto Rico, and the courts established under Spanish sovereignty were open.

The plaintiffs contend that the military power, acting by the authority of the President, as Commander in Chief, does not warrant the creation of the United States provisional court.

By the ratifications of the treaty of peace, Porto Rico ceased to be subject to the Crown of Spain, and became subject to the legislative power of Congress. But the civil government of the United States cannot extend immediately and of its own force over

conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation, and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an interregnum? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as Commander in Chief. In the case of *Cross v. Harrison*, 16 How. 164, 14 L. ed. 889, a situation of this kind was referred to in the opinion of the court, where it said; "It [the military authority] was the government when the territory was ceded as a conquest, and it did not cease as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been 266] legislatively changed. *No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the government." Pp. 193, 194. And see *Leitensdorfer v. Webb*, 20 How. 176, 15 L. ed. 891, and opinion of Mr. Justice Gray in *Downes v. Bidwell*, 182 U. S. 244, 345, 45 L. ed. 1088, 1128, 21 Sup. Ct. Rep. 770.

The authority of a military government during the period between the cession and the action of Congress, like the authority of the same government before the cession, is of large, though it may not be of unlimited, extent. In fact, certain limits, not material here, were put upon it in *Doolley v. United States*, 182 U. S. 222, 45 L. ed. 1074, 21 Sup. Ct. Rep. 762, and *Lincoln v. United States*, 197 U. S. 419, 49 L. ed. 816, 25 Sup. Ct. Rep. 455, though it was said in the *Doolley Case*, page 234: "We have no doubt, however, that, from the necessities of the case, the right to administer the government of Porto Rico continued in the military commander after the ratification of the treaty, and until further action by Congress,"—citing *Cross v. Harrison*, supra.

But, whatever may be the limits of the 53 L. ed.

military power, it certainly must include the authority to establish courts of justice, which are so essential a part of any government. So it seems to have been thought in *Leitensdorfer v. Webb*, supra. With this thought in mind, the military power not only established this particular court in Porto Rico, but as well a system of courts which took the place of the courts under Spanish sovereignty, and were continued by the organic act. The same course was pursued in the Philippine Islands.

By § 34 of the organic act (31 Stat. at L. 77, chap. 191) a district court of the United States for Porto Rico was created, and it was provided that the same "shall be the successor to the United States provisional court established by general orders numbered eighty-eight, promulgated by Brigadier General Davis, United States Volunteers, and shall take possession of all records of that court, and take jurisdiction of all cases and proceedings pending therein, and said United States provisional court is hereby discontinued."

*The record shows that, in conformi-[267 ty with this provision, the newly-created district court of the United States for Porto Rico issued an execution upon this judgment of the United States provisional court, and the property was sold upon that execution.

A further contention of the plaintiffs is that the United States provisional court was without jurisdiction because the diversity of citizenship made requisite by the order did not exist. Assuming, without deciding, that this question is open at this time, we are of the opinion that the citizenship of the parties to the action in the United States provisional court was such as to give that court jurisdiction. The plaintiff there was a Spanish subject and the defendant a citizen and a resident of Porto Rico. Taking the second and the tenth paragraphs into consideration, and the classes of persons enumerated in paragraph 8, which included "foreigners," there can be no doubt that the case was within the jurisdiction which the order sought to confer. In view of the whole order, we think that a controversy between a Porto Rican and a Spaniard furnished the diversity of citizenship which the order made jurisdictional. Undoubtedly, one of the main purposes of the establishment of this court was to afford a court where Spanish subjects could obtain justice against Porto Ricans at a time when it might be feared that the embers of the old disputes between Spaniards and Porto Ricans were still aflame.

The plaintiffs, one of whom was the defendant in the action before the United States provisional court, further suggest that that defendant was not served with

process, and never appeared, and that the judgment rendered against him by default was a nullity. This point does not appear to be pressed and there is nothing in it. The service was in strict accordance with the procedure established by the court, and by delivering a summons at the usual place of abode of the defendant, into the hands of his wife.

The plaintiffs further contend that, if the United States provisional court had jurisdiction of the case and the parties, *in some way it had lost it, because, in the course of its proceedings, it disregarded certain provisions of the Code of Civil Procedure which were binding upon it. But clearly no such question is open on a collateral attack, such as this is, and we need delay no further upon that point.

There were other questions in the case, which the view we have taken of it render it unnecessary to consider.

We are of the opinion that the judgment of the United States provisional court was not a nullity, and that the sale on execution, under which the defendants claim, conveyed to them a good title. As the court below took the same view, its judgment is affirmed.

By agreement, Nos. 128, 129, 130 abide the result of this case, and corresponding judgments will be entered in them.

MIGUEL TUPIÑO et al., Plffs. in Err.,
v.
LA COMPAÑIA GENERAL DE TABACOS
DE FILIPINAS.

(See S. C. Reporter's ed. 268-274.)

Appeal—amount in dispute—uniting interests of several parties.

The judgment in an action to recover real property in which plaintiff, although claiming under a single title all the land occupied separately by the various defendants, does not allege joint ownership or joint possession or joint action of any kind, the controversy with each defendant relating to a separate and distinct parcel, does not show an amount in dispute sufficient to sustain a writ of error from the Federal Supreme Court, where such judgment, while apparently rendered jointly, so far as the damages are concerned, against all the defendants, runs separately against each defendant for recovery of possession of that part of the land of which he was alleged and found to be in

possession, and the whole amount of the damages added to the value of the land in controversy with any of the defendants does not equal the jurisdictional amount. [For other cases, see Appeal and Error, 560-566, in Digest Sup. Ct. 1908.]

[No. 148.]

Argued April 14, 15, 1909. Decided May 24, 1909.

IN ERROR to the Supreme Court of the Philippine Islands to review a judgment which affirmed a judgment of the court of First Instance of the Province of Isabela de Luzon for the restoration of possession of certain lands, for damages, and for an injunction against further disturbance of the plaintiff's rights. Dismissed for want of jurisdiction.

See same case below, 4 Philippine, 33.

The facts are stated in the opinion.

Mr. John C. Gittings argued the cause, and, with Messrs. William Steele Grey and Justin M. Chamberlin, filed briefs for plaintiffs in error.

Mr. Aldis B. Browne argued the cause, and, with Messrs. Alexander Britton, W. A. Kincaid, and J. H. Blount, filed a brief for defendant in error.

Mr. Justice Moody delivered the opinion of the court:

The defendant in error brought this action for the recovery of certain lands, in the court of first instance of the Philippine Islands, against eighty-four persons, who are now the plaintiffs in error. The prayer of the complaint was for restoration of possession, for damages, and an injunction against further disturbance of the plaintiff's right. The court of first instance rendered judgment for the plaintiff, awarding the relief prayed for, and the judgment was affirmed by the supreme court of the Philippine Islands. The case is now here upon writ of error, accompanied by a large number of assignments of error. The defendant in error has moved to dismiss the writ for lack of jurisdiction of this court to entertain it, and that motion must first receive consideration.

The jurisdiction of this court is rested by the plaintiffs in error solely upon the ground that the value of the real estate in controversy exceeds the sum of \$25,000. Sec. 10 of act approved July 1, 1902, 32 Stat. at L. 691, 695, chap. 1369, U. S. Comp. Stat. Supp. 1907, p. 214. The disposition of the motion to dismiss turns upon the question whether, within the true meaning of the statute, land of the value of \$25,000 was in controversy. In the solution of this

NOTE.—As to amount necessary to give United States Supreme Court jurisdiction—see notes to Schunk v. Moline, M. & S. Co. 37 L. ed. U. S. 256, and Commercial Bank v. Buckingham, 12 L. ed. U. S. 169.

question it is useful to examine the pleadings, the course of the trial, and the judgment.

270] *The company alleged itself to be the owner of lands known as the Hacienda de San Luis y la Concepción, having certain defined boundaries and an area of some 4,000 hectares. The complaint further alleged "that the defendants above named, for more than one and less than six years ago, illegally seized and continued to hold certain portions of the said property," having an "area of 446 hectáreas, 79 areas, and 4 centiareas as to the fields, and 4 hectareas, approximately, as to the lots on which their houses and warehouses are built, distributed among distinct and separate parcels, but all within the perimeter of the said estate above described; and for a better understanding thereof the following statement is given of the parcels held by each one of the defendants." There then follows eighty-four separate descriptions of the separate holdings of each of the defendants. The case of Miguel Tupiño is agreed upon by the parties as typical of the others, and the allegation with respect to him is: "Miguel Tupiño has a lot of 6 areas with a dwelling and two warehouses thereon, and 2 fields, containing 4 hectareas and 50 areas and 2 hectareas and 25 areas, respectively." Then follows an allegation that "the plaintiff has been damaged in the sum of 9,000 Mexican pesos by reason of the unlawful detention above described," and the complaint closes with the prayer before stated.

Each of the defendants filed separate answers. The answer of Tupiño may be taken as a type. In it he denies the title of the plaintiff and that it suffered the damages alleged; denies, specifically, that the plaintiff had a record title to the portion of the land described as possessed by him; denies that that portion of the land was situated within the boundaries of the Hacienda de San Luis y la Concepción; denies that the plaintiff is the owner of the portion of the land described as possessed by the defendant, or any part thereof, or that the plaintiff has ever been entitled to the possession thereof; denies that the plaintiff has any interest in the 271] portion of the land *described as possessed by the defendant, or ever has had any; denies that the defendant has unlawfully withheld from the plaintiff the portion of land described as possessed by the defendant.

In the opinion of the judge of the court of first instance he describes the defense in part as being "that each and every one of them (the defendants) is the owner of the parcel of land occupied by him, because it has been cultivated and possessed by some

of them for more than ten years and by all of them for more than one year."

After the supreme court of the Philippine Islands had rendered its judgment, the defendants made a motion for a rehearing, in which they complained that the court had overlooked an assignment of error in assessing damages jointly against all the defendants, and said, in this connection, "inasmuch as each of said defendants is alleged by plaintiff, and found by the trial court, to be occupying a distinct and separate parcel of land, with no privity or community of interest with his codefendants, and each of said defendants has filed a separate answer for such distinct parcel, and maintained a separate defense."

It is very clear, although the plaintiff claimed under a single title all the land occupied separately by the various defendants, that the action itself was not against the defendants as joint disseisors, but was an action against each of them separately as the holder of a distinct parcel or parcels of land. There was no allegation, in either the complaint or the answer, of joint ownership or joint possession or joint action of any kind. The proceeding, in effect, consisted of eighty-four separate and distinct actions against the eighty-four defendants. The complaint alleged that each defendant was in possession of a separate and distinct parcel of land, described separately, however inadequately. The answer of each defendant, while denying *in toto* the title of the plaintiff, in other respects related solely to the tract of land alleged to be unlawfully held by that particular defendant. Undoubtedly, where a complaint alleges *a joint entry and [272] ouster, and the answer takes issue, without setting up separate claims to distinct parcels by the several defendants, and the judgment for the recovery of possession is against all the defendants jointly, then the measure of appellate jurisdiction is the value of the whole land. *Friend v. Wise*, 111 U. S. 797, 28 L. ed. 602, 4 Sup. Ct. Rep. 695. But where the pleadings show that there was no allegation of joint ownership or joint possession, and that the controversy with each defendant related to a separate and distinct lot of land, and the judgment is rendered separately against the defendants, then the measure of jurisdiction on appeal or writ of error is not the value of the whole land, but the value of each part separately. *Tupper v. Wise*, 110 U. S. 398, 28 L. ed. 189, 4 Sup. Ct. Rep. 26, where it was said: "The rule is well settled that distinct judgments in favor of or against distinct parties, though in the same record, cannot be joined to give this court jurisdiction."

We think that the case at bar falls within the rule of *Tupper v. Wise*. It appears in

point of fact that the value of the whole land which the plaintiff sought to recover in separate parcels from the eighty-four defendants exceeds \$25,000. But it also appears that the value of the land in controversy with any one of the defendants is far less than \$25,000.

Stopping at this point, it would follow that the writ of error should be dismissed. But the form of the judgment in this case is peculiar and must receive consideration before the motion to dismiss is finally disposed of. The judgment of the supreme court of the Philippine Islands simply affirmed the judgment of the court of first instance. In that court, as there was no formal judgment, the terms of it must be gathered from the opinion of the judge. The opinion concludes as follows:

"I decide: First, that the *Compañia General de Tabacos de Filipinas* shall be restored by the sheriff or by any of his deputies to the possession of the *Hacienda San Luis y la Concepción* by giving possession thereof to D. Miguel Macias y Toro, or any other person lawfully representing the said 273]company. . . . *Third, that both the present defendants as well as those declared in default, be required to immediately vacate the said hacienda or be evicted therefrom, together with their houses and warehouses. Fourth, that the preliminary injunction issued on the 15th of November last, and modified on the third inst., be regarded as perpetual from this date, and the injunction bond of \$10,000 given is to be canceled after the proper legal formalities. The tobacco in the hands of the receiver will be delivered to the *Compañia General*, and the bond given by the receiver canceled, after rendition by him of the accounts of his receivership. Fifth, and last, that the defendants present, and those in default, pay the costs and damages in the sum of 9,000 Mexican pesos; and finally, that the said defendants are enjoined absolutely from performing any act hereafter tending in the slightest degree to disturb the possession by the *Compañia General* of the lands comprised within the hacienda of *San Luis y la Concepción*. So ordered."

If this language is to be taken as expressing the judgment of the court, it certainly has some tendency to show that the judgment for the restoration of the lands was a joint one against all the defendants. But we are not inclined to scrutinize too strictly the language of a learned judge, trained in another system of jurisprudence than our own; and in view of the separate issues clearly made by the pleadings, and the prayer of the complaint that the plaintiff be restored "to the possession of the various parcels of the said estate above indicated,

after the eviction or expulsion therefrom of all the defendants, including the houses and warehouses which they have erected thereon," we construe this judgment to run separately against each defendant for that part of the land of which he was alleged and found to be in possession. It was so treated by the judge of the supreme court of the Philippine Islands, in refusing to allow a writ of error. The judgment for damages appears to be, so far as we can see, a joint judgment against all the defendants. But even the whole amount *of the [274 damages, 9,000 Mexican pesos, added to the value of the land in controversy with any of the defendants, does not make a sum exceeding \$25,000. We think, therefore, that the writ of error must be dismissed.

It may not be improper to say that if we had jurisdiction on this writ of error we should find grave difficulty in sustaining the joint judgment for damages against all the defendants, if, indeed, we have properly construed it to be joint. But we have no such jurisdiction, and therefore refrain from deciding that point. Doubtless, if there is anything in it, some way may be found, by application to the supreme court of the Philippine Islands, to correct the error, if any exists.

Writ of error dismissed.

WESTERN UNION TELEGRAPH COMPANY, Plff. in Err.,

v.

SAMUEL CHILES.

(See S. C. Reporter's ed. 274-279.)

States — power over navy yard — exclusiveness of Federal jurisdiction.

The exclusive legislative power which Congress possesses over the Norfolk Navy Yard excludes the giving of any operation or effect, within the limits of such navy yard, to the provisions of Va. Code 1904, pp. 696, 697, imposing a penalty upon telegraph companies for failure to deliver a message to the addressee.

[For other cases, see *States*, 87-91, in *Digest Sup. Ct.* 1908.]

[No. 168.]

Argued April 20, 1909. Decided May 24, 1909.

NOTE. — As to state jurisdiction over lands of the United States within the state — see note to *Barrett v. Palmer*, 17 L.R.A. 720.

On the effect of acquisition of territory by United States on laws and property rights therein — see note to *Re Chavez*, 80 C. C. A. 457.

IN ERROR to the Supreme Court of Appeals of the State of Virginia to review a judgment which affirmed a judgment of the Court of Hustings of the city of Portsmouth, in that state, imposing a penalty upon a telegraph company for failure to deliver a telegram addressed to a person on board a government vessel lying at the Norfolk Navy Yard. Reversed.

See same case below, 107 Va. 60, 57 S. E. 587.

The facts are stated in the opinion.

Mr. Francis Raymond Stark argued the cause, and, with Messrs. George H. Fearons, Robert M. Hughes, and Rush Taggart, filed a brief for plaintiff in error:

It can hardly be successfully contended that the police power of a state can be invoked within the limits of territory not only beyond its jurisdiction, but actually within the jurisdiction and subject to the police power of another government, whether the Federal government or that of another state or country; and, if it cannot, then any default on the part of the plaintiff in error, occurring within such territory, was an extraterritorial default, and one to which the statute could not be held to apply.

Western U. Teleg. Co. v. Pendleton, 122 U. S. 347, 30 L. ed. 1187, 1 Inters. Com. Rep. 306, 7 Sup. Ct. Rep. 1126; Western U. Teleg. Co. v. James, 162 U. S. 650, 40 L. ed. 1105, 16 Sup. Ct. Rep. 934.

If the constitutional provision that Congress shall have power to exercise exclusive legislation over given territory has any meaning at all, it means, clearly, that, with respect to such territory, the state is forbidden to legislate.

Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525, 532, 537, 29 L. ed. 264, 266, 268, 5 Sup. Ct. Rep. 995; Foley v. Shriver, 81 Va. 568; Mitchell v. Tibbetts, 17 Pick. 298; Com. v. Clary, 8 Mass. 72; Re Ladd, 74 Fed. 41.

Within the Norfolk Navy Yard the state of Virginia could not levy or collect a tax (Ft. Leavenworth R. Co. v. Lowe, supra; 5 Ops. Atty. Gen. 316; Bannon v. Burnes, 39 Fed. 892). She could not prescribe or enforce the punishment for a crime committed therein (United States v. Cornell, 2 Mason, 63, Fed. Cas. No. 14,867; 8 Ops. Atty. Gen. 418; Com. v. Clary and Re Ladd, supra). She could not, except for the express reservation of the right so to do, serve civil process there (14 Ops. Atty. Gen. 426; Martin v. House, 39 Fed. 694). A person residing there is not a "resident" of the state, and, under a provision of the state Constitution requiring that electors shall be residents of the state, would not be entitled to vote (Sinks v. Reese, 19 Ohio St. 316, 2 Am. Rep. 397). "National and 53 L. ed.

municipal powers of government of every description," with respect to this territory, were cut off from the state of Virginia, and "united in the government of the Union" (Pollard v. Hagan, 3 How. 223, 11 L. ed. 570). As in the case of the District of Columbia, the only government in the navy yard is that of the United States, and the only laws that are or can be enforced there are the laws of the United States. "No portion of the state sovereignty or jurisdiction remained in or over the ceded district. The only sovereignty in the district is that of the United States" (United States v. Williams, 4 Cranch, C. C. 399, Fed. Cas. No. 16,712).

Mr. William D. Stoakley (by special leave) argued the cause and filed a brief for defendant in error:

The power, whether called police, governmental, or legislative, exists in each state, by appropriate enactment, not forbidden by its own Constitution or by the Constitution of the United States, to regulate the relative rights and duties of all persons and corporations within its jurisdiction, and, therefore, to provide for the public convenience and the public good. This power in the state is entirely distinct from any power granted to the general government, although, when exercised, it may sometimes reach subjects over which national legislation can be constitutionally extended.

Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 297, 43 L. ed. 707, 19 Sup. Ct. Rep. 465.

Outside of the field directly occupied by the general government, under the powers granted to it by the Constitution, all questions arising within a state that relate to its internal order, or that involve the public convenience or the general good, are primarily for the determination of the state; and its legislative enactments relating to these subjects, and which are not inconsistent with the state Constitution, are to be respected and enforced by the courts of the Union, if they do not, by their operation, directly intrench upon the authority of the United States, or violate some right protected by the national Constitution.

Lake Shore, M. & S. R. Co. v. Ohio, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465; Com. v. Alger, 7 Cush. 85.

So long as the state legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates, in fact, to aid commerce, and to expedite, instead of hindering, the safe transportation of persons and commodities from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial Federal statutes relating to the same sub-

ject, or in lieu of such legislation, where Congress has not exercised its power at all.

Faust v. Cleveland, 58 C. C. A. 194, 121 Fed. 810; Ray, Negligence of Imposed Duties, pp. 483, 484; Chicago, R. I. & P. R. Co. v. McGlinn, 114 U. S. 546, 29 L. ed. 272, 5 Sup. Ct. Rep. 1005, 1008; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 297, 43 L. ed. 707, 19 Sup. Ct. Rep. 465; Com. v. Drewry, 15 Gratt. 1; 8 Cyc. Law & Proc. pp. 774, 775.

Mr. Justice **Moody** delivered the opinion of the court:

The defendant in error, a gunner in the Navy, was stationed on board the U. S. S. Abarenda, which was lying at the Norfolk Navy Yard. A telegram addressed to him aboard the ship was received for transmission at Richmond, Virginia, thence transmitted, so far as appears, with due dispatch, to Portsmouth, Virginia, which adjoins the Norfolk Navy Yard, and is the place to which telegrams directed to the navy yard are commonly sent. The message was never received by the defendant in error. He brought this action in the court of hustings of the city of Portsmouth against the plaintiff in error, the telegraph company, to recover a penalty imposed by the laws of Virginia. The Virginia Code 1904, pp. 696, 697, after providing for a penalty for failure duly to transmit a message, contains the following provision:

"(6)

"It shall be the duty of every telegraph company, upon the arrival of a dispatch or message at the point to which it is to be transmitted, to cause the same to be forwarded by a messenger to the person to whom the same is addressed, or his agent, and, upon the payment of any charges due on this dispatch or message, to deliver it; provided, such person or agent reside within the city or incorporated town in which such station is, or that at such point the regulations of the company require such delivery. 276] *"[It shall also be the duty of such company to forward a dispatch or message promptly, as directed, where the same is to be forwarded. For every failure to deliver or forward a dispatch or message as promptly as practicable the company shall forfeit \$100 to the person sending the dispatch or message, or the person to whom it was addressed."

The plaintiff's declaration contained two counts: the first, for failure to transmit the telegram in conformity with the law of Virginia; and the second, for failure to deliver it in accordance with the part of the law just quoted. As there was no proof in support of the first count, and it was apparent-

ly not submitted to the jury at the trial, it may pass out of view.

The second count, after alleging the receipt of the message at the point of origin, and its transmission, and receipt at the office at Portsmouth, avers that it was the duty of the telegraph company to deliver it to the plaintiff on the U. S. S. Abarenda at the navy yard as promptly as practicable, and that the defendant failed to perform its duty in that regard, wherefore it became indebted to the plaintiff for the amount of the statutory penalty. There was a demurrer to the declaration, and one of the reasons alleged was "that the place at which the message was to be delivered was on board a government vessel, at a yard which is under the jurisdiction and control of the United States, and neither the state nor this honorable court has jurisdiction to impose any penalty for failure to deliver a message at such place." The demurrer was overruled, and the case was tried before a jury. There was testimony in behalf of the defendant that, seasonably after the message was received at Portsmouth, it was intrusted to a messenger boy for delivery to the plaintiff on board the ship; that it was taken to the gangway of the ship, and there, in accordance with the practice in such cases, delivered to the man on duty at that place, who receipted for it. With the weight of this testimony we have no concern. It also appeared that the message never reached the plaintiff. The defendant requested the presiding judge to instruct the jury, in substance, *that if the default[277 in delivery occurred within the limits of the territory of the Norfolk Navy Yard, plaintiff could not recover by virtue of the Virginia law, which had no authority within those limits. The court declined, under exception, to give this instruction, and the jury returned a verdict for the plaintiff for the amount of the penalty. There was judgment for the plaintiff, which, upon writ of error duly raising the questions which have been stated, was affirmed by the supreme court of appeals of the state. Thereupon a writ of error from this court was allowed.

Part of the land composing the Norfolk Navy Yard, formerly known as the Gosport Navy Yard, was once owned by the state of Virginia. Title to the remainder of it was acquired by the United States by purchase from the owners. Title to the land owned by the state was acquired by the United States under the provisions of an act of assembly passed January 25, 1800, which authorized the governor of the commonwealth to convey by deed the title to the state land and "all the jurisdiction which this commonwealth possesses over the public lands commonly called and known by the name of

Gosport," reserving only the right of the officers of the state to execute process within the jurisdiction authorized to be ceded. The files of the Department of the Navy contain a deed of Governor James Monroe, dated June 15, 1801, executing in precise conformity with the act the authority which it conferred. The United States had purchased from the owners other land, for the purpose of extending the navy yard. That purchase was recognized by the state of Virginia by an act of assembly passed February 27, 1833, and the governor of the commonwealth was authorized to cede the same jurisdiction, with the same reservation. The files of the Department of the Navy contain also a deed by Governor Littleton W. Tazewell, dated April 1, 1835, fully executing the provisions of the last-named act.

The case does not call for the consideration of the effect of a contract made within the state of Virginia for the seasonable **278** *transmission and delivery of a telegram. The record presents the single question whether a law of the state of Virginia imposing a penalty has any effect or operation within the limits of the navy yard. This question, if not fully raised by the demurrer, was distinctly raised by the request for instructions, which was refused. On one aspect of the evidence it might have been found that the only default of the defendant was entirely within the limits of the navy yard, and the defendant was entitled to an appropriate instruction on the issue thus raised. By the refusal to give the instruction requested, the jury in effect was permitted to find for the plaintiff, even if the default was entirely within the navy yard. We think this was clearly erroneous. By the terms of the Constitution, Congress is given the power "to exercise exclusive legislation in all cases whatsoever . . . over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." Art. 1, § 8, ¶ 17, of the Constitution.

It is apparent from the history of the establishment of the Norfolk Navy Yard, already given, that it is one of the places where the Congress possesses exclusive legislative power. It follows that the laws of the state of Virginia, with the exception referred to in the acts of assembly, cannot be allowed any operation or effect within the limits of the yard. The exclusive power of legislation necessarily includes the exclusive jurisdiction. The subject is so fully discussed by Mr. Justice Field, delivering the opinion of the court in *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525, 29 L. ed. 264, 5 Sup. Ct. Rep. 995, that we need do no more than refer to that case and the cases cited

in the opinion. It is of the highest public importance that the jurisdiction of the state should be resisted at the borders of those places where the power of exclusive legislation is vested in the Congress by the Constitution. Congress already, with the design that the places under the exclusive jurisdiction of the United States shall not be freed from the restraints of the law, has enacted for them * (Revised Statutes, title 70, [279 chapter 3, U. S. Comp. Stat. 1901, p. 3625) an extensive criminal code, ending with the provision (§ 5391 [U. S. Comp. Stat. 1901, p. 3651]) that where an offense is not specially provided for by any law of the United States, it shall be prosecuted in the courts of the United States, and receive the same punishment prescribed by the laws of the state in which the place is situated for like offenses committed within its jurisdiction. We do not mean to suggest that the statute before us creates a crime in the technical sense. If it is desirable that penalties should be inflicted for a default in the delivery of a telegram occurring within the jurisdiction of the United States, Congress only has the power to establish them.

Judgment reversed.

THAD A. BRYANT, Trustee in the Matter of E. M. Newton & Company, Bankrupts, Appt.,

v.

SWOFFORD BROS. DRY GOODS COMPANY.

(See S. C. Reporter's ed. 279-292.)

Federal courts—following local law—conditional sale.

1. Whether a contract under which goods were delivered to the bankrupts was one of conditional sale, and valid without record, are questions on which a court of bankruptcy follows the local law.

[For other cases, see Courts, VII. c, 10, in Digest Sup. Ct. 1908.]

Conditional sale—right to resell—recording.

2. A contract which gives the purchaser

NOTE.—As to state decisions and laws as rules of decision in Federal courts—see notes to *Wilson v. Perrin*, 11 C. C. A. 71; *Hill v. Hite*, 29 C. C. A. 553; *Griffin v. Overman Wheel Co.* 9 C. C. A. 548; *Elmendorf v. Taylor*, 6 L. ed. U. S. 290; *Jackson ex dem. St. John v. Chew*, 6 L. ed. U. S. 584; *United States ex rel. Butz v. Muscatine*, 19 L. ed. U. S. 490; *Clark v. Graham*, 5 L. ed. U. S. 335; *Forepaugh v. Delaware, L. & W. R. Co.* 5 L.R.A. 508; and *Mitchell v. Burlington*, 18 L. ed. U. S. 351.

As to what constitutes a conditional sale—see notes to *Sturm v. Boker*, 37 L. ed. U. S. 1093, and *Dunlop v. Mercer*, 86 C. C. A. 448.

the right to resell in the ordinary course of business, but provides that title shall remain in the seller until such resale, and that the proceeds derived therefrom, in whatever form existing, shall be the property of the seller, is, in Arkansas, a conditional sale, and valid without record.

[For other cases, see Sale, I. d, in Digest Sup. Ct. 1908.]

Bankruptcy — title of trustee.

3. A trustee in bankruptcy has no higher rights than the bankrupts themselves in property delivered to the bankrupts under a contract of conditional sale.

[For other cases, see Bankruptcy, 268-274, in Digest Sup. Ct. 1908.]

Stipulation — by receiver in bankruptcy — binding effect on trustee.

4. A trustee in bankruptcy is bound by the stipulation of the receiver in bankruptcy, approved by the referee, on the faith of which the bankrupt's conditional vendor surrendered possession, that all the property in dispute should be deemed to have been that delivered under the conditional contract, or to be the proceeds of the resale of property so delivered.

[Stipulations generally, see Stipulation, in Digest Sup. Ct. 1908.]

[No. 172.]

Argued April 22, 23, 1909. Decided May 24, 1909.

A PPEAL from the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment which reversed a judgment of the District Court for the Western District of Arkansas, denying the right of a conditional vendor, presented by a petition in intervention, to certain moneys and property in the hands of a trustee in bankruptcy. Affirmed.

See same case below, 83 C. C. A. 23, 153 Fed. 841.

Statement by Mr. Justice Moody:

The record in this appeal, transmitted to this court from the circuit court of appeals, contains the following findings of fact and conclusions of law:

1. On July 20, 1904, Ernest M. Newton and John F. Newton, partners as E. M. Newton & Company, merchants at wholesale and retail in Arkansas, and Swofford Bros. Dry Goods Company, a corporation, of Kansas City, Missouri, engaged in the wholesale dry goods business, entered into a written contract as follows:

Know all men by these presents: That Mr. E. M. Newton & Company of New Lewisville, Lafayette county, Arkansas, a copartnership composed of E. M. Newton and J. F. Newton, party of the first part, has this day purchased from Swofford Bros. Dry Goods Company and said Swofford Bros.

Dry Goods Company, party of the second part, has sold to said E. M. Newton & Company, certain goods upon the following expressed conditions:

1. Said goods shall be selected by said first party from sample or from stock of said second party at Kansas City, Missouri, and same shall be shipped to said first party upon their request to New Lewisville, Arkansas, from which place they shall not be removed without the written consent of said second party, save and except that said first party shall have the right to sell said goods in the ordinary course of business, but not otherwise.

2. Said second party shall prepare at time of shipment full and complete invoices of the goods so sold and selected, and shall deliver copies of said invoices by mail or otherwise to said first party. Such invoices shall consist of itemized list of *the articles[281 so sold and shipped, with the price and value of each article, and shall show also the credit terms upon which the same are sold, and the rate of discount, if any, which is to be allowed upon payment of the purchase price in cash upon delivery or at an earlier date than that specified in said credit terms.

3. The title to and right to immediate possession of all the goods so sold and shipped by said Swofford Bros. Dry Goods Company and of the proceeds derived from the sale of the same by the first party, whether in cash or note or book account, shall be vested and remain in said Swofford Bros. Dry Goods Company until the full purchase price and the agreed value of the same shall be paid by said E. M. Newton & Company to said Swofford Bros. Dry Goods Company in cash; and any and all notes, checks, and accepted drafts shall not be considered as payment, but merely as evidence of indebtedness. And upon taking possession of any notes and book accounts derived by said first party from the sale of said goods or any part thereof, said Swofford Bros. Dry Goods Company shall have the right to collect the same, either in its name or in the name of E. M. Newton & Company, by suit or otherwise, and in case of disputed notes and accounts against persons of doubtful solvency, said second party may compromise and settle the same, or may extend the time of payment thereof in such manner and upon such terms as may to it seem advantageous, and any new notes taken thereafter, whether in the name of Mr. E. M. Newton & Company, or in the name of said Swofford Bros. Dry Goods Company, shall be held and considered in all respects the same as the original evidence of indebtedness.

4. This contract and the terms thereof shall apply to all future orders given by the E. M. Newton & Company, and to all future

sales and shipments made to them by said Swofford Bros. Dry Goods Company; so long as any part or portion of the purchase price of the goods sold and delivered hereunder shall remain unpaid, said Swofford Bros. Dry Goods Company shall have the right to terminate this contract at any time, and said E. M. Newton & Company may terminate the same at any time by paying **282]***in full in cash whatever balance of the purchase price of the goods purchased and shipped shall then remain unpaid. Delivery of the goods, properly packed and marked, to a common carrier at Kansas City, Missouri, consigned to the first party, as above specified, shall be deemed and considered a full and complete delivery thereof by said second party, and all freight and transportation charges shall be paid by said consignees. The acceptance of goods subsequently sold and shipped by the first party, and the placing of the same in their stores and warehouses at New Lewisville, Arkansas, or elsewhere, shall be held and considered sufficient to bring such goods within and under the terms hereof, shall be mentioned or referred to in the order so given or in the invoices given and delivered with each invoice.

Said first party shall keep all goods purchased hereunder properly insured at their expense for the benefit of second party; but the loss or destruction of such goods by fire or otherwise shall not cancel the indebtedness thereof, but said first party shall still remain liable to second party for any part of the purchase price remaining unpaid.

In witness whereof the parties above named have hereunto placed their hands and seals in duplicate this 20th day of July, 1905

E. M. Newton & Co.,

Swofford Bros. Dry Goods Co.,

Signed by Wm. Moore, Sec.

2. The contract was not filed or recorded.

3. Pursuant to the contract, and prior to June 30, 1905, the dry goods company delivered to the Newtons goods of the value of \$15,369.57. The latter paid on account thereof the sum of \$2,059.01. On June 30, 1905, the unpaid balance was \$13,310.56.

4. The goods delivered under the contract were placed by the Newtons in their stock with other goods obtained from other parties, but they were of such character and contained such marks as rendered them capable of being identified and *separated. **283]**It was contemplated by the parties that the Newtons might sell the goods so delivered in the usual course of their business. The Newtons did not keep separate accounts of their resales of the goods, nor did the dry goods company require them to make reports thereof.

5. On June 30, 1905, when the Newtons were insolvent and the dry goods company knew it, they surrendered to the dry goods company, as belonging to it under the provisions of the contract, goods of the value of \$5,337.21, notes to the amount of \$1,684.32, and customers' accounts to the amount of \$8,277.04. The goods were so surrendered by the Newtons as being the unsold part of those delivered under the contract, and the notes and accounts as representing proceeds of their sales of like goods. Actual possession was taken by the dry goods company.

6. In fact, the goods surrendered to the dry goods company were, with slight exception, goods that had been delivered under the contract; but only about one half in amount of the notes and accounts surrendered represented proceeds of other goods delivered under the contract.

7. On July 3, 1905, three days after the surrender of the property as above mentioned, the Newtons filed their voluntary petition in bankruptcy, were adjudged bankrupts, and Thad. A. Bryant was appointed receiver. In one of the schedules attached to the verified petition in bankruptcy the dry goods company was listed as a secured creditor, with a statement of the facts upon which its rights were based, and recitals of the surrender to it of the goods, notes, and accounts, that the notes and accounts were proceeds of the goods furnished by the dry goods company under the contract and resold by the Newtons to their customers, and that the goods, notes, and accounts were then in possession of that company.

8. After the appointment of the receiver in the bankruptcy proceeding he demanded from the dry goods company possession of the goods, notes, and accounts mentioned. The *demand was refused, but after-**284]**wards the dry goods company surrendered them to the receiver under a written stipulation that they might be disposed of by him in connection with the sale of the other property in his hands, but that the dry goods company should not be prejudiced thereby, and that the proceeds should be held in lieu of the property so surrendered, to abide the final determination of a court of competent jurisdiction as to the ownership thereof; and, if the dry goods company prevailed, it should have the proceeds free of fees, charges, and expenses. As one of the conditions upon which it was made, it was expressly admitted in this stipulation that the goods, notes, and accounts in controversy were then in the actual, exclusive, and adverse possession of the dry goods company, that the goods were part of those delivered to the Newtons under the contract of July 20, 1904, and that the notes and accounts

were proceeds of other goods delivered under that contract. This stipulation was made subject to the approval of the referee in bankruptcy. It was executed by the dry goods company and the receiver, and the referee duly indorsed his approval thereon. Upon the faith thereof the goods, notes, and accounts were then surrendered to the receiver. No fraud or deception was practised by the dry goods company upon the referee or the receiver in connection with the making of this stipulation.

9. Thad. A. Bryant, who had been appointed receiver, was duly selected as trustee. He sold the goods in controversy for \$3,135. The notes and accounts were not sold, but, at the time of the hearing of this matter before the referee, he had collected \$2,250 on account thereof, and still retained in his hands those that were uncollected. He has kept a separate account of these funds, and held sufficient funds to answer the result of the litigation.

10. The dry goods company thereupon presented its intervening petition, seeking the payment to it of the sums realized as mentioned in the preceding finding, and the restitution to it of the uncollected notes and 285]accounts. The controversy *in the cause was presented by the intervening petition, the trustee's answer thereto, and the reply of the dry goods company.

Conclusions of Law.

1. The contract of July 20, 1904, is a contract of conditional sale, and not of mortgage, and as such was not required by the laws of Arkansas to be filed or recorded.

2. Under the laws of Arkansas the contract was valid as between the parties thereto, notwithstanding the fact that it authorized the vendees to resell the goods delivered thereunder.

3. It was also valid as between the parties thereto not only in respect of such of the goods delivered thereunder as remained unsold when the vendor demanded and secured possession from the vendees, but also in respect of the notes and accounts which represented proceeds of like goods resold by the vendee to their customers, and which could be so identified and segregated.

4. The contract being valid under the local law as between the parties thereto, the trustee in bankruptcy of the vendees cannot avoid or defeat the title of the vendor, who took possession prior to the institution of the proceedings in which the vendees were adjudged to be bankrupts. The trustee has no greater right or title than the bankrupts.

5. Inasmuch as the bankruptcy court obtained from the vendor possession of the notes and accounts in controversy upon the faith of a stipulation made with its approv-

al, and without practice of fraud or deceit, that such notes and accounts were the proceeds of goods covered by the contract of conditional sale, and still holds to such possession, the trustee is estopped from disputing the fact stipulated.

6. Swofford Bros. Dry Goods Company, the vendor, is entitled to a decree that the trustee in bankruptcy pay to it the sum of \$3,135, the proceeds of the goods in controversy, and the further sum of \$2,250, the collections of notes and accounts in controversy, made by the trustee prior to the hearing *before the referee, and also for [286 such collections as may have been made since that time, and for the surrender of such of said notes and accounts as may remain uncollected, and for costs. The sums mentioned should be paid in full.

Mr. William H. Arnold argued the cause, and, with Mr. James K. Jones, filed a brief for appellant:

The power of the receiver and of the referee are derived solely from the bankrupt act, and there is nothing in the bankrupt act which will authorize a receiver to enter into an agreed statement of facts pertaining to the case.

Booth v. Clark, 17 How. 322, 15 L. ed. 164; Ray v. Norseworthy, 23 Wall. 128, 23 L. ed. 116.

There are a number of decisions of the supreme court of Arkansas sustaining contracts wherein it is stipulated that the title of the property is to remain in the vendor until the price is paid, but these decisions are with reference to such things as machinery, farming implements, live stock, and where it is not agreed that the property shall be resold.

Gibson v. Martin, 38 Ark. 207; McIntosh v. Hill, 47 Ark. 363, 1 S. W. 680; Carroll v. Wiggins, 30 Ark. 402; Simpson v. Shackelford, 49 Ark. 63, 4 S. W. 165; McRea v. Merrifield, 48 Ark. 160, 2 S. W. 780; Cincinnati Safe Co. v. Kelly, 54 Ark. 476, 16 S. W. 263; Edgewood Distilling Co. v. Shannon, 60 Ark. 133, 29 S. W. 147; Dedman v. Earle, 52 Ark. 164, 12 S. W. 330; Ferguson v. Hetherington, 39 Ark. 438; Ames Iron Works v. Rea, 56 Ark. 450, 19 S. W. 1063; Morris v. Cohn, 55 Ark. 401, 17 S. W. 342, 18 S. W. 384; Bank of Little Rock v. Collins, 66 Ark. 240, 50 S. W. 694; Faisst v. Waldo, 57 Ark. 270, 21 S. W. 436.

The doctrine of these cases follows the decisions of the Supreme Court of the United States.

Sturm v. Boker, 150 U. S. 312, 37 L. ed. 1093, 14 Sup. Ct. Rep. 99.

There is an obvious difference in reserving the title to implements, wagons, gristmills, tools, etc., under such contracts, and gents'

furnishing goods or general merchandise, where there can be no question of the identity of the wagons, machinery, etc., but there would always be a question with reference to the identity of general merchandise. The very nature of the goods themselves, added to the power of disposition, as in the case at bar, without being required to keep them separate from other goods, or the proceeds separate from the general stock, ought to bar a recovery in this case.

Lund v. Fletcher, 39 Ark. 334, 43 Am. Rep. 270; Robinson v. Elliott, 22 L. ed. 758, note; Means v. Dowd, 128 U. S. 273, 32 L. ed. 429, 9 Sup. Ct. Rep. 65; Griswold v. Sheldon, 4 N. Y. 581; Davis v. Ransom, 18 Ill. 396; Blennerhassett v. Sherman, 105 U. S. 100, 26 L. ed. 1080; Second Nat. Bank v. Hunt, 11 Wall. 391, 20 L. ed. 190.

The decisions of the supreme court of Arkansas, under practically the same conditions as in the case at bar, show that the intervener's contract is fraudulent in law and cannot be sustained.

Lund v. Fletcher, 39 Ark. 335, 43 Am. Rep. 270; Martin v. Ogden, 41 Ark. 192; Fink v. Ehrman Bros, 44 Ark. 310; see also Loving Pub. Co. v. Johnson, 68 Tex. 273, 4 S. W. 532; Phelps v. Murray, 2 Tenn. Ch. 746; Mayer v. Catron (Tenn. Ch. App.) 48 S. W. 255; Wilder v. Wilson, 16 Lea, 548; Arbuckle Bros. v. Kirkpatrick, 98 Tenn. 221, 36 L.R.A. 285, 60 Am. St. Rep. 854, 39 S. W. 3; Star Clothing Mfg. Co. v. Norde-man, 118 Tenn. 384, 100 S. W. 93; Coweta Fertilizer Co. v. Brown, 89 C. C. A. 612, 163 Fed. 162; Re Garcewich, 55 C. C. A. 510, 115 Fed. 87; Re Pekin Plow Co. 50 C. C. A. 257, 112 Fed. 308; Re Fraizer, 117 Fed. 747; Re Carpenter, 125 Fed. 831; Re Howland, 109 Fed. 869; Re Rabenau, 118 Fed. 471; Kellam v. Brown, 112 N. C. 451, 17 S. E. 416; Chickering v. Bastress, 130 Ill. 206, 17 Am. St. Rep. 309, 22 N. E. 542; Ex parte White, L. R. 6 Ch. 397; Drew v. Smith, 59 Me. 393; Gross v. Jordan, 83 Me. 380, 22 Atl. 250; Cleveland Mach. Works v. Lang, 67 N. H. 348, 68 Am. St. Rep. 675, 31 Atl. 20; Dixon v. Blondin, 58 Vt. 689, 5 Atl. 514; Marvin Safe Co. v. Norton, 48 N. J. L. 410, 57 Am. Rep. 566, 7 Atl. 418; Mershon v. Moors, 76 Wis. 502, 45 N. W. 95; Barrett v. Kelley, 66 Vt. 515, 44 Am. St. Rep. 862, 29 Atl. 809.

The title of an assignee under a general assignment for the benefit of creditors under the laws of Arkansas fails whenever it is shown that there is fraud on the part of the assignor in making the assignment.

Hill v. Shrygley, 51 Ark. 59, 9 S. W. 845; Probst v. Welden, 46 Ark. 405; Penzel Grocer Co. v. Williams, 53 Ark. 81, 13 S. W. 736; Lazarus v. Camden Nat. Bank, 64 Ark. 322, 42 S. W. 412.

53 L. ed.

Mr. Ernest S. Ellis argued the cause, and, with Messrs. Edgar C. Ellis and Webber & Webber, filed a brief for appellee:

Stipulations made during the progress of, or in regard to, litigation, are upheld and favored by the courts.

20 Enc. Pl. & Pr. pp. 622, 657, 662, 663, 666, 668, 669.

The line of discrimination between mortgages and conditional sales cannot be marked out by any general rule; but, in every case, the true nature of the transaction, and the intention of the parties, must be determined by its own circumstances.

Johnson v. Clark, 5 Ark. 321; Porter v. Clements, 3 Ark. 364; Blakemore v. Byrnside, 7 Ark. 505; Stryker v. Hershey, 38 Ark. 264; Hershey v. Luce, 56 Ark. 320, 19 S. W. 963, 20 S. W. 6.

Such an instrument as the one between the Swoffords and Newtons has not only been construed to be a contract of conditional sale in Arkansas, but it has been held legal and binding by the supreme court of that state in Triplett v. Mansur & T. Implement Co. 68 Ark. 230, 82 Am. St. Rep. 284, 57 S. W. 261; see also McRea v. Merrifield, 48 Ark. 160, 2 S. W. 780; Carroll v. Wiggins, 30 Ark. 402; F. J. Dewes Brewery Co. v. Merritt, 82 Mich. 198, 9 L.R.A. 270, 46 N. W. 379; Perkins v. Mettler, 126 Cal. 100, 58 Pac. 384; Harkness v. Russell, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51.

In the state of Arkansas, there is no statute either requiring or permitting the filing or recording of conditional-sale contracts.

McRea v. Merrifield, supra; McIntosh v. Hill, 47 Ark. 363, 1 S. W. 680; Simpson v. Shackelford, 49 Ark. 66, 4 S. W. 165.

And, in the absence of such a statute, there is neither necessity nor opportunity for recording. An unauthorized record of such a contract is not notice.

6 Am. & Eng. Enc. Law, 2d ed. p. 498.

The trustee is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued.

York Mfg. Co. v. Cassell, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481; Security Warehousing Co. v. Hand, 206 U. S. 415, 51 L. ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas. 789.

Mr. Justice Moody delivered the opinion of the court:

The merchandise which was delivered by Swofford Bros. Dry Goods Company to E. M. Newton & Company was delivered under the terms of a written contract. That contract provided that the title to the goods until their sale, and to the proceeds derived

from their sale, whether in the form of cash, notes, or book accounts, should be and remain in the dry goods company. The contract gave the Newtons the right to sell the goods in the ordinary course of business, but, as has been said, provided that the proceeds of the sale, in whatever form they existed, should be the property of the dry goods company. When the Newtons became insolvent and ceased business, they, in recognition of the obligations due from them under this contract, returned to the dry goods company that part of their goods which remained unsold. The character and marks of the goods rendered them capable of being identified and separated. They turned over at the same time, as and for the notes and accounts representing the proceeds of sales of the company's goods, certain notes and customers' accounts. It was found as a fact that one half in amount of these notes and accounts represented the proceeds of sales of other goods than those delivered under the contract. It, therefore, now appears, if it is competent to show it, that this one **290**]half of the *notes and accounts did not belong to the dry goods company, and ought not to have been turned over to it, and that, on the contrary, they should have gone into the estate of the Newtons, who subsequently became bankrupt. Three days after the surrender of this property the Newtons, on their voluntary petition, were adjudged bankrupts, and the appellant was appointed receiver. He demanded of the dry goods company the possession of the goods, notes, and accounts mentioned, but the demand was refused. Subsequently a written contract was entered into between the dry goods company and the receiver, with the approval of the referee. No fraud or deceit induced the making of this contract. By its terms the dry goods company, on its part, surrendered the goods, notes, and accounts to the receiver, and agreed that he might dispose of them in connection with the assets of the estate, and that the proceeds of the property thus disposed of should be held in lieu of it to abide the determination of a court of competent jurisdiction. The receiver, on the other hand, agreed that the goods, notes, and accounts were in the actual and adverse possession of the dry goods company, and that the goods were part of those delivered to the Newtons under the contract between them and the dry goods company, before referred to, and that the notes and accounts were the proceeds of other goods delivered under that contract. Subsequently, the receiver was appointed trustee, and sold the goods, and collected a part of the notes and accounts. The proceeds of the goods and of the collections are held to await the result of this litigation, which is

in the form of an intervening petition of the dry goods company.

We think it clear that the contract under which the goods were delivered to the Newtons was one of conditional sale. *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51; *William W. Bierce v. Hutehins*, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524. There is nothing in the nature of this contract which would forbid the parties from entering into it if it is valid by the laws of the state where made, but in bankruptcy the construction and validity of such a contract must be *determined by the [291 local laws of the state. *Thompson v. Fairbanks*, 196 U. S. 516, 49 L. ed. 577, 25 Sup. Ct. Rep. 306; *Humphrey v. Tatman*, 198 U. S. 91, 49 L. ed. 956, 25 Sup. Ct. Rep. 567; *York Mfg. Co. v. Cassell*, 201 U. S. 344, 50 L. ed. 782, 26 Sup. Ct. Rep. 481. That such a contract is a conditional sale and is valid without record is the law of Arkansas. *Triplett Mansur & T. Implement Co.* 68 Ark. 230, 82 Am. St. Rep. 284, 57 S. W. 261. The trustee has no higher rights in this regard than the bankrupt. *York Mfg. Co. v. Cassell*, supra.

It follows that, so far as the identified goods and notes and accounts are concerned, the intervener, the dry goods company, must prevail.

It has turned out, according to the finding of facts, that some small fraction of the goods and about one half of the notes and accounts which were delivered by the Newtons to the dry goods company, as and for the goods, notes, and accounts which were the property of that company, were not in fact such, and the question therefore arises whether, under the circumstances disclosed in the findings, the trustee is entitled to avail himself of these facts. We think it was rightly held by the court below that he was not. There seems to be no reason for a nice consideration of the powers of receivers and trustees. When the receiver was appointed he found all the property in dispute in the hands of the dry goods company, to which it had been delivered by the Newtons, as and for the property of the company, and by which it had been received as its own property. When the receiver made his demand for it the return was at first refused. The parties in the controversy, then being at arms' length, agreed that if the dry goods company would give up the advantages of possession, and, instead of converting the goods, notes, and accounts into cash in its own way and on its own account, permit the receiver to do so, then those goods should be deemed part of those delivered under the contract, and the notes and accounts the proceeds of other goods delivered under the contract. This arrange-

ment was approved by the referee. The trustee has taken the property under it and has never offered to return the property, or 292]*any part of it. The property has in large part been sold or otherwise disposed of in the course of the bankruptcy administration. Under these circumstances we are of opinion that the trustee, the appellant in case, was bound by the agreement of the receiver, that all the property in dispute should be conclusively deemed that which passed under the original conditional contract, or the proceeds thereof.

Judgment affirmed.

JOSEPH WILD & COMPANY, Appts.,
v.
PROVIDENT LIFE & TRUST COMPANY,
Trustee of the Estate of George Watkinson & Company, Bankrupts.

(See S. C. Reporter's ed. 292-297.)

Bankruptcy — surrender of preference to permit proof of claim.

Payments made on an open account for goods sold and delivered within four months prior to an adjudication in bankruptcy, which are received in good faith, without the creditor's knowledge of the debtor's insolvency, the account being made up of debits and credits, leaving a net amount due from the bankrupt's estate, do not constitute preferences which the creditor is bound to surrender before proving his claim.

[For other cases, see Bankruptcy, 349-357, in Digest Sup. Ct. 1908.]

[No 190.]

Argued April 29, 1909. Decided May 24, 1909.

A PPEAL from the United States Circuit Court of Appeals for the Third Circuit to review a judgment which affirmed a judgment of the District Court for the Eastern District of Pennsylvania, disallowing a claim in bankruptcy except upon a surrender of an alleged preference. Reversed.

See same case below, 82 C. C. A. 516, 153 Fed. 562.

The facts are stated in the opinion.

Messrs. Max L. Powell and Harris S. Sparhawk argued the cause and filed a brief for appellants:

The running account between the insolvent and the creditor may be variable, and during insolvency may show at times a diminishing of the estate; but if, in the entirety of the transactions, the estate is enriched, then the payments are not preferential.

Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649.
53 L. ed.

Mr. Arthur G. Dickson argued the cause, and, with Messrs. Dickson, Beitler, & McCouch, filed a brief for appellee:

An innocently preferred creditor should not be placed in a worse position than one who had received a guilty preference, as, by the new credits which he had given to his debtor, the creditor had, in effect, returned payments which were otherwise preferential.

McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923, 5 Am. Bankr. Rep. 267; Re Ryan, 105 Fed. 760, 5 Am. Bankr. Rep. 396; Re Southern Overalls Mfg. Co. 111 Fed. 518, 6 Am. Bankr. Rep. 633; Kahn v. Cone Export & Commission Co. 53 C. C. A. 92, 115 Fed. 290, 8 Am. Bankr. Rep. 157; Re E. O. Thompson's Sons, 6 Am. Bankr. Rep. 663, affirmed in 7 Am. Bankr. Rep. 214; Gans v. Ellison, 52 C. C. A. 366, 114 Fed. 734, 8 Am. Bankr. Rep. 153; Peterson v. Nash Bros. 55 L.R.A. 344, 50 C. C. A. 260, 112 Fed. 311, 7 Am. Bankr. Rep. 181; Re Beswick, 7 Am. Bankr. Rep. 395.

Where credits succeeded payments, and the credits during the period of insolvency exceeded the payments made during the same period, it was not necessary for the creditor to make any surrender before proving his claim.

Re Dickson, 55 L.R.A. 349, 49 C. C. A. 574, 111 Fed. 726, 7 Am. Bankr. Rep. 186; C. S. Morey Mercantile Co. v. Schiffer, 52 C. C. A. 249, 114 Fed. 447, 7 Am. Bankr. Rep. 670; Kimball v. E. A. Rosenham Co. 52 C. C. A. 33, 114 Fed. 85, 7 Am. Bankr. Rep. 718; Re Sagor, 57 C. C. A. 412, 121 Fed. 658, 9 Am. Bankr. Rep. 361; Jaquith v. Alden, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649; Yaple v. Dahl-Millakan Grocery Co. 193 U. S. 526, 48 L. ed. 776, 24 Sup. Ct. Rep. 552.

In the present case, the first sale was paid for and then there followed a number of sales. If the transactions had stopped there, this case would not be before this court. There was, however, a subsequent payment of a part of the account. This payment did not induce any subsequent credits; it was not so intermingled with other payments and sales as to entitle the creditor to ask that it be taken as part of a continuing transaction by which the estate was benefited. Its only effect was to reduce the estate, to take a part of the assets which then belonged to all of the creditors of the bankrupts, and to give it to one of them. No reasoning, however plausible, can rob this payment of that effect, and it was, therefore, under the bankruptcy act of 1898, a preference.

Gans v. Ellison and Kimball v. E. A. Rosenham Co. supra; Re Colton Export & Import Co. 57 C. C. A. 417, 121 Fed. 663, 10 Am. Bankr. Rep. 14.

Mr Justice Moody delivered the opinion of the court:

The appellants, Joseph Wild & Company, offered for proof against the estate of George Watkinson & Company, who had been declared bankrupts, a claim of \$2,565.92. The claim was allowed by the referee, but disallowed by the district court, except upon a surrender of an alleged preference of \$634.78, which was received within four months of the adjudication. The judgment of the district court was affirmed by the circuit court of appeals.

The facts of the case are simple. The bankrupt because insolvent on or before January 1, 1901, but the claimants had no knowledge of their insolvency during the running of the account hereafter referred to, and the merchandise therein specified was sold and delivered in the ordinary course of business. The appellants sold and delivered merchandise in various items, beginning February 14, 1901, and ending October 8, 1901. The total price of the merchandise thus delivered was \$3,377.28. There were payments on account on June 29 and October 10, amounting to \$811.36, leaving the net amount by which the bankrupt estate was enriched, \$2,565.92. The last payment, on October 10, was \$634.78, and was two days after the last sale and delivery of merchandise.

The single question in the case is whether that payment was a preference. It is conceded that it would not be a preference, in view of the other facts in the case, if it had been followed by a sale and delivery of goods of any value, however small. This concession is made necessary by the decision in *Jaquith v. Alden*, 189 U. S. 78, 47 L. ed. 717, 23 Sup. Ct. Rep. 649, which is, in all respects, like the present case, except that two days after the payment which was alleged *to be a preference, merchandise of trifling value was sold and delivered to the bankrupt. But the decision in that case was not rested upon the fact of this slight sale subsequent to the last payment. It was rather put upon the broader principle that all the dealings between the creditor and the bankrupt were after the bankrupt's insolvency, and that their net effect was to enrich the bankrupt's estate by the total sales, less the total payments. The majority of the court thought these facts distinguished the case from *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 45 L. ed. 1171, 21 Sup. Ct. Rep. 906, though there was a difference of opinion upon that point. But all doubt was resolved in *Yaple v. Dahl-Millikan Grocery Co.* 193 U. S. 526, 48 L. ed. 776, 24 Sup. Ct. Rep. 552, where the precise question which is now here was decided by the court, and it was held, where a creditor has a claim upon

an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, that payments made under such circumstances did not constitute preferences which the creditor was bound to surrender before proving his claim in bankruptcy.

It follows that the judgment of the Circuit Court of Appeals was erroneous, and it must be reversed.

SOUTHERN RAILWAY COMPANY, Plff.
in Err.,
v.

ST. LOUIS HAY & GRAIN COMPANY.

(See S. C. Reporter's ed. 297-302.)

Carriers — charges for permitting re-consignment.

A railway carrier is entitled to some compensation in addition to the actual cost involved in taking loaded cars in transit to the shipper's warehouses at an intermediate point for unloading, inspection, and reloading, and taking away the reloaded cars, whether or not the carrier is under any obligation to extend such a privilege to shippers.

[Reasonableness of carrier's rates, see *Carriers*, III. d, in Digest Sup. Ct. 1908.]

[No. 104.]

Argued March 8, 9, 1909. Decided June 1, 1909.

IN ERROR to the United States Circuit Court of Appeals for the Seventh Circuit to review a judgment which affirmed a judgment of the Circuit Court for the Eastern District of Illinois for the recovery of an award of the Interstate Commerce Commission in favor of a shipper, based upon the payment of an alleged unreasonable and excessive charge for permitting a reconsignment. Reversed and remanded with instructions to remit the proceedings to the Interstate Commerce Commission for further investigation.

See same case below, 82 C. C. A. 614, 153 Fed. 728.

Statement by Mr. Justice Brewer:

This was an action brought by the defendant in error on an award of the Interstate Commerce Commission. In a general way, the facts are as follows: The St. Louis Hay & Grain Company is a corporation organized under the laws of the state of Illinois, with its principal office at St. Louis, Missouri, a dealer in hay, in the course of which business it operates two

warehouses in East St. Louis, Illinois. The railway company is the owner and operating a line of railway extending from East St. Louis through the eastern district of Illinois to points in Southern states, to which the hay and grain company is engaged in shipping hay. The company buys some hay at its warehouses, brought in from the adjacent country, but a large portion of it is bought at points to the north and west. Some of the hay thus purchased is sent directly through East St. Louis in the cars in which it was originally loaded, but much of it is taken to its warehouses, there unloaded, inspected, and reloaded for the Southern markets. This is called a reconsignment. Taking these cars which are to be reconsigned to the hay and grain company's warehouses, and taking the reloaded cars therefrom, involves the use of the cars for a longer time, and there is some expense in hauling the cars. For this the railway company had been in the habit of charging \$4 or \$5 a car, equivalent on the average loading to 2 cents per hundred pounds. On an application by the company to the Interstate Commerce Commission it was held, on May 15, 1905 (11 Inters. Com. Rep. 90), that such charge was an excessive and unreasonable charge, and that one half thereof was sufficient. Upon that basis it awarded to [299] the hay and grain company the sum of \$1,572.08, one half the sum paid theretofore by it to the railway company. This sum not being paid, the hay and grain company, on January 23, 1906, filed its petition in the United States circuit court for the eastern district of Illinois to recover the amount thus awarded, with interest, and also for an attorney's fee. A trial resulted on June 25, 1906, in a judgment in favor of the hay and grain company for the amount awarded by the Commission, with interest thereon, and also for \$350 as an attorney's fee. 149 Fed. 609. On error to the United States circuit court of appeals for the seventh circuit the judgment of the circuit court was, on April 16, 1907, affirmed (82 C. C. A. 614, 153 Fed. 728), whereupon the case was brought here on error.

Messrs. **Claudian B. Northrop and Edward C. Kramer** argued the cause and filed a brief for plaintiff in error.

Messrs. **P. J. Farrell and L. O. Whitenel** argued the cause and filed a brief for defendant in error.

Mr. Justice **Brewer** delivered the opinion of the court:

This case rests on the findings and conclusion of the Interstate Commerce Commission; for while, on the trial in the circuit court, testimony in addition to that which

was produced before the Commission was received, yet the finding of the court was that, "from all the evidence heard and adduced on the trial of this cause in this court, the court finds that the said findings of fact by the said Interstate Commerce Commission are supported and justified by the said evidence, and it is ordered that the said findings of fact, as above recited and set out, be and the same are adopted as the special findings of fact of the court, and that the same be set out in the records of this court accordingly."

Nothing was, of course, added in the circuit court of appeals, which merely affirmed the judgment of the circuit court. We *turn, therefore, to the proceedings [300 before the Commission, and there is this finding of fact:

"While the question is perplexing, and while we may not have apprehended all the material points involved, we are strongly of the opinion and find that, taking everything into account, the average additional expense to southern lines in case of reconsigned hay will not exceed that of direct through shipments by more than from \$2 to \$2.50 per car, which is equivalent upon the average loading of hay to about 1 cent per hundred pounds."

The conclusions, so far as material to this controversy, are thus stated:

"The stopping of a commodity in transit for the purpose of treatment or reconsignment is in the nature of special privilege which the carrier may concede, but which the shipper cannot, in the present state of the law, demand as a matter of lawful right. *Diamond Mills v. Boston & M. R. Co.* 9 Inters. Com. Rep. 311. Carriers may not, however, discriminate between markets nor between individuals in the granting of such privileges. If this right is given to the markets which compete with East St. Louis in this business by these defendants, it should, *prima facie*, also be granted to that market. If these defendants allow this privilege to the competitors of the complainant at East St. Louis, they should accord it the same privilege.

"The case shows, although not very clearly, that the defendants concede this privilege at other competing markets, and that a track buyer in East St. Louis itself can send along a car load, which he purchases, but does not unload, without the payment of this charge. It further shows, however, that the right to unload this hay and handle it at its warehouse is of value to the complainant, and that it costs these defendants something to accord that privilege.

"Under these circumstances, we think it is not an undue preference against this complainant if the railroads charge for the

privilege what it actually costs them, but we 301] do not think *that they should charge more than the actual cost. The case finds that the fair average cost when the complainant handles its hay through its warehouse, over and above the cost of a through shipment, is from \$2 to \$2.50 per ear, or approximately 1 cent per hundred pounds. We think, therefore, that this reconsignment charge ought not to exceed the proportional rate by more than one cent, and that the complainant is entitled to recover whatever it has paid in addition to that sum."

It thus appears that the Commission was of the opinion that the shipper could not demand, as a matter of right, the stopping of the hay for the purposes of treatment or reconsignment unless the same privilege was given to other shippers; and that, in granting this privilege, the railway company could only charge the shipper the actual cost. But this privilege involved to the railway company the cost of hauling to and from the warehouses and the use of the car for some hours, perhaps days. The Commission found that \$2 or \$2.50 per ear, or approximately 1 cent per hundred pounds, was the actual cost to the railway company.

We are unable to concur with the Commission. If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but, if it does so, it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true when, as here, the privilege is in no sense a part of the transportation, but outside thereof. Whether the conclusion of the Commission that the carrier is under no obligations to permit the interruption of the transit is right, and whether it is or is not under such obligation, it is entitled to receive some compensation beyond the mere cost for that which it does.

302] *We have been particular to copy the exact language used by the Commission, for, in another case between the same plaintiff and other railroad companies, involving the charges in a case of reconsignment of hay, decided on December 20 of the same year (St. Louis Hay & Grain Co. v. Illinois C. R. Co. 11 Inters. Com. Rep. 486), the Commission made an order dismissing the complaint. It is true that the facts are not precisely like those in this case, but, at the same time, the difference in the conclusions of the Commission is such as seem to suggest that per- 1006

haps, on further examination, the Commission had come to a different conclusion.

The testimony taken before the Commission is not preserved in the record, hence it would be impossible, even if proper, with all the testimony before us, to fix the amount which would be a fair and reasonable charge. All we can do is to reverse the judgments of the Circuit Court and Circuit Court of Appeals, and remand the case to the former court with instructions to send the matter back to the Commerce Commission for further investigation and report.

Reversed.

UNITED STATES, Plff. in Err.,
v.
NATIONAL EXCHANGE BANK OF
PROVIDENCE.

(See S. C. Reporter's ed. 302-320.)

Assumpsit — recovering back payments on forged indorsements — demand — notice.

The right of the United States to recover back moneys paid to a bank on pension checks bearing the forged indorsements of the payees is not conditioned either upon demand or the giving of notice of the discovery of the forgeries, since the bank, by presenting the checks for payment, warranted their genuineness, and the United States cannot, especially in view of the provisions of U. S. Rev. Stat. §§ 4764, 4765, U. S. Comp. Stat. 1901, pp. 3284, 3285, contemplating departmental regulations for establishing the identity of pensioners, be charged with knowledge of their signatures. [For other cases, see Assumpsit, 61-65, in Digest Sup. Ct. 1908.]

[No. 90.]

Argued and submitted January 25, 26, 1909.
Decided June 1, 1909.

IN ERROR to the United States Circuit Court of Appeals for the First Circuit to review a judgment which, reversing a judgment of the Circuit Court for the District of Massachusetts in favor of the United States in an action to recover back payments upon pension checks bearing forged indorsements, ordered the entry of judgment in favor of defendant. Reversed. Judgment of the Circuit Court affirmed.

See same case below, 80 C. C. A. 632, 151 Fed. 402.

NOTE.—On the right of a drawee of forged check or draft to recover the money paid thereon—see note to First Nat. Bank v. Bank of Wyndmere, 10 L.R.A. (N.S.) 49.

Statement by Mr. Justice White:

This action was brought by the United States to recover the sum of payments made at the subtreasury in Boston upon 194 pension checks, the signatures or marks of the persons to whom the checks were payable having been forged. The National Exchange Bank of Boston was originally sole defendant, but in legal effect the National Exchange Bank of Providence was substituted as defendant, and the issues were made up between it and the United States. We shall hereafter refer to that bank as the Exchange Bank.

The cause was tried upon an agreed statement, and the material facts may be thus summarized:

Upon receipt of pension vouchers, regular in form and purporting to be executed by the pensioners named therein,—but which in fact were forgeries,—the United States pension agent at Boston drew the checks in question upon the subtreasury at Boston, aggregating \$6,362.07, in favor of the pensioners named in the vouchers, and transmitted such checks by mail directly to the address of each pensioner as given in the vouchers, in accordance with the provision of § 4765, Revised Statutes, U. S. Comp. Stat. 1901, p. 3285. Of the persons named in the checks fifteen had died, and the others were the widows of soldiers, who had remarried, and whose right to a pension had ceased, all the names, however, as we have said, having been forged. With but two exceptions the checks were either for \$24 or \$36.

The checks with the forged indorsements 304] thereon of the *payees were cashed by the Exchange Bank, and immediately indorsed to a national bank in Boston for collection. The checks were presented by the collecting bank at the subtreasury of the United States in Boston. The collecting bank received payment of the same, and accounted for such payment to the Exchange Bank.†

In May, 1897, a special examiner of the Pension Bureau was detailed at Providence to investigate the case of one Mooy, a deceased pensioner, in whose name three of

the checks here in question, each for \$36, had been issued and paid in 1896. On June 18, 1897, the examiner reported to the bureau the forgery of the name of the deceased payee, and that it had probably been done by one William A. Munson. December 18, 1897, notice was given to the Exchange Bank by the United States attorney at Providence that the indorsements of Mooy's name to said checks were forged, and that at a proper time reclamation would be made for the money paid to the bank upon the checks. The remaining forgeries were discovered at different times during the months of February, March, April, and May, 1898, and in December, 1898, Munson, who was undergoing imprisonment upon a sentence imposed June 22, 1898, for forging a pension check, with which presumably this case is not concerned, admitted that he had forged the signatures of the payees on the checks in suit.

*On July 22, 1898, the United States [305 attorney at Providence made written demand upon the Exchange Bank to be refunded the sums paid, except as to checks aggregating \$351.27, for which no demand for repayment was made other than by the bringing of this action. The bank refusing to repay, this action was commenced on August 27, 1901.

Each of the 194 checks was made the subject of two counts. An indebtedness of the defendant bank to the United States was averred in the first count to have arisen from the fact that a described check had been lawfully issued by a United States pension agent, drawn upon the Assistant Treasurer of the United States, that a signature, purporting to be that of the payee, was thereafter forged upon the check, and that the Exchange Bank indorsed said check and presented it for payment to the Assistant Treasurer, who paid the amount thereof. The second count was the common count for money received by the defendant to the use of the United States. In substance, the defenses interposed in the answer of the bank were that, if the facts averred in the declaration were established by the proof, the bank was yet not liable, because the action had not been brought within a reasonable time after the alleged payments of the drafts, nor had prompt notice been given of the discovery of the forgeries. It was also averred that the United States had been negligent in not verifying the signatures of the payees of the checks in suits by comparing them with signatures of the payees in its possession.

Upon the agreed facts the circuit court entered judgment against the bank for the full amount claimed, with interest. The appellate court, however, reversed this judgment, and remanded the cause with direc-

†The payments were made as follows:

During 1886, 1887, and 1888, five checks, each for \$36, were paid on account of pension certificate issued in name of Martha Crampton		\$180 00
During 1892	\$334 80	
1893	867 27	
1894	1,092 00	
1895	1,380 00	
1896	1,620 00	
1897	888 00	
		6,182 07
		\$6,362 07

tions to enter judgment for the Exchange Bank (80 C. C. A. 632, 151 Fed. 402); and this writ of error was thereupon prosecuted.

Assistant Attorney General Fowler submitted the cause for plaintiff in error:

Is the government's right of action defeated by the failure of its agents to give notice to defendant of the forged indorsements immediately upon the discovery thereof?

United States v. National Park Bank, 6 Fed. 852; United States v. National Bank, 2 Mackey, 296; United States v. Onondaga County Sav. Bank, 39 Fed. 259.

Ordinarily no delay is regarded as vital unless it has had the effect of placing the opposite party in a worse condition.

Cooke v. United States, 91 U. S. 389, 402, 403, 23 L. ed. 237, 244, 245; 5 Cyc. Law & Proc. pp. 546, 547; White v. Continental Nat. Bank, 64 N. Y. 321, 21 Am. Rep. 612; Continental Nat. Bank v. National Bank, 50 N. Y. 575; 2 Dan. Neg. Inst. § 1372.

Mr. Theodore Francis Green argued the cause and filed a brief for defendant in error:

The bank is not concluded by the fact that it cashed the checks.

Salt Springs Bank v. Syracuse Sav. Inst. 62 Barb. 101; Leather Mfrs. Nat. Bank v. Morgan, 117 U. S. 96, 112, 29 L. ed. 811, 817, 6 Sup. Ct. Rep. 657; Howard v. Mississippi Valley Bank, 28 La. Ann. 727, 26 Am. Rep. 105; Wood v. Carpenter, 101 U. S. 135, 140, 25 L. ed. 807, 808.

The bank, by presentment, did not warrant genuineness.

4 Harvard Law Rev. 301; East India Co. v. Tritton, 3 Barn. & C. 289; Wilkinson v. Johnson, 3 Barn. & C. 428; Dedham Nat. Bank v. Everett Nat. Bank, 177 Mass. 392, 83 Am. St. Rep. 286, 59 N. E. 62; Bernheimer v. Marshall, 2 Minn. 84, Gil. 61, 72 Am. Dec. 79; Bank of St. Albans v. Farmers' & M. Bank, 10 Vt. 145, 33 Am. Dec. 188; Story, Promissory Notes, 7th ed. 526, note 1; Goetz v. Bank of Kansas City, 119 U. S. 551, 555, 30 L. ed. 515, 517, 7 Sup. Ct. Rep. 318; Leather v. Simpson, L. R. 11 Eq. 398; Sheffield v. Barclay [1903] 2 K. B. 580.

In case of a payment under a forged indorsement of commercial paper, the plaintiff, in order to recover, must have given notice of the forgery within a reasonable time after payment.

Cocks v. Masterman, 9 Barn. & C. 902; Mather v. Maidstone, 18 C. B. 294; Wilkinson v. Johnson, supra; Smith v. Mercer, 6 Taunt. 76; Bloomer v. Spittle, L. R. 13 Eq. 427; 2 Parsons, Notes & Bills, 598; United States v. Cooke, 9 Phila. 468, Fed. Cas. No. 14,855; Bank of United States v.

Bank of Georgia, 10 Wheat. 333, 6 L. ed. 334.

In case of a payment under a forged indorsement of commercial paper, the plaintiff, to recover, must have given notice of the forgery within a reasonable time after its discovery.

Cocks v. Masterman, supra; Mather v. Maidstone, 18 C. B. 274; Wilkinson v. Johnson; Smith v. Mercer, and Bloomer v. Spittle,—supra; 2 Parsons, Notes & Bills, 598; Bank of United States v. Bank of Georgia, 10 Wheat. 333, 344, 6 L. ed. 334, 338; United States v. Clinton Nat. Bank, 28 Fed. 357; United States v. Central Nat. Bank, 6 Fed. 134; United States v. Cooke, supra; United States v. National Exch. Bank, 45 Fed. 163; Gloucester Bank v. Salem Bank, 17 Mass. 33; Raymond v. Baar, 13 Serg. & R. 318, 15 Am. Dec. 603; 3 Kent, Com. 12th ed. 108, 111, *85, note, *86, note b.

A number of cases allowing recovery of money paid under a forged indorsement will be found to conform to the rule that notice must be given within a reasonable time. Several, indeed, expressly recognize the correctness of the principle.

Canal Bank v. Bank of Albany, 1 Hill, 287; Bank of Commerce v. Union Bank, 3 N. Y. 230; Ellis v. Ohio Life Ins. & T. Co. 4 Ohio St. 657, 64 Am. Dec. 610; Frank v. Lanier, 91 N. Y. 112; United States v. National Bank, 2 Mackey, 289; Merchants' Bank v. Marine Bank, 3 Gill, 96, 43 Am. Dec. 300; Goddard v. Merchants' Bank, 4 N. Y. 147, affirming 2 Sandf. 247; Star F. Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 443; McCall v. Corning, 3 La. Ann. 409, 48 Am. Dec. 454; Wilkinson v. Johnson, supra; Carpenter v. Northborough Nat. Bank, 123 Mass. 66.

Mr. Justice White, after making the foregoing statement, delivered the opinion of the court:

A preliminary matter needs to be noticed. In the opinion of the circuit court of appeals it is said (*italics ours*):

"The precise form of only one of the so-called checks is shown by the record, as follows:

United States Pension Agency, No. 297,073.
Boston, Mass., Meh. 5, 1892.
Assistant Treasurer of the United States,
Boston, Mass.

Pay to the order of Mahala B. 9492 B81
Jaques

Thirty-six Dollars. \$36

36 100 Interior

W. H. Osborne,

U. S. Pension Agent.

Paid Mar. 12, 1892,

Asst. Treas., Boston.

"Indorsements:

Mahala B. Jaques,
Payee.
M. M. Angell.

Pay Nat. Bank of the Republic, Boston,
or order, for collection, for account of First
National Bank, Providence, R. I.

C. E. Lapham,
Cashier.

Indorsement Guaranteed.

Nat'l Bank of the Republic, Boston.

"This is, however, understood to be a sample of the remaining checks. As they were drawn by the pension agent on the Assistant Treasurer of the United States, the question naturally arises whether, after all, they were anything more than official warrants,—a question which we will turn to later. *It 310] will *be observed, however, that no indorsement by the Exchange Bank appears on the sample shown in the record, and whatever indorsement there is is simply 'for collection.'*"

The sample check thus referred to is also set out in the opinion delivered in the circuit court. But no such check is in the record, nor is it embraced in the list of checks collected by the Exchange Bank, and for which recovery is sought by the United States. Presumably the stated sample check must have been inadvertently taken from the record in an action against some other bank. At all events, as it is not in argument questioned that the Exchange Bank was the holder of the checks sued for, when they were paid by the United States, we shall assume the correctness of the recital in the agreed statement of facts, that the checks "with the forged signatures thereon were cashed by the defendant, who immediately indorsed the said checks to a national bank in Boston for collection."

The circuit court of appeals reversed the judgment in favor of the United States upon the ground that, by the operation of an exceptional rule, said to prevail, under certain conditions, as to commercial paper, the United States could not recover for the mistaken payments, as there had been unreasonable delay in giving notice to the Exchange Bank after the discovery of the forgeries. The correctness of this action is assailed in the assignments of error, the government contending that the pension checks in question were mere Treasury warrants, not commercial paper in the true sense of that term, and hence not controlled by the so-called exceptional commercial rule; but that, even if the checks were commercial paper, and governed by such rule, mere negligent delay in giving notice of the discovery of the forgery would not prevent recovery

unless the Exchange Bank established by proof that it had thereby suffered damage. It is besides claimed that if the agents of the government were negligent in giving notice of the discovery of the forgeries, their laches cannot be imputed to the United States. The Exchange Bank not only traverses *these assignments, but insists[311 that the claim of the United States to recover was rightfully rejected, because the duty was on it not only to give prompt notice of the discovery of the forgeries, but also to discover the forgeries promptly after payment,—a contention which is controverted by the government.

In order to simplify the issue for decision we concede, for the sake of the argument only, that the forged instruments were not official warrants, as contended by the government, but, in a generic sense, are to be classed as negotiable commercial paper, and that, in a case coming within the exceptional rule referred to, the laches of the authorized agents of the government can be imputed to it. But, assuming the instruments to be negotiable paper, the question yet remains whether the right of the United States to recover from the Exchange Bank is controlled or limited by the exceptional rule referred to.

That, in certain classes of cases, an exceptional rule is enforced in England as to commercial paper, by which, under particular circumstances, such paper is taken out of the operation of the general rule relating to the recovery of money paid by mistake, is not subject to question. *Price v. Neale*, 3 Burr. 1354; *Smith v. Chester*, 1 T. R. 654; *Smith v. Mereer*, 6 Taunt. 76; *Wilkinson v. Johnson*, 3 Barn. & C. 428; *Coeks v. Masterman*, 9 Barn. & C. 902. The decisions referred to, however, show that the exception was limited to cases where the person who paid a forged instrument, and who sought recovery of the amount paid, was charged with knowledge of the genuine signature of the person whose name was forged, and, therefore, was presumed to have been negligent in making the payment. For instance, where one accepted a draft purporting to be drawn upon him by a customer whose signature he was presumed to know, which afterwards turned out to be a forgery. Again, where a draft which purported to have been accepted, and, by the seeming act of acceptance, was made payable at a particular bank, which paid the same for account of its customer, the apparent acceptor, and it afterwards turned *out that the acceptance[312 was a forgery, the exceptional rule was applied.

Several of the English cases above cited were reviewed by this court in *Bank of United States v. Bank of Georgia*, 10 Wheat.

333, 348, et seq., 6 L. ed. 334, 339. In that case recovery of moneys paid was denied to a bank which had received as genuine notes it had issued, but which had been fraudulently altered as to amount after being put in circulation, the decision having been rested (p. 353) "upon the broad ground that there was an acceptance of the notes as genuine, and that it falls directly within the authorities which govern the cases of acceptance of forged drafts."

The exceptional rule was thus noticed in the opinion delivered in *Cooke v. United States*, 91 U. S. 389, 396, 23 L. ed. 237, 242:

"It is, undoubtedly, also true, as a general rule of commercial law, that where one accepts forged paper purporting to be his own, and pays it to a holder for value, he cannot recall the payment. The operative fact in this rule is the acceptance, or, more properly, perhaps, the adoption, of the paper as genuine by its apparent maker. Often the bare receipt of the paper, accompanied by payment, is equivalent to an adoption within the meaning of the rule; because, as every man is presumed to know his own signature, and ought to detect its forgery by simple inspection, the examination which he can give when the demand upon him is made is all that the law considers necessary for his protection. He must repudiate as soon as he ought to have discovered the forgery; otherwise he will be regarded as accepting the paper. Unnecessary delay, under such circumstances, is unreasonable; and unreasonable delay is negligence, which throws the burden of the loss upon him who is guilty of it, rather than upon one who is not. The rule is thus well stated in *Gloucester Bank v. Salem Bank*, 17 Mass. 45: 'The party receiving such notes must examine them as soon as he has opportunity, and return them immediately; if he does not, he is negligent; and negligence will defeat his action.'"

313] *Although it has been considered that, in later cases, courts of England have mitigated the strictness of the exception upheld in the cases we have previously cited, and have made the right to recover back embraced in such cases depend somewhat upon the prejudice occasioned by the delay in giving notice (*Chitty, Bills*, 464), it is certain that the exception has not been extended so as to cause it to include a case like the one before us. *Imperial Bank v. Bank of Hamilton* [1903] A. C. 49. And, although the courts of some of the states of the Union have limited, restricted, or declined to follow the exceptional rule,—see the subject reviewed in *Greenwald v. Ford* (1906) 21 S. D. —, 109 N. W. 516, and *First Nat. Bank v. Bank of Wyndmere* (1906) 15 N. D. 299, 10 L.R.A. (N.S.) 49, 108 N. W. 546,

—we have been cited to no decision of a court of last resort, involving a case like the one before us, where it was held that such a case is controlled by the exceptional rule. True it is, a decision of the supreme court of New York, rendered in 1841 (*Canal Bank v. Bank of Albany*, 1 Hill, 287), involving analogous facts, has, by some text writers, been treated as holding a doctrine which might be considered as establishing that the exceptional rule, as somewhat qualified by the decision in question, would be applicable to a case like the one before us. In the case referred to it was decided that where the bank upon which a draft was drawn paid it in ignorance of the fact that the supposed signature of the person to whom it was payable had been forged, it could not recover back the money without exercising reasonable diligence to give notice after the discovery of the forgery. We think, however, it is apparent that the court considered not that it was applying the exceptional rule, but that it was simply announcing its conception of the general principle as to the right to recover back money paid by mutual mistake. This is evident, since the court, after holding that the case before it was not governed by the exceptional rule, remarked that "where each party enjoys the same chance of knowledge, no case demands anything more than reasonable diligence in giving notice after the discovery of the forgery." No authority, *however, was cited on this proposition, nor was any intimation given by the court as to whether, even if there had been negligence in giving notice, recovery would not be permitted if no damage had been occasioned by the delay to the party to whom the payment had been made. A later case in New York enforced a principle which we deem applicable to the present controversy. The case is *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612. The facts were these: A customer of the firm of White & Company drew a draft on that firm for \$27. After the delivery of the draft to the payee it was raised to the sum of \$2,750. The raised draft came into the possession of the Continental National Bank of New York city, who took the same from a customer, who was credited with and drew the amount. The Continental Bank presented the draft to White & Company, and that firm accepted the same, payable at the Leather Manufacturers' National Bank. When due, the Leather Manufacturers' Bank paid the Continental Bank, and debited the account of White & Company. This payment was made in August. Monthly accounts passed between White & Company and its correspondent by whom the draft had been drawn, but the August account, which was rendered in

the early part of September, was not examined. When the next account came along and was examined, the alteration of the draft was discovered, and White & Company, evidently being bound to the Leather Manufacturers' Bank by the payment made by that bank at the request of White & Company, and for their account, notified the Continental Bank, demanded repayment, and, on refusal, brought suit to recover. The trial court enforced the exceptional rule and denied the right of White & Company to recover. The court of appeals, while substantially conceding that, if the forgery had been of the name of the drawer of the draft, White & Company, because of their presumed knowledge of such signature, would have been, by their acceptance, brought within the exceptional rule, decided that the rule was not applicable, because the forgery concerned not the signature, but the body of the draft, of which White & Company were not presumed to have knowledge. 315]*Thus eliminating the exceptional rule, the court held that, as the Continental Bank had presented the forged draft for payment, and had, under the principles of commercial liability, at least impliedly warranted its genuineness, the bank was liable to repay to White & Company. Although resting its conclusion upon the warranty on the part of the Continental National Bank of the genuineness of the instrument which it presented, the court, nevertheless, at the close of the opinion, observed (p. 322):

"But, waiving the question as to the responsibility of the defendant for the genuineness of the instrument, and taking the most favorable view for the defendant, which is to regard it as the case of a mutual mistake, in respect to which neither was in fault, and in that view and upon that theory, the case is within the principles decided in *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Kingston Bank v. Eltinge*, 40 N. Y. 391, 100 Am. Dec. 516."

White v. Continental Nat. Bank was cited and the doctrine therein expressed was approved and applied by this court in *Leather Mfrs.' Nat. Bank v. Merchants' Nat. Bank*, 128 U. S. 26, 32 L. ed. 342, 9 Sup. Ct. Rep. 3. The opinion in that case, delivered by Mr. Justice Gray, was announced on October 22, 1888, and was subsequent in date to several decisions of lower Federal courts, cited in the opinion of the court below in this case, and which were deemed to conclusively demonstrate that the United States was not entitled to recover. In the *Leather Mfrs.' Bank Case* the question for decision was thus stated in the opinion:

"The question, then, is whether, if a bank, upon which a check is drawn, payable to a

particular person or order, pays the amount of the check to one presenting it with a forged indorsement of the payee's name, both parties supposing the indorsement to be genuine, the right of action of the bank to recover back the money from the person so obtaining it accrues immediately upon the payment of the money, or only after a demand for its repayment."

The right of action was held to have accrued upon the payment of the money. [316 After distinguishing the case from one which involved the relations of a bank and its depositors, the court said (p. 34):

"But, as between the bank and the person obtaining money on a forged check or order, the case is quite different. The first step in bringing about the payment is the act of the holder of the check, in assuming and representing himself to have a right, which he has not, to receive the money. One who, by presenting forged paper to a bank, procures the payment of the amount thereof to him, even if he makes no express warranty, in law represents that the paper is genuine; and, if the payment is made in ignorance of the forgery, is liable to an action by the bank to recover back the money, which, in equity and good conscience, has never ceased to be its property. It is not a case in which a consideration which has once existed fails by subsequent election or other act of either party, or of a third person; but there is never, at any stage of the transaction, any consideration for the payment. *Espy v. First Nat. Bank*, 18 Wall. 604, 21 L. ed. 947; *Gurney v. Womersley*, 4 El. & Bl. 133; *Cabot Bank v. Morton*, 4 Gray, 156; *Aldrich v. Jackson*, 5 R. I. 218; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612.

"Whenever money is paid upon the representation of the receiver that he has either a certain title in property transferred in consideration of the payment, or a certain authority to receive the money paid, when, in fact, he has no such title or authority, then, although there be no fraud or intentional misrepresentation on his part, yet there is no consideration for the payment: and the money remains, in equity and good conscience, the property of the payer, and may be recovered back by him, without any previous demand, as money had and received to his use. His right of action accrues, and the statute of limitations begins to run, immediately upon the payment.

"In the case at bar, as in the case last cited, the plaintiff's right of action did not depend upon any express promise by *the defendant after the discovery of [317 the mistake or upon any demand by the plaintiff upon the defendant, or by the de-

positor or any other person upon the plaintiff; but it was to recover back the money, as paid without consideration, and had and received by the defendant to the plaintiff's use. That right accrued at the date of the payment, and was barred by the statute of limitations in six years from that date."

We are of the opinion that the case before us is directly within the principle governing the ruling made in the case just cited as well as within the doctrine of *White v. Continental Nat. Bank*, which in effect, as we have shown, was approved by this court in *Leather Mfrs.' Nat. Bank v. Merchants' Nat. Bank*. The United States is not before us as the acceptor of a draft drawn upon it, and charged with knowledge of the signature of the drawer; nor was it a bank which had paid the check of a depositor, and was charged with knowledge of the signature of such depositor. The forgery here was in the name of the payee, and it is therefore impossible, as it was in the case of *White v. Continental Nat. Bank* and in the *Leather Mfrs.' Bank Case*, to bring this cause within the exceptional rule without holding that the United States was charged with knowledge of the signatures of the vast multitude of persons who are entitled under the law to receive pensions. The exceptional rule as to certain classes of commercial paper proceeds upon an assumption of knowledge or duty to know, naturally arising from the situation of the parties, entirely consonant with their capabilities, and in accord with the common-sense view of their relation. To apply the rule, however, to the government and its duty in paying out the millions of pension claims which are yearly discharged by means of checks would require it to be assumed that that was known, or ought to have been known, which, on the face of the situation, was impossible to be known; would besides wholly disregard the relation between the parties, and would also require that to be assumed which the obvious dictates of common sense make clear could not be truth-318]fully assumed. But, conclusive *as are these considerations, the case does not alone depend upon them, since we think legislation of Congress in reason precludes the conception that it was contemplated that the United States (or its agents) had actual knowledge of the signatures of pensioners, and, in paying pensions, was bound to all the world under such an assumption.

By §§ 4764 and 4765, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 3284, 3285), it is required before a pension check shall be issued, that vouchers shall be supplied, and the duty is cast upon the Secretary of the Interior of making rules and regulations to establish the identity of the pensioner. As shown by the record, the regulations thus promulgat-

ed require vouchers to be signed in duplicate before an officer authorized to administer an oath, or before a fourth-class postmaster. The pensioner is required to exhibit his pension certificate to such officer, and also to sign and make oath to a statement as to his identity, his existing right to the pension, and his postoffice address. The officer is required to certify as to inspection of the pension certificate; that the pensioner was fully identified; that he had signed the duplicate receipts; and the address of the pensioner is to be stated in the certificate. These requirements are incompatible with the assumption that the government was chargeable with knowledge of the identity, continued existence, and right to pensions, or with the signatures, of those entitled to receive pension moneys. The requirement by the government of proof, for its own protection, affords no ground for the contention that, as to any action taken as the result of the furnishing of such proof, the government is estopped as to third parties from showing that the proofs furnished were false and fraudulent, and that the government had been deceived thereby. To so hold would be to say that, from the act of exerting a precaution against fraud, there arose a presumption by which the fraud could be successfully accomplished. This would be the case if it were now held that, because by forged vouchers the government was deceived into acting, third parties had a right to rely upon the integrity of the proof, and to estop the government as though *representations as to the verity of[319 such proof had been made by it to such third parties. The rights, therefore, of the bank as the apparent acquirer of the pension checks are to be governed by the nature and character of the instruments, and cannot be enlarged so as to relieve the bank from the obligation of warranty implied in the presentation of checks and the collecting of the amount. The subject is aptly illustrated in the opinion of Coxe, Judge, in *United States v. Onondaga County Sav. Bank*, 39 Fed. 259, affirmed by the circuit court of appeals for the second circuit in 12 C. C. A. 407, 26 U. S. App. 377, 64 Fed. 703.

As the nature of the forgery did not cause the case to be controlled by the exceptional rule, and as the Exchange Bank, when it presented the checks and obtained thereon the money of the United States, by operation of law warranted the genuineness of the instruments which it thus presented and upon which it asked and received payment, it follows that the case in substance is accurately portrayed in observations made by the court of appeals of New York in the *White Case*, at pages 320, 321:

"The facts which disentitled the defendant

to receive the money, and in ignorance of which it was paid, were those presumed to be within the knowledge of the defendant, and not of the plaintiffs. The defendant, in receiving the money and in disposing of it, did not act upon the faith of any admission by the plaintiffs, express or implied, of any fact which they now controvert in prosecuting this action. There was, therefore, no want of good faith, no negligence, or even want of ordinary care on the part of the plaintiffs in the payment of the money. The defendant, in the entire transaction, acted upon other evidence of its right to the money than the statement or actions of the plaintiffs, and, in dealing with the bill and with the money, its avails, acted upon the apparent title and genuineness of the instrument, and the responsibility of those from and through whom it received the bill. The plaintiffs, therefore, owed no duty to the defendant in respect to the forgery, 320]*which invalidated the bill and its title to the moneys represented by it."

Under these conditions the warranty of genuineness implied by the presentation and collection of the checks bearing the forged indorsement having been broken at the time the checks were cashed by the United States, and the cause of action having therefore then accrued, the right to sue to recover back from the Exchange Bank was not conditioned upon either demand or the giving of notice of the discovery of facts which, by the operation of the legal warranty, were presumably within the knowledge of the defendant.

The conclusion to which we have thus come renders it unnecessary to consider whether, if the facts presented merely a case of mutual mistake, where neither party was in fault, and reasonable diligence was required to give notice of the discovery of the forgery, if there was lack of such diligence, it would operate to bar recovery by the United States, although the Exchange Bank was not prejudiced by the delay.

The judgment of the Circuit Court of Appeals must be reversed and the judgment of the Circuit Court affirmed. //

And it is so ordered.

OCEANIC STEAM NAVIGATION COMPANY, Limited, Plff. in Err.,
v.

NEVADA N. STRANAHAN.

(See S. C. Reporter's ed. 320-343.)

Aliens — exclusion — power of administrative officers.

1. Congress, in the exercise of its authority over foreign commerce and of its 53 L. ed.

power to regulate immigration, could lawfully enact the provisions of the act of March 3, 1903 (32 Stat. at L. 1213, chap. 1012), § 9, which make it unlawful to bring into the United States any alien afflicted with a loathsome or dangerous contagious disease, provide for the exacting of a penalty for bringing in an alien so afflicted, authorize the refusal of clearance papers to a vessel while any such fine imposed upon it remains unpaid, and confide the enforcement of the law to administrative officers.

[For other cases, see *Aliens*, VI. a, in Digest Sup. Ct. 1908.]

Right to jury trial — criminal proceeding — penalty for bringing in diseased aliens.

2. Empowering the Secretary of Commerce and Labor to exact a money penalty for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease, in violation of the act of March 3, 1903, § 9, when the official medical examination at the port of arrival shows that the alien was suffering from the disease at the time of embarkation, the existence of which might have been detected by a competent medical examination then made as the statute requires, does not render such statute open to the objection that it defines a criminal offense, and authorizes a purely administrative officer to determine whether the defined crime has been committed, and, if so, to inflict a punishment. [For other cases, see *Jury*, I. b, in Digest Sup. Ct. 1908.]

Action — civil or criminal — enforcing penalty.

3. The enforcement of the exaction of \$100 which the Secretary of Commerce and Labor is authorized by the act of March 3, 1903, § 9, to impose for violations of its provisions against bringing into the United States aliens afflicted with loathsome or dangerous contagious diseases is not necessarily governed by the rules controlling in criminal prosecutions merely because such exaction is a penalty.

[For other cases, see *Action or Suit*, 7-9, in Digest Sup. Ct. 1908.]

Constitutional law — delegating judicial power to administrative officers.

4. Congress could constitutionally empower the Secretary of Commerce and Labor to enforce, without invoking the judicial power, the penalty imposed by the act of March 3, 1903, § 9, for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease, when the official medical examination at the port

NOTE.—On the right to trial by jury—see notes to *Supreme Ct. Justices v. United States*, 19 L. ed. U. S. 658; *Eilenbecker v. District Ct.* 33 L. ed. U. S. 801; *Gulf, C. & S. F. R. Co. v. Shane*, 39 L. ed. U. S. 727; and *Perego v. Dodge*, 41 L. ed. U. S. 113.

On notice and hearing required to constitute due process of law—see notes to *Kuntz v. Sumption*, 2 L.R.A. 657; *Chauvin v. Valiton*, 3 L.R.A. 194; and *Ulman v. Baltimore*, 11 L.R.A. 225.

or arrival discloses that such alien was suffering from the disease at the time of embarkation, the existence of which might have been detected by a competent medical examination then made as the statute requires.

[For other cases, see Constitutional Law, 167-171, in Digest Sup. Ct. 1908.]

Constitutional law—due process of law—notice or hearing.

5. Making the official medical examination at the port of arrival conclusive for the purpose of imposing the penalty, enforceable by refusing clearance papers until paid, which is authorized by the act of March 3, 1903, § 9, for violating its provisions by bringing into the United States an alien afflicted with a loathsome or contagious disease from which he was suffering at the time of embarkation, the existence of which might have been detected by means of a competent medical examination then made, does not render such statute repugnant to U. S. Const., 5th Amend., as taking property without due process of law.

[For other cases, see Constitutional Law, 764-767, in Digest Sup. Ct. 1908.]

[No. 509.]

Argued January 11, 12, 1909. Decided June 1, 1909.

IN ERROR to the Circuit Court of the United States for the Southern District of New York to review a judgment in favor of defendant in an action to recover back a penalty paid to the collector of customs of the port of New York for bringing into the United States an alien afflicted with a loathsome or dangerous contagious disease. Affirmed.

See same case below, 155 Fed. 428.

The facts are stated in the opinion.

Messrs. Lucius H. Beers and William G. Choate argued the cause and filed a brief for plaintiff in error:

The provision of the 5th Amendment to the Constitution left Congress with no powers to authorize any court or officer to take property without giving the owner previous notice and an opportunity to be heard.

Pennoyer v. Neff, 95 U. S. 714, 733, 24 L. ed. 565, 572; *Scott v. McNeal*, 154 U. S. 34, 46, 50, 38 L. ed. 896, 901, 903, 14 Sup. Ct. Rep. 1108; *Simon v. Craft*, 182 U. S. 427, 45 L. ed. 1165, 21 Sup. Ct. Rep. 836; *Central R. Co. v. Wright*, 207 U. S. 127, 52 L. ed. 134, 28 Sup. Ct. Rep. 47, 12 A. & E. Ann. Cas. 463; *Londoner v. Denver*, 210 U. S. 373, 386, 52 L. ed. 1103, 1112, 28 Sup. Ct. Rep. 708; *Stuart v. Palmer*, 74 N. Y. 183, 30 Am. Rep. 289; *Santa Clara County v. Southern P. R. Co.* 9 Sawy. 165, 18 Fed. 424; *Cooper v. Board of Works*, 14 C. B. N. S. 180; *R. v. The Chancellor*, 1 Strange, 557.

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Even in tax cases, where beyond question Congress can leave the determination of the fact on which the liability depends to an executive officer, and where, from reasons of public policy, the most summary proceeding is allowable, the absence of notice and an opportunity to be heard is fatal.

Londoner v. Denver, supra.

It cannot be urged, in support of the provisions of circular 58, that officials, as a matter of grace or favor, might have extended the time, for the provisions of the circular are clear.

Stuart v. Palmer, supra; *Security Trust & S. V. Co. v. Lexington*, 203 U. S. 323, 333, 51 L. ed. 204, 208, 27 Sup. Ct. Rep. 87; *Roller v. Holly*, 176 U. S. 398, 409, 44 L. ed. 520, 524, 20 Sup. Ct. Rep. 410.

The fines were imposed in some cases without any previous notice, and in all cases without any adequate opportunity to be heard.

Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; *Londoner v. Denver*, 210 U. S. 373, 378, 52 L. ed. 1103, 1109, 28 Sup. Ct. Rep. 708; *Simon v. Craft*, 182 U. S. 427, 436, 45 L. ed. 1165, 1170, 21 Sup. Ct. Rep. 836.

Section 9 of the immigration act of 1903 violates art 3 of the Constitution relating to the judiciary, and it also violates the 5th Amendment relating to the taking of property without due process of law, because it authorizes the taking of the property of the plaintiffs in error without a judicial trial.

Wong Wing v. United States, 163 U. S. 228, 237, 41 L. ed. 140, 143, 16 Sup. Ct. Rep. 977; *United States ex rel. Turner v. Williams*, 194 U. S. 279, 291, 48 L. ed. 979, 984, 24 Sup. Ct. Rep. 719; *United States ex rel. Anderson v. Burke*, 99 Fed. 895.

In cases which arose, under the customs laws and under the immigration laws, for the recovery of penalties by civil action, it has been held in both cases that some of the provisions relating to trial for crimes apply to such actions.

Boyd v. United States, 116 U. S. 616, 634, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; *Lees v. United States*, 150 U. S. 476, 37 L. ed. 1150, 14 Sup. Ct. Rep. 163.

If Congress itself is without power to punish directly and without judicial trial, then, obviously, it cannot empower an executive officer to punish without such a trial.

Kilbourn v. Thompson, 103 U. S. 168, 26 L. ed. 377.

The distinction between the power to regulate, which may be given by Congress to an executive officer, and the power to punish, violations of statute, which must remain with the courts, is well illustrated by Union

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Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

These cases are clearly distinguishable from cases where this court has sanctioned the taking of property by the government without a judicial trial, and has placed the determination of the fact on which liability rests on an executive officer, because all of these cases rest upon the existence of an imperative necessity for prompt and summary determination, while that necessity does not exist here.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 282, 15 L. ed. 372, 376; Springer v. United States, 102 U. S. 586, 593, 26 L. ed. 253, 256; Passavant v. United States, 148 U. S. 214, 220, 37 L. ed. 426, 428, 13 Sup. Ct. Rep. 572; Helwig v. United States, 188 U. S. 605, 47 L. ed. 614, 23 Sup. Ct. Rep. 427; Clay v. Swope, 38 Fed. 396; Lawton v. Steele, 152 U. S. 133, 136, 38 L. ed. 385, 388, 14 Sup. Ct. Rep. 499; Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Re Rapier, 143 U. S. 110, 134, 36 L. ed. 93, 102 Sup. Ct. Rep. 374; Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789; Union Bridge Co. v. United States, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367.

A suit for a penalty for an act prohibited by a statute of the United States is a criminal prosecution within the meaning of the 6th Amendment. It is not the form, but the nature of the action, which determines whether it is criminal or civil.

Iowa v. Chicago, B. & Q. R. Co. 3 L.R.A. 554, 37 Fed. 497; Boyd v. United States, 116 U. S. 616, 633, 634, 29 L. ed. 746, 752, 6 Sup. Ct. Rep. 524; Lees v. United States, 150 U. S. 476, 480, 37 L. ed. 1150, 1151, 14 Sup. Ct. Rep. 163; Ely v. Thompson, 3 A. K. Marsh. 70; Com. v. Certain Intoxicating Liquors, 115 Mass. 142; Com. v. Certain Intoxicating Liquors, 122 Mass. 11; State v. Dent, 29 Kan. 418; Schiek v. United States, 195 U. S. 65, 49 L. ed. 99, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585; United States v. Nash, 111 Fed. 525.

Assistant to the Attorney General Ellis argued the cause, and, with Messrs. Henry L. Stinson, Winfred T. Denison, and E. P. Grosvenor, filed a brief for defendant in error:

The subject of immigration is a part of the power over foreign commerce which is expressly assigned to Congress by art. 1, § 8, of the Constitution.

Nishimura Ekiu v. United States, 142 U. S. 651, 659, 35 L. ed. 1146, 1149, 12 Sup. Ct. Rep. 336; United States ex rel. Turner v. Williams, 194 U. S. 279, 290, 48 L. ed. 979, 983, 24 Sup. Ct. Rep. 719; Head Money

Cases (Edye v. Robertson) 112 U. S. 580-595, 28 L. ed. 798-803, 5 Sup. Ct. Rep. 247; Passenger Cases, 7 How. 283, 12 L. ed. 702; Immigration Comrs. v. North German Lloyd, 92 U. S. 259, 23 L. ed. 543; Chy Lung v. Freeman, 92 U. S. 275, 23 L. ed. 550; New York v. Compagnie Générale Transatlantique, 107 U. S. 59, 27 L. ed. 383, 2 Sup. Ct. Rep. 87.

It is also a part of the inherent control of the sovereign over its boundary line.

Fong Yue Ting v. United States, 149 U. S. 698, 37 L. ed. 905, 13 Sup. Ct. Rep. 1016; Chinese Exclusion Case, 130 U. S. 581, 32 L. ed. 1068, 9 Sup. Ct. Rep. 623; United States ex rel. Turner v. Williams and Nishimura Ekiu v. United States, supra.

Within such fields acts of Congress are constitutional, unless they fall under some specific prohibition of the Constitution.

Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; Lottery Case (Champion v. Ames) 188 U. S. 321, 353, 356, 47 L. ed. 492, 500, 501, 23 Sup. Ct. Rep. 321; Leisy v. Hardin, 135 U. S. 100, 108, 34 L. ed. 128, 132, 3 Inters. Com. Rep. 36, 10 Sup. Ct. Rep. 681; Fairbank v. United States, 181 U. S. 283, 285, 45 L. ed. 802, 863, 21 Sup. Ct. Rep. 648.

Repeated decisions of this court have recognized the unusual completeness of this power acquired by Congress from these two sources, and have expressed the reluctance of the courts to interfere in questions arising in the administration of the laws passed by Congress in the exercise of the power.

United States ex rel. Turner v. Williams, 194 U. S. 279, 289, 48 L. ed. 979, 983, 24 Sup. Ct. Rep. 719; Nishimura Ekiu v. United States, supra; Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 97, 47 L. ed. 721, 724, 23 Sup. Ct. Rep. 611; Buttfield v. Stranahan, 192 U. S. 470, 493, 48 L. ed. 525, 534, 24 Sup. Ct. Rep. 349; Fong Yue Ting v. United States; Chinese Exclusion Case; and Lottery Case,—supra; Auffmordt v. Hedden, 137 U. S. 310, 329, 34 L. ed. 674, 680, 11 Sup. Ct. Rep. 103.

Section 9 does not create an offense, within the meaning of the word "crime" as used in the constitutional provisions, requiring a jury trial.

Schiek v. United States, 195 U. S. 65, 67, 49 L. ed. 99, 101, 24 Sup. Ct. Rep. 826, 1 A. & E. Ann. Cas. 585; United States v. Zucker, 161 U. S. 475, 481, 40 L. ed. 777, 16 Sup. Ct. Rep. 641; Callan v. Wilson, 127 U. S. 540, 549, 552, 32 L. ed. 223, 226, 227, 8 Sup. Ct. Rep. 1301; Ex parte Wilson, 114 U. S. 417, 425, 29 L. ed. 89, 92, 5 Sup. Ct. Rep. 935; Taylor v. United States, 3 How. 197, 210, 11 L. ed. 559, 564; Lawton v. Steele, 152 U. S. 133, 141, 38 L. ed. 385,

390, 14 Sup. Ct. Rep. 499; *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644.

The fact that the section used the word "fine" instead of the word "penalty" does not necessarily indicate an intention to create a crime, for the words "fine" and "penalty" are interchangeable.

Cunard S. S. Co. v. Stranahan, 134 Fed. 318; 1 Bishop, *Crim. Law*, 7th ed. p. 17, note.

There are many familiar statutory precedents for penalties to be recovered civilly as debts.

Werckmeister v. American Tobacco Co. 207 U. S. 375, 52 L. ed. 254, 28 Sup. Ct. Rep. 124; *Chaffee v. United States*, 18 Wall. 516, 538, 21 L. ed. 908, 912; *Stockwell v. United States*, 13 Wall. 531, 542, 20 L. ed. 491, 493; *Proctor v. People*, 24 Ill. App. 599; *Ferguson v. People*, 73 Ill. 559; *United States v. Mundell*, 1 Hughes, 423, Fed. Cas. No. 15,834; *United States v. Younger*, 92 Fed. 672; *Stearns v. United States*, 2 Paine, 311, Fed. Cas. No. 13,341; *People v. Girard*, 73 Hun, 457, 26 N. Y. Supp. 272, affirmed in 145 N. Y. 105, 45 Am. St. Rep. 595, 39 N. E. 823; *Fielding v. LaGrange*, 104 Iowa, 530, 73 N. W. 1038; *Counselman v. Hitchcock*, 142 U. S. 547, 562, 35 L. ed. 1110, 1113, 3 Inters. Com. Rep. 816, 12 Sup. Ct. Rep. 195; 1 Bishop, *Crim. Law*, 7th ed. pp. 16, 32, §§ 956, 990; *Moller v. United States*, 6 C. C. A. 459, 13 U. S. App. 472, 57 Fed. 495.

In committing the enforcement of the provisions of § 9 to an administrative or executive officer, Congress did not violate the provision of the Constitution relating to the judicial power.

Bartlett v. Kane, 16 How. 269, 14 L. ed. 933; *Passavant v. United States*, 148 U. S. 214, 221, 37 L. ed. 426, 429, 13 Sup. Ct. Rep. 572; *Origet v. Hedden*, 155 U. S. 228, 236, 39 L. ed. 130, 133, 15 Sup. Ct. Rep. 92; *Doll v. Evans*, 9 Phila. 364, Fed. Cas. No. 3,969; *Clay v. Swope*, 38 Fed. 396; *Com. v. Byrne*, 20 Gratt. 165; *Union Bridge Co. v. United States*, 204 U. S. 364, 51 L. ed. 523, 27 Sup. Ct. Rep. 367; *United States v. Ju Toy*, supra; *United States v. Sing Tuck*, 194 U. S. 161, 170, 48 L. ed. 917, 921, 24 Sup. Ct. Rep. 621; *Japanese Immigrant Case (Yamataya v. Fisher)* 189 U. S. 98, 47 L. ed. 724, 23 Sup. Ct. Rep. 611; *Chinese Exclusion Case*, supra; *United States ex rel. Turner v. Williams*, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719; *Nishimura Ekiu v. United States*, 142 U. S. 651, 35 L. ed. 1146, 12 Sup. Ct. Rep. 336; *Chin Bak Kan v. United States*, 186 U. S. 193, 46 L. ed. 1121, 22 Sup. Ct. Rep. 891; *Fok Yung Yo v. United States*, 185 U. S. 296, 46 L. ed. 917, 22 Sup. Ct. Rep. 686;

Lem Moon Sing v. United States, 158 U. S. 538, 39 L. ed. 1082, 15 Sup. Ct. Rep. 67; *Lawton v. Steele*, 152 U. S. 133, 140, 38 L. ed. 385, 390, 14 Sup. Ct. Rep. 499; *McGehee, Duc Process of Law*, pp. 375, 376; *State v. French*, 71 Ohio St. 186, 104 Am. St. Rep. 770, 73 N. E. 216, 1 A. & E. Ann. Cas. 948.

Congress may certainly delegate to others powers which it may rightfully use itself.

United States v. Eliason, 16 Pet. 291, 10 L. ed. 968; *Gratiot v. United States*, 4 How. 80, 11 L. ed. 884; *Nishimura Ekiu v. United States*, supra; *Dreyer v. Illinois*, 187 U. S. 84, 47 L. ed. 79, 23 Sup. Ct. Rep. 28; *Story, Const. § 528*; *Baldwin, American Judiciary*, p. 24.

Within the marginal area between the powers it is competent for Congress to make such distribution as it deems reasonable, for its objects and its decisions, at least within that area, are not to be disturbed by the courts.

Cary v. Curtis, 3 How. 236, 11 L. ed. 576; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 284, 15 L. ed. 372; *Chinese Exclusion Case*, 130 U. S. 606, 32 L. ed. 1075, 9 Sup. Ct. Rep. 623; *McCulloch v. Maryland*, 4 Wheat. 316, 415, 421-423, 4 L. ed. 579, 603, 605; *Kansas v. Colorado*, 206 U. S. 46, 88, 51 L. ed. 956, 970, 27 Sup. Ct. Rep. 655.

Obviously the administrative power is more appropriately and freely available in questions involving public rights than in questions of private right between man and man.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 283, 284, 15 L. ed. 372, 377, 378; *Goodnow, Comparative Administrative Law*, p. 384.

The general objects to which § 9 is subsidiary have already been held to be of such public necessity as to justify the destruction, without judicial proceeding, of the very highest right of a citizen; namely, citizenship itself,—a right beside which the alleged right of judicial trial as a condition to the imposition of a hundred dollar penalty is insignificant.

United States v. Ju Toy, supra; *Chinese Exclusion Case*, 130 U. S. 581, 609, 32 L. ed. 1068, 1076, 9 Sup. Ct. Rep. 623; *Fong Yue Ting v. United States*, 149 U. S. 698, 722, 37 L. ed. 905, 916, 13 Sup. Ct. Rep. 1016; *United States ex rel. Turner v. Williams*; *Nishimura Ekiu v. United States*; and *Japanese Immigration Case*,—supra; *Re Howard*, 63 Fed. 263; *Re Sing Lee*, 54 Fed. 334; *United States v. Sing Tuck*, supra.

Den ex dem. Murray v. Hoboken Land & Improv. Co. 18 How. 272, 15 L. ed. 372, as to deprivation of property is even more extreme than the *Ju Toy Case* as to depriva-

tion of liberty; for, in that case, the court upheld the taking of property to the extent of \$1,374,199.65 my purely administrative process, and without any notice or hearing whatever.

Other cases incident to the raising of revenue for the support of government are the following, involving summary infringement of the ordinary individual rights as practically necessary to the interests of the public.

Bartlett v. Kane, 16 How. 263, 272, 14 L. ed. 931, 934; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 708, 28 L. ed. 572, 4 Sup. Ct. Rep. 663; *Auffmordt v. Hedden*, 137 U. S. 310, 34 L. ed. 674, 11 Sup. Ct. Rep. 103; *Turpin v. Lemon*, 187 U. S. 51, 47 L. ed. 70, 23 Sup. Ct. Rep. 20; *King v. Mullins*, 171 U. S. 429, 43 L. ed. 224, 18 Sup. Ct. Rep. 92; *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232-239, 33 L. ed. 892-896, 10 Sup. Ct. Rep. 533; *Origet v. Hedden*, *supra*; *Hilton v. Merritt*, 110 U. S. 97, 28 L. ed. 83, 3 Sup. Ct. Rep. 548; *United States v. Leng*, 18 Fed. 15; *McMillen v. Anderson*, 95 U. S. 37, 24 L. ed. 335; *United States v. Tiffany*, *Treas. Dec. No. 27,754*; *Upshur County v. Rich*, 135 U. S. 467, 34 L. ed. 196, 10 Sup. Ct. Rep. 651; *Cary v. Curtis*, 3 How. 236, 11 L. ed. 576; *North German Lloyd S. S. Co. v. Hedden*, 43 Fed. 17; *Marshall Field & Co. v. Clark*, 143 U. S. 649, 36 L. ed. 294, 12 Sup. Ct. Rep. 495; *United States v. Heinszen*, 206 U. S. 370, 389, 51 L. ed. 1098, 1105, 27 Sup. Ct. Rep. 742, 11 A. & E. Ann. Cas. 688.

The power of Congress to use exclusively administrative agencies over the importation of goods is equally well established, even when the purpose is not revenue.

Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349; *Union Bridge Co. v. United States*, *supra*.

The extent to which Congress may dispose of private interests by summary administrative process in support of the power as to national banks is illustrated by a line of cases in which the court sustained the right of the Comptroller of the Treasury to appoint receivers of national banks, and levy assessments upon their stockholders, without prior judicial ascertainment.

Kennedy v. Gibson, 8 Wall. 498, 19 L. ed. 476; *Casey v. Galli*, 94 U. S. 673, 24 L. ed. 168; *United States v. Knox*, 102 U. S. 422, 26 L. ed. 216; *Bushnell v. Leland*, 164 U. S. 684, 41 L. ed. 598, 17 Sup. Ct. Rep. 209; *Young v. Wempe*, 46 Fed. 354.

The latest case upon this general subject is in respect to the power over the Indians.

United States ex rel. West v. Hitchcock, 53 L. ed.

205 U. S. 80, 51 L. ed. 718, 27 Sup. Ct. Rep. 423.

The right of the administrative officers to exclude persons from use of the mails is undoubted.

Public Clearing House v. Coyne, 194 U. S. 497, 48 L. ed. 1092, 24 Sup. Ct. Rep. 789.

In the subject of patents, the administrative power was sustained, and for the same reason.

United States v. Duell, 172 U. S. 576, 583, 43 L. ed. 559, 562, 19 Sup. Ct. Rep. 286; *Johnson v. Towsley*, 13 Wall. 72, 83, 20 L. ed. 485, 486; *St. Louis Smelting & Ref. Co. v. Kemp*, 104 U. S. 636, 26 L. ed. 875; *State v. French*, 71 Ohio St. 186, 104 Am. St. Rep. 770, 73 N. E. 216, 1 A. & E. Ann. Cas. 948.

Section 9 does not violate the due process clause of the 5th Amendment.

Dreyer v. Illinois, 187 U. S. 71, 83, 84, 47 L. ed. 79, 85, 23 Sup. Ct. Rep. 28; *Michigan C. R. Co. v. Powers*, 201 U. S. 294, 50 L. ed. 762, 26 Sup. Ct. Rep. 459; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. ed. 327, 28 Sup. Ct. Rep. 178, 12 A. & E. Ann. Cas. 658; *Twining v. New Jersey*, 211 U. S. 78, ante, 97, 29 Sup. Ct. Rep. 14; *Walker v. Sauvinet*, 92 U. S. 90, 23 L. ed. 678; *Maxwell v. Dow*, 176 U. S. 581, 44 L. ed. 597, 20 Sup. Ct. Rep. 448, 494; *Hurtado v. California*, 110 U. S. 516, 28 L. ed. 232, 4 Sup. Ct. Rep. 111, 292; *Davis v. Burke*, 179 U. S. 399, 45 L. ed. 249, 21 Sup. Ct. Rep. 210; *Reetz v. Michigan*, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

In the cases before circular 58, the determination of the Secretary of Commerce and Labor that the facts warranted the imposition of a penalty was arrived at with due process of law.

Japanese Immigrant Case (Yamataya v. Fisher) 189 U. S. 86, 101, 7 L. ed. 721, 726, 23 Sup. Ct. Rep. 611; *Buttfield v. Stranahan*, 192 U. S. 470, 497, 48 L. ed. 525, 536, 24 Sup. Ct. Rep. 349; *Auffmordt v. Hedden*, 137 U. S. 310, 323, 34 L. ed. 674, 678, 11 Sup. Ct. Rep. 103; *Origet v. Hedden*, *supra*; *Re Moy Quong Shing*, 125 Fed. 643; *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372; *Springer v. United States*, 102 U. S. 586, 594, 26 L. ed. 253, 256; *Public Clearing House v. Coyne*, *supra*; *Kennedy v. Gibson*, 8 Wall. 498, 19 L. ed. 476; *Lent v. Tillson*, 140 U. S. 316, 35 L. ed. 419, 11 Sup. Ct. Rep. 825; *Happy v. Mosher*, 48 N. Y. 313; *Glidden v. Harrington*, 189 U. S. 255, 258, 47 L. ed. 798, 801, 23 Sup. Ct. Rep. 574;

Ex parte Terry, 128 U. S. 289, 32 L. ed. 405, 9 Sup. Ct. Rep. 77.

Any proceeding reasonably necessary and appropriate to the situation is due process of law.

Turpin v. Lemon, 187 U. S. 51, 58, 47 L. ed. 70, 74, 23 Sup. Ct. Rep. 20; *Hagar v. Reclamation Dist. No. 108*, supra; *Ex parte Wall*, 107 U. S. 265, 289, 27 L. ed. 552, 562, 2 Sup. Ct. Rep. 569; *Davidson v. New Orleans*, 96 U. S. 97, 107, 24 L. ed. 616, 620.

In the cases after circular 58, the determination of the Secretary of Commerce and Labor that the facts warranted the imposition of a penalty was arrived at with due process of law; the regulations provided for fourteen days' notice.

Roller v. Holly, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410; *Johnson v. Hunter*, 127 Fed. 223; *Hanover Nat. Bank v. Moyses*, 186 U. S. 181, 192, 46 L. ed. 1113, 1120, 22 Sup. Ct. Rep. 857; *Huling v. Kaw Valley R. & Improv. Co.* 130 U. S. 559, 32 L. ed. 1045, 9 Sup. Ct. Rep. 603; *Bellingham Bay & B. C. R. Co. v. New Whatcom*, 172 U. S. 314, 318, 43 L. ed. 460, 461, 19 Sup. Ct. Rep. 205.

Congress had the power to make the payment of the penalty a condition of obtaining clearance.

Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; *United States ex rel. Wilson v. The William*, 2 Hall, Am. L. J. 255, Fed. Cas. No. 16,700; *Hendriks v. Gonzalez*, 14 C. C. A. 659, 35 U. S. App. 127, 67 Fed. 351; *Cunard S. S. Co. v. Stranahan*, 134 Fed. 318.

Mr. Justice White delivered the opinion of the court:

The steamship company sought the recovery of money paid to the collector of customs of the port of New York which was exacted by that official under an order of the Secretary of Commerce and Labor. The findings of the court, the ease by stipulation having been tried without a jury, leave no doubt that the money was paid to the collector under protest, and involuntarily. We say this because the findings establish that the company was coerced by the certainty that, if it did not pay, the collector would refuse a clearance to its steamships plying between New York city and foreign ports at periodical and definite sailings, whose failure to depart on time would have caused not only grave public inconvenience from the nonfulfilment of mail contracts, but besides would have entailed upon the company the most serious pecuniary loss consequent on its failure to carry out many other contracts.

Both the Secretary and the collector were expressly authorized by law, the one to impose and the other to collect the exactions

which were made. The only question, therefore, is whether the power conferred upon the named officials was consistent with the Constitution. The provision under which the officials acted is § 9 of March 3, 1903, entitled, "An Act *to Regulate the Im-[330 migration of Aliens into the United States." 32 Stat. at L. chap. 1012, p. 1213. Light to guide in an analysis of the contentions concerning the asserted repugnancy of the section to the Constitution will be afforded by giving at once the merest outline of some of the comprehensive provisions of the act of which it forms a part.

The act excludes from admission into the United States, among other classes, those afflicted "with a loathsome or with a dangerous contagious disease." Sec. 2. It prohibits the importation of persons for immoral purposes or of persons to perform labor or service of any kind, skilled or unskilled, by previous solicitation or agreement. Secs. 3 and 4. It imposes the duty on the master of any vessel having on board alien immigrants to deliver to the immigrant officer at the port of arrival lists made at the port of embarkation. Sec. 12. These lists are required to be verified by the oath of the master of the vessel, taken before the immigrant officer at the port of arrival, to the effect that the surgeon of the vessel, who sails therewith, has physically and orally examined each alien, and that, from such examination by the surgeon, and from his own investigation, the officer of the ship believes that no one of the listed persons is disqualified by law from entering. This list is also required to be verified by the affidavit of the surgeon, and, in case no surgeon sails with the ship, it is required that the owner of the vessel employ at the port of embarkation a competent surgeon to make the examination. Secs. 13 and 14. Upon the arrival of a vessel in the United States, for the purpose of verifying the lists, immigration officers are authorized to board the vessel, inspect the immigrants, and to disembark them for further inspection and medical examination, the disembarkation for such purposes not to be considered as a landing within the United States. The medical examination, the statute provides, shall be made by medical officers of the United States Marine Hospital Service assigned to such duty, and upon them is imposed the obligation of certifying, "for the information of the immigration officers and the boards of special *inquiry[331 hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien." In case of controversy concerning the right of an alien to land, full provision is made for the taking of testimony, and ultimately, where a right to land is challenged, for a de-

termination of the question by boards of inquiry which the statute creates. Secs. 16, 17, 24. The cost of maintenance pending investigation or treatment of an alien found to be within the prohibited class or classes is cast upon the vessel and its owners, and the duty of returning at its cost such immigrant to the port from which he came is also cast upon the ship or its owner. Sec. 19. The performance of the duties which the act imposes are sanctioned in some cases by the creation of a criminal responsibility, and in others by the imposition of penalties recoverable in civil actions. Thus, among others, it is made a misdemeanor, punishable by fine and imprisonment, for any person to bring into or land, or attempt to do so, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter. Sec. 6. It is made a misdemeanor, punishable upon conviction by fine and imprisonment, to land any alien without complying with the requirements for examination by medical officers as contemplated in the statute. Secs. 17 and 18. And it is also made a misdemeanor, punishable by fine or imprisonment, to knowingly aid or assist or conspire to procure or permit the entry of an alien into the United States contrary to the regulations which the statute provides. Sec. 38. Further, it is made a misdemeanor to refuse to discharge the duty of returning an immigrant, and power is given to refuse clearance to the vessel. Sec. 19. And a penalty, recoverable by civil action, is authorized for violations of § 4, relating to the importation of aliens under previous contract. Section 9, which, as we have said, is here involved, is as follows:

"That it shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee 332] of any vessel, to bring to the *United States any alien afflicted with a loathsome or with a dangerous contagious disease; and, if it shall appear to the satisfaction of the Secretary of the Treasury [Secretary of Commerce and Labor] that any alien so brought to the United States was afflicted with such a disease at the time of foreign embarkation, and that the existence of such disease might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers while any such fine imposed upon it remains unpaid, nor shall such fine be remitted."

The express prohibition against bringing

into the United States alien immigrants afflicted with "loathsome or dangerous contagious diseases," which the section contains, is so apparent, and the power to enact the prohibition so obvious, that we dismiss these subjects from further consideration. The exaction which the section authorizes the Secretary of Commerce and Labor to impose, when considered in the light afforded by the context of the statute, is clearly but a power given as a sanction to the duty which the statute places on the owners of all vessels, to subject all alien emigrants, prior to bringing them to the United States, to medical examination at the point of embarkation, so as to exclude those afflicted with the prohibited diseases. In other words, the power to impose the exaction which the statute confers on the Secretary is lodged in that officer only when it results from the official medical examination at the point of arrival not only that an alien is afflicted with one of the prohibited diseases, but that the stage of the malady, as disclosed by the examination, establishes that the alien was suffering with the disease at the time of embarkation, and that such fact would have been then discovered had the medical examination been then made by the vessel or its *owners, as the statute requires. We 333 think it is also certain that the power thus lodged in the Secretary of Commerce and Labor was intended to be exclusive, and that its exertion was authorized as the result of the probative force attributed to the official medical examination for which the statute provides, and that the power to refuse clearance to vessels was lodged for the express purpose of causing both the imposition of the exaction and its collection to be acts of administrative competency, not requiring a resort to judicial power for their enforcement. While we have said that the conclusions just stated are clearly sustained by the text, yet, if ambiguity be conceded, it is dispelled and the same result is reached by a consideration of the report of the Senate committee on immigration, where the provisions originated, and which we have a right to consider as a guide to its true interpretation. The Delaware, 161 U. S. 459, 40 L. ed. 771, 16 Sup. Ct. Rep. 516; *Buttfield v. Stranahan*, 192 U. S. 470, 495, 48 L. ed. 525, 535, 24 Sup. Ct. Rep. 349. In that report it was said:

"Notwithstanding the explicit prohibition of the present law, it has been found impossible to prevent the steamship companies from bringing diseased aliens to our ports. Once on this side, every argument and influence that can be used is resorted to, either to effect the landing of such aliens or their treatment in the hospital as a preliminary to such landing. Expert medical testimony

is secured to attack the diagnosis of the examining surgeon and even to question the contagious nature of the disease. Pitiableness is told of the separation of parents from young children to induce officers to relax in the discharge of their plain duty. Great charitable organizations intervene, and even political influence is invoked for the same purpose, the steamship companies themselves, either covertly or openly, displaying a spirit of resistance to the law. If all of these obstacles to the execution of the law fail of their purpose, and the alien afflicted with tuberculosis, favus, or trachoma is sent back, still, by the wilful or indifferent defiance of this sanitary law, the design sought by its passage is defeated, for hundreds may possibly 334] have been—indeed, *almost certainly have been—exposed to the disease in the steerage on the way over, may have been affected by it, and landed before it has reached a stage of development sufficiently advanced to be detected by the medical inspector.

"Section 10 of the measure under consideration [which, in the final enactment, became § 9 of the law] therefore imposes a penalty of \$100, to be imposed by the Secretary of the Treasury (now Secretary of Commerce and Labor) for each case brought to an American port, provided, in his judgment, the disease might have been detected by means of medical examination at the port of embarkation. This sufficiently guards the transportation lines from an unjust and hasty imposition of the penalty, insures a careful observance of the law, and leaves in their own hands the power to escape even a risk of the fine being imposed, since they can refuse to take on board even the most doubtful case until certified by competent medical authority to be entirely cured." 57th Cong. 1st sess. S. Rept. No. 2119, p. viii.; 57th Cong. 2d sess. S. Doe. No. 62.

Resting, as the statute does, upon the authority of Congress over foreign commerce and its right to control the coming in of aliens into the United States, and to regulate that subject in the fullest degree, reserving for future consideration the particular contentions advanced at bar by the plaintiff in error, it may not be doubted that it is not open to discussion that the statute, as thus construed, was within the power of Congress to enact. In *Buttfield v. Stranahan*, 192 U. S. 470, 48 L. ed. 525, 24 Sup. Ct. Rep. 349, considering the subject, it was said (pp. 492, 493):

"Whatever difference of opinion, if any, may have existed or does exist concerning the limitations of the power resulting from other provisions of the Constitution, so far as interstate commerce is concerned, it is not

to be doubted that from the beginning Congress has exercised a plenary power in respect to the exclusion of merchandise brought from foreign countries; not alone directly, by the enactment of embargo statutes, but indirectly, as a necessary result of provisions contained in tariff legislation. It has also, in other than tariff *legislation, exerted a police power over foreign commerce by provisions which, in and of themselves, amounted to the assertion of the right to exclude merchandise at discretion.

"As a result of the complete power of Congress over foreign commerce, it necessarily follows that no individual has a vested right to trade with foreign nations, which is so broad in character as to limit and restrict the power of Congress to determine what articles of merchandise may be imported into this country, and the terms upon which a right to import may be exercised. This being true, it results that a statute which restrains the introduction of particular goods into the United States from considerations of public policy does not violate the due process clause of the Constitution."

In *United States ex rel. Turner v. Williams*, 194 U. S. 279, 48 L. ed. 979, 24 Sup. Ct. Rep. 719, in the course of an opinion considering the act here involved, and holding it valid in so far as it provided for the exclusion of anarchists, it was said (pp. 289, 290):

"Repeated decisions of this court have determined that Congress has the power to exclude aliens from the United States; to prescribe the terms and conditions on which they may come in; to establish regulations for sending out of the country such aliens as have entered in violation of law, and to commit the enforcement of such conditions and regulations to executive officers; that the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and that the provisions of the Constitution securing the right of trial by jury have no application."

The whole subject was again reviewed in *United States v. Ju Toy*, 198 U. S. 253, 49 L. ed. 1040, 25 Sup. Ct. Rep. 644, where, in upholding the validity of the Chinese exclusion act, it was observed that the power of Congress to deal with the admission of aliens, and to confide the enforcement of such laws to administrative officers, was, in view of the previous cases, no longer open to discussion.

We come to consider the specific grounds which are relied *upon to remove the [336 case from the control of these general principles.

1. It is insisted that, however complete

may be the power of Congress to legislate concerning the exclusion of aliens, and to intrust the enforcement of legislation of that character to administrative officers, nevertheless the particular legislation here in question is repugnant to the Constitution because it defines a criminal offense, and authorizes a purely administrative official to determine whether the defined crime has been committed, and, if so, to inflict punishment. Conclusive support for the legal proposition upon which this contention must rest, it is insisted, results from the ruling in *Wong Wing v. United States*, 163 U. S. 228, 41 L. ed. 140, 16 Sup. Ct. Rep. 977, where it was said (p. 237):

"We regard it as settled by our previous decisions that the United States can, as a matter of public policy, by congressional enactment, forbid aliens or classes of aliens from coming within their borders, and expel aliens or classes of aliens from their territory, and can, in order to make effectual such decree of exclusion or expulsion, devolve the power and duty of identifying and arresting the persons included in such decree, and causing their deportation, upon executive or subordinate officials.

"But when Congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, we think such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of Constitutional legislation unless provision were made that the fact of guilt should first be established by a judicial trial. *It is not consistent with the theory of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt and adjudge the punishment by one of its own agents."

But, in so far as the case of *Wong Wing* held that the trial and punishment for an infamous offense was not an administrative, but a judicial, function, it is wholly inapposite to this case, since, on the face of the section which authorizes the Secretary of Commerce and Labor to impose the exaction which is complained of, it is apparent that it does not purport to define and punish an infamous crime, or indeed any criminal of-

fense whatever. Clear as is this conclusion from the text of § 9, when considered alone, it becomes, if possible, clearer when the section is enlightened by an analysis of the context of the act and by a consideration of the report of the Senate committee to which we have previously made reference. We say by an analysis of the context of the act, because, as we have previously stated, its various sections accurately distinguish between those cases where it was intended that particular violations of the act should be considered as criminal and be punished accordingly, and those where it was contemplated that violations should not constitute crime, but merely entail the infliction of a penalty, enforceable in some cases by purely administrative action and in others by civil suit. We say also by a consideration of the report of the Senate committee, since that report leaves no doubt that the sole purpose of § 9 was to impose a penalty, based upon the medical examination for which the statute provided, thus tending, by the avoidance of controversy and delay, to secure the efficient performance by the steamship company of the duty to examine in the foreign country, before embarkation, and thereby aid in carrying out the policy of Congress to exclude from the United States aliens afflicted with loathsome or dangerous contagious diseases as defined in the act. The contention that because the exaction which the statute authorizes the Secretary of Commerce and Labor to impose is a penalty, *therefore its enforcement is [338 necessarily governed by the rules controlling in the prosecution of criminal offenses, is clearly without merit, and is not open to discussion. *Hepner v. United States*, 213 U. S. 103, ante, 720, 29 Sup. Ct. Rep. 474.

2. But it is argued that even though it be conceded that Congress may, in some cases, impose penalties for the violation of a statutory duty, and provide for their enforcement by civil suit instead of by criminal prosecution, as held in *Hepner v. United States*, nevertheless that doctrine does not warrant the conclusion that a penalty may be authorized, and its collection committed to an administrative officer without the necessity of resorting to the judicial power. In all cases of penalty or punishment, it is contended, enforcement must depend upon the exertion of judicial power, either by civil or criminal process, since the distinction between judicial and administrative functions cannot be preserved consistently with the recognition of an administrative power to enforce a penalty without resort to judicial authority. But the proposition magnifies the judicial to the detriment of all other departments of the government, disregards many previous adjudications of this court,

and ignores practices often manifested and hitherto deemed to be free from any possible constitutional question.

Referring in *Bartlett v. Kane*, 16 How. 263, 14 L. ed. 931, to the authority of Congress to confide to administrative officers the enforcement of tariff legislation, it was said (p. 272):

"The interference of the courts with the performance of the ordinary duties of the executive departments of the government would be productive of nothing but mischief; and we are satisfied that such a power was never intended to be given to them. *Decatur v. Paulding*, 14 Pet. 499, 10 L. ed. 561."

And in the same case, in considering the nature and character of a penalty of 10 per cent which the tariff act of 1842 (5 Stat. at L. 563, chap. 270) authorized administrative officers to impose in cases of undervaluation, it was said (p. 274):

"An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation *by the importer, shows that they were exacted as discouragements of fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, . . . it must still be regarded in the light of a penal duty."

See also *Den ex dem. Murray v. Hoboken Land & Improv. Co.* 18 How. 272, 15 L. ed. 372.

In *Passavant v. United States*, 148 U. S. 214, 37 L. ed. 426, 13 Sup. Ct. Rep. 572, the authority of Congress to delegate to administrative officers final and conclusive authority as to the valuation of imported merchandise, accompanied with the power to impose a penalty for undervaluation, was reiterated, and the doctrine of *Bartlett v. Kane* was applied. And the same principle was upheld in *Origet v. Hedden*, 155 U. S. 228, 39 L. ed. 130, 15 Sup. Ct. Rep. 92.

In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff, but as to internal revenue, taxation, and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations, and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power.

It is insisted that the decisions just stated and the legislative practices referred to are

inapposite here, because they all relate to subjects peculiarly within the authority of the legislative department of the government, and which, from the necessity of things, required the concession that administrative officers should have the authority to enforce designated penalties without resort to the courts. But over no conceivable subject is the legislative power of Congress more complete than it is over that with which the act we are now considering deals. If the proposition implies that the right of Congress to enact legislation is to be determined, not by the grant of power made *by the Constitution, but by consider-[340] ing the particular emergency which has caused Congress to exert a specified power, then the proposition is obviously without foundation. This is apparent, since the contention then would proceed upon the assumption that it is within the competency of judicial authority to control legislative action as to subjects over which there is complete legislative authority, on the theory that there was no necessity calling for the exertion of legislative power. As the authority of Congress over the right to bring aliens into the United States embraces every conceivable aspect of that subject, it must follow that, if Congress has deemed it necessary to impose particular restrictions on the coming in of aliens, and to sanction such prohibitions by penalties enforceable by administrative authority, it follows that the constitutional right of Congress to enact such legislation is the sole measure by which its validity is to be determined by the courts. The suggestion that, if this view be applied, grave abuses may arise from the mistaken or wrongful exertion by the legislative department of its authority, but intimates that, if the legislative power be permitted its full sway within its constitutional sphere, harm and wrong will follow, and therefore it behooves the judiciary to apply a corrective by exceeding its own authority. But, as pointed out in the passage previously quoted from *Bartlett v. Kane*, supra, and as often since emphasized by this court (*McCray v. United States*, 195 U. S. 27, 49 L. ed. 78, 24 Sup. Ct. Rep. 769, 1 A. & E. Ann. Cas. 561), the proposition but mistakenly assumes that the courts can alone be safely intrusted with power, and that hence it is their duty to unlawfully exercise prerogatives which they have no right to exert, upon the assumption that wrong must be done to prevent wrong being accomplished.

3. It is urged that the fines which constituted the exactions were repugnant to the 5th Amendment, because amounting to a taking of property without due process of law, since, as asserted, the fines were imposed, in some cases, without any previous

notice, and in all cases without any adequate notice or opportunity to defend. Stated in the 341] briefest form, *the findings below show that on the arrival of a vessel, if the examining medical officers discovered that an immigrant was afflicted with one of the prohibited diseases, the owner of the vessel was notified of the fact, and, indeed, that the steamship company had at the place where the examination was made what is known as a landing agent, whose business it was to keep informed as to the result of medical examinations, and to know when an immigrant was detained by the medical officers because afflicted with a prohibited disease. The findings also established that, where a fine was imposed under § 9 by the Secretary of Commerce and Labor, it was only done after the transmission to that official of the certificate of the examining medical officer that a particular alien immigrant had been found to be afflicted with one of the prohibited diseases, and that the state of the disease established in the opinion of the medical officer that it existed at the time of embarkation, and could then have been detected by a competent medical examination. Prior to a certain date the action of the Secretary of Commerce and Labor, imposing a fine, was notified to the steamship company, and demand of payment was practically at once made. After a certain date, by what is known as circular No. 58, the same process was followed as to the imposition of the fine, but a period of time—fourteen days—was allowed to intervene between the notice given of the imposition of the fine and its final and compulsory exaction. As to the action of the Secretary of Commerce and Labor before the promulgation of circular No. 58, the court below found that no adequate opportunity was afforded the vessel or its owner to be heard, and, as to the notice given after the promulgation of circular No. 58, it was found that the fourteen days allowed by that circular, and the practice under it, "did not afford the plaintiff a reasonable opportunity to obtain evidence from the port of embarkation and to be heard upon the question whether a fine should be imposed." Much contention is made in argument concerning these findings, it being insisted that there is conflict between them, and different 342] views are taken as to *which of the findings should, under the circumstances of the case, be treated as dominant. But into that controversy we do not think it necessary to enter, since, as previously pointed out, it is evident that the statute unambiguously excludes the conception that the steamship company was entitled to be heard, in the sense of raising an issue and tendering evidence concerning the condition of the alien immigrant upon arrival at the point of dis-

embarkation, as the plain purpose of the statute was to exclusively commit that subject to the medical officers for which the statute provided. We shall, therefore, test the soundness of the proposition we are considering upon that assumption.

In view of the absolute power of Congress over the right to bring aliens into the United States we think it may not be doubted that the act would be beyond all question constitutional if it forbade the introduction of aliens afflicted with contagious diseases, and, as a condition to the right to bring in aliens, imposed upon every vessel bringing them in, as a condition of the right to do so, a penalty for every alien brought to the United States afflicted with the prohibited disease, wholly without reference to when and where the disease originated. It must then follow that the provision contained in the statute is of course valid, since it only subjects the vessel to the exaction when, as the result of the medical examination for which the statute provides, it appears that the alien immigrant afflicted with the prohibited malady is in such a stage of the disease that it must, in the opinion of the medical officer, have existed and been susceptible of discovery at the point of embarkation. Indeed, it is not denied that there was full power in Congress to provide for the examination of the alien by medical officers, and to attach conclusive effect to the result of that examination for the purposes of exclusion or deportation. But it is said the power to do so does not include the right to make the medical examination conclusive for the purpose of imposing a penalty upon the vessel for the negligent bringing in of an alien. We think the argument rests *upon a distinction [343 without a difference. It disregards the purpose which, as we have already pointed out, Congress had in view in the enactment of the provision; that is, the guarding against the danger to arise from the wrongful taking on board of an alien afflicted with a contagious malady, not only to other immigrant passengers, but ultimately, it might be, to the entire people of the United States,—a danger arising from the possible admission of aliens who might contract the contagion during the voyage, and yet be entitled to admission because apparently not afflicted with the prohibited disease, owing to the fact that the time had not elapsed for the manifestation of its presence. In effect, all the contentions pressed in argument concerning the repugnancy of the statute to the due process clause really disregarded the complete and absolute power of Congress over the subject with which the statute deals. They mistakenly assume that mere form, and not substance, may be made by the courts

the conclusive test as to the constitutional power of Congress to enact a statute. These conclusions are apparent, we think, since the plenary power of Congress as to the admission of aliens leaves no room for doubt as to its authority to impose the penalty, and its complete administrative control over the granting or refusal of a clearance also leaves no doubt of the right to endow administrative officers with discretion to refuse to perform the administrative act of granting a clearance, as a means of enforcing the penalty which there was lawful authority to impose.

There are many other propositions urged in argument which we do not deem it necessary to specifically notice, as in effect they are all disposed of by the considerations which we have stated.

We have not considered the questions which would arise for decision if the case presented an attempt to endow administrative officers with the power to enforce a lawful exaction by methods which were not within the competency of administrative duties, because they required the exercise of judicial authority.

Affirmed.

344]*INTERNATIONAL MERCANTILE MARINE COMPANY, Plff. in Err.,

v.

NEVADA M. STRANAHAN. (No. 510.)

SAME

v.

SAME. (No. 511.)

(See S. C. Reporter's ed. 344.)

These cases are governed by the decision in *Ocean Steam Nav. Co. v. Stranahan*, ante, p.

[Nos 510, 511.]

Argued January 11, 12, 1909. Decided June 1, 1909.

TWO WRITS OF ERROR to the Circuit Court of the United States for the Southern District of New York to review judgments in favor of the defendant in actions to recover back sums paid as penalties to the collector of customs of the port of New York for bringing into the United States aliens afflicted with loathsome or dangerous contagious diseases. **Affirmed.**

See same case below, 155 Fed. 428.

The facts are stated in the opinion.

Messrs Lucius H. Beers and William G. Choate argued the cause and filed a brief for plaintiff in error.

Assistant to the Attorney General Ellis argued the cause, and, with Messrs. Henry L. Stimson, Winfred T. Denison, and E. P. Grosvenor, filed a brief for defendant in error.

For contentions of counsel see their briefs as reported in *Oceanic Steam Nav. Co. v. Stranahan*, ante, 1013.

Mr. Justice White delivered the opinion of the court:

These writs of error are prosecuted to obtain the reversal of judgments entered in favor of the United States in actions brought to recover back sums paid as penalties imposed and collected under authority of § 9 of the immigration act of March 3, 1903. [32 Stat. at L. 1215, chap. 1012.] One action concerned penalties exacted before, and the other related to a penalty which attached after, the promulgation by the Secretary of Commerce and Labor of a certain rule of procedure known as circular No. 58. As the controversies in these cases are of the same nature as that presented by the record in *Oceanic Steam Nav. Co. v. Stranahan*, No. 509, just decided [214 U. S. 320, ante, 1013, 29 Sup. Ct. Rep. 671], and as the principles which controlled the decision in that case are here absolutely decisive, the judgments in these cases must be, and they are, affirmed.

***WEEMS STEAMBOAT COMPANY[345 OF BALTIMORE CITY, Petitioner,**

v.

PEOPLE'S STEAMBOAT COMPANY, William D. Carter, President, et al.

(See S. C. Reporter's ed. 345-359.)

Waters — riparian rights — wharfing out.

1. Riparian proprietors in Virginia have the right to build out private wharves so as to reach the navigable waters of the stream. [For other cases, see *Waters*, 87-100, in Digest Sup. Ct. 1908.]

Wharves — right to use.

2. The owner or lessee of the exclusive right to use a wharf on a navigable stream need not permit its use by others upon payment of reasonable compensation therefor because there is no other wharf at that port, or because such use is convenient, and has been permitted by the former owner or lessor.

[For other cases, see *Wharves*, III. in Digest Sup. Ct. 1908.]

[No. 181.]

NOTE.—On the right to erect wharves, see notes to *Madison v. Mayers*, 40 L.R.A. 635, and *Ex parte Easton*, 24 L. ed. U. S. 373.

Argued April 26, 1909. Decided June 1, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which affirmed a decree of the Circuit Court for the Eastern District of Virginia, dismissing the bill in a suit to enjoin the use of certain wharves on the Rappahannock river, in that state, of which the complainant was the owner or lessee. Reversed with directions to grant the injunction.

See same case below, 82 C. C. A. 276, 152 Fed. 1022.

Statement by Mr. Justice Peckham:

The complainant (the above-named petitioner) commenced this suit in the circuit court of the United States for the eastern district of Virginia against the defendant 346]the People's *Steamboat Company and its officers and agents, for the purpose of obtaining an injunction restraining the corporation defendant from using certain wharves on the Rappahannock river, in the state of Virginia, of some of which the complainant was the owner in fee, and of others the lessee of the exclusive use from the owners. The complainant contended that it had the exclusive right to the use of such wharves, either as owner or lessee, and that the defendant illegally, and against the will of the complainant, insisted upon using them to carry on its business, although offering to pay the complainant what was the reasonable value of the defendant's use of such wharves.

The corporation and the individual defendants filed joint and separate answers, setting up a claim of right to the use of such wharves upon compensation being made therefor, and the case came before the court on motion of complainant for a temporary injunction, as prayed for in the bill of complaint. The court, without then passing upon any other question, ordered that the matter be referred to a special master for the purpose of taking such evidence as might be submitted to him by either party, or which he might find necessary to take, bearing upon the title to the several wharves mentioned in complainant's bill and claimed by complainant, and to ascertain what rights passed to complainant with the acquisition of such wharves, and whether or not the wharves were public or private wharves. Pursuant to this order of reference, hearings were had before the master, who returned the evidence taken before him with his opinion in favor of granting the injunction as prayed for by the complainant, on the ground that the wharves in question were private wharves, owned or leased by the complain-

53 L. ed.

ant, who had the exclusive right to their use. The facts found by the master were not overruled, but his conclusions of law were not concurred in by the court, and the preliminary injunction was refused. The case was then submitted to the court for trial upon all the evidence taken, and the bill was dismissed with costs. 141 Fed. 454.

*The complainant appealed from the [347] decree of dismissal to the circuit court of appeals for the fourth circuit, where it was affirmed upon the opinion of the circuit court.

The complainant then applied to this court for a writ of certiorari to bring the case here, which petition was granted, and the case has been submitted to this court upon the briefs of respective counsel.

Messrs. George Weems Williams and St. George R. Fitzhugh argued the cause, and, with Mr. Nicholas P. Bond, filed a brief for petitioner:

The wharf property of the plaintiff is not, by virtue of the fact that it was used by it as a common carrier for its business as such, public for all purposes, but only public in the sense that the plaintiff could not lawfully discriminate against members of the public desiring to use its property to transact business with it as a common carrier.

Donovan v. Pennsylvania Co. 199 U. S. 279, 50 L. ed. 192, 26 Sup. Ct. Rep. 91.

The right of a riparian owner to erect wharves is property.

1 Farnham, Waters, § 66, p. 297, § 110, pp. 509, 510, § 112, p. 523, § 113b, pp. 533, 534; Yates v. Milwaukee, 10 Wall. 497, 19 L. ed. 984; R. v. Russell, 6 Barn. & C. 566; Weber v. State Harbor Comrs. 18 Wall. 57, 64, 65, 21 L. ed. 798, 801, 802; Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 445, 446, 36 L. ed. 1018, 1039, 1040, 13 Sup. Ct. Rep. 110; Dutton v. Strong, 1 Black, 23, 17 L. ed. 29; Norfolk City v. Cooke, 27 Gratt. 435; Alexandria & F. R. Co. v. Faunce, 31 Gratt. 764; Hardy v. McCullough, 23 Gratt. 262.

The statutes of Virginia and the decisions of its courts govern in the determination of the rights of a riparian owner in the navigable waters of that state.

Shively v. Bowlby, 152 U. S. 1, 24-26, 38 L. ed. 331, 340, 341, 14 Sup. Ct. Rep. 548; Illinois C. R. Co. v. Illinois, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; St. Anthony Falls Water Power Co. v. St. Paul Water Comrs. 168 U. S. 349, 42 L. ed. 497, 18 Sup. Ct. Rep. 157.

The wharf owner may determine who shall have the privilege of using his wharf.

Louisville & N. R. Co. v. West Coast

Naval Stores Co. 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745; *Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co.* 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673.

The fact that public roads were open to certain of the wharves in controversy after their construction does not alter the character of those wharves.

Louisville & N. R. Co. v. West Coast Naval Stores Co. supra; *Exterkamp v. Covington Harbor Co.* 104 Ky. 796, 47 S. W. 1086; *Brisbane v. St. Paul & S. C. R. Co.* 23 Minn. 129; *California Nav. & Improv. Co. v. Union Transp. Co.* 126 Cal. 433, 46 L.R.A. 825, 58 Pac. 936; *Irwin v. Dixon*, 9 How. 33, 13 L. ed. 35.

Even if the wharves had been so located that the public authorities might have objected to the maintenance of the same, that, of itself, would have furnished no authority or justification to the defendants to use the wharves.

Davenport & N. W. R. Co. v. Renwick, 102 U. S. 180, 26 L. ed. 51; *Gerrish v. Union Wharf*, 26 Me. 384, 46 Am. Dec. 568; *Coney v. Brunswick & F. S. B. Co.* 116 Ga. 222, 42 S. E. 498; *Wetmore v. Brooklyn Gas-light Co.* 42 N. Y. 384.

Neither the legislature nor the courts can compel the owners of the wharves on the Rappahannock to devote them to the public use any further than such owners see fit, without taking the wharves from their owners by condemnation, and making adequate compensation.

Louisville & N. R. Co. v. Interstate R. Co. 108 Va. 502, 62 S. E. 369.

A wharf owner can prevent persons from using his wharf for purposes of their own.

Coney v. Brunswick & F. S. B. Co. supra; *Mills v. Evans*, 100 Iowa, 712, 69 N. W. 1043; see also *Bogert v. Haight*, 20 Barb. 251.

A common carrier has the right to select its agencies for conducting its business, and to decline to allow other carriers the use of its terminal facilities.

Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co. 110 U. S. 667, 28 L. ed. 291, 4 Sup. Ct. Rep. 185; *Express Cases*, 117 U. S. 1, 29 L. ed. 791, 6 Sup. Ct. Rep. 542, 628; *St. Louis Drayage Co. v. Louisville & N. R. Co.* 5 Inters. Com. Rep. 137, 65 Fed. 39.

A wharf owner may revoke a license to use his property.

New Orleans, M. & C. R. Co. v. Hanning, 15 Wall. 649, 21 L. ed. 220; *Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co.*; *Coney v. Brunswick & F. S. B. Co.*; and *Bogert v. Haight*.—supra; *Heaney v. Heaney*, 2 Denio, 625; *Swords v. Edgar*. 59 N. Y. 31, 17 Am. Rep. 295; *O'Neill v. An-*

nett, 27 N. J. L. 290, 72 Am. Dec. 364; 29 Am. & Eng. Enc. Law, p. 64; 1 Farnham, Waters, p. 562.

Mr. William D. Carter argued the cause, and, with Mr. Ellerbe W. Carter, filed a brief for respondents:

If the plaintiff owns a wharf, it is as a riparian proprietor, and not because it is a common carrier, that it is permitted to hold, maintain, and enjoy the same.

Illinois v. Illinois C. R. Co. 184 U. S. 77, 86, 46 L. ed. 440, 444, 22 Sup. Ct. Rep. 300, 146 U. S. 387, 36 L. ed. 1018, 13 Sup. Ct. Rep. 110; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Dutton v. Strong*, 1 Black, 23, 17 L. ed. 29.

Equity and justice require that the appropriate rules of law be made to apply to every riparian proprietor alike. One riparian proprietor who has exercised his privilege of constructing a wharf may enjoy his structure in his own way, and put the wharf to his own use alone, or to his own use collectively with others, provided the uses are restricted and location and surrounding circumstances permit such use without injury to the public.

Dutton v. Strong, supra; *Louisville & N. R. Co. v. West Coast Naval Stores Co.* 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745.

The title to navigable waters, and to the soil under water in navigable rivers, is and must be held in perpetual trust for the public as beneficiary.

Martin v. Waddell, 16 Pet. 367, 410, 10 L. ed. 997, 1012; *McCready v. Virginia*, 94 U. S. 391, 24 L. ed. 248; *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N. C. 517, 61 L.R.A. 937, 44 S. E. 39; *Smith v. Maryland*, 18 How. 71, 74, 15 L. ed. 269, 270.

But though his domain stops at low-water mark, the riparian proprietor (and he alone) may build out a wharf structure in aid of navigation.

Mobile Transp. Co. v. Mobile, 153 Ala. 409, 13 L.R.A. (N.S.) 352, 44 So. 976; 1 Farnham, Waters, p. 227, § 113b; *Dutton v. Strong* and *Yates v. Milwaukee*, supra.

In the building of a wharf under Va. Code, § 998, the riparian proprietor exercises an inherent privilege which he enjoys under the law. Whether he makes of his wharf a private "staith" or a public facility depends mainly on the use to which it is subsequently put. He may charge for the use of his wharf, but the charge must be reasonable if he serves the general public.

Parkersburg & O. River Transp. Co. v. Parkersburg, 107 U. S. 691, 27 L. ed. 584, 2 Sup. Ct. Rep. 732; *Riddick v. Dunn*, 145 N. C. 31, 58 S. E. 439; *Mobile Transp. Co. v. Mobile*, supra; *Gibler v. Terminal R. Asso.*

203 Mo. 208, 101 S. W. 37, 11 A. & E. Ann. Cas. 1194.

The rule must be the same as to the impartial reception and handling of freight at a wharf or "station" provided for the handling of freight as at a "baggage room," provided and equipped for the handling of baggage.

Hart v. Atlanta Terminal Co. 128 Ga. 754, 58 S. E. 452; Tift v. Southern R. Co. 123 Fed. 789.

Every such wharf is irrevocably affected with a public interest *ab condide*, no matter how often it may be conveyed and pass from vendor to vendee.

Weber v. State Harbor Comrs. 18 Wall. 57, 21 L. ed. 798.

The Weems Steamboat Company is tenant of the public, both as to shore and channel at Tappahannock.

New Orleans v. Louisiana Constr. Co. 140 U. S. 654, 35 L. ed. 556, 11 Sup. Ct. Rep. 968; Weber v. State Harbor Comrs. *supra*.

A private wharf, when maintainable at all, must be devoted habitually to private business.

Dutton v. Strong, *supra*.

The wharf is a public wharf because there is no other wharf in the port.

Dutton v. Strong; Louisville & N. R. Co. v. West Coast Naval Stores Co.; and Parkersburg & O. River Transp. Co. v. Parkersburg—*supra*; Ilwaco R. & Nav. Co. v. Oregon Short Line & U. N. R. Co. 5 Inters. Com. Rep. 627, 6 C. C. A. 495, 15 U. S. App. 173, 57 Fed. 673.

Wharves exist, not to prop a monopoly, but as aids to commerce.

The Kate Tremaine, 5 Ben. 60, Fed. Cas. No. 7,622; Barrington v. Commercial Dock Co. 15 Wash. 170, 33 L.R.A. 116, 45 Pac. 748; Parkersburg & O. River Transp. Co. v. Parkersburg, *supra*.

The conduct of the Weems Steamboat Company discloses a policy tending to close monopoly.

Pocahontas Coke Co. v. Powhatan Coal & Coke Co. 60 W. Va. 508, 10 L.R.A. (N.S.) 268, 116 Am. St. Rep. 901, 56 S. E. 264, 9 A. & E. Ann. Cas. 667; Mines v. Scribner, 147 Fed. 927; United States v. Trans-Missouri Freight Assn. 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, John D. Park & Sons Co. v. Hartman, 12 L.R.A. (N.S.) 135, 82 C. C. A. 158, 153 Fed. 24.

If the wharf be a "station," as contended, it is admittedly a "public station."

Donovan v. Pennsylvania Co. 199 U. S. 296, 50 L. ed. 200, 26 Sup. Ct. Rep. 91; Hart v. Atlanta Terminal Co. *supra*.

Can the boat of the respondents, having on board prospective passengers who wish to pass over the petitioner's wharf, expecting to pay for the privilege, be denied the privilege? 53 L. ed.

lege of landing because of an arbitrary discrimination against the vehicle, or against its owner as the agent of the passenger desiring to land at the wharf?

Kates v. Atlanta Baggage & Cab Co. 107 Ga. 636, 46 L.R.A. 431, 34 S. E. 372.

Mr. Justice Peckham, after making the foregoing statement, delivered the opinion of the court:

It appears that the complainant herein is a corporation of *the state of Maryland[352 and the defendant is a corporation of the state of Virginia, the individual defendants being officers or agents of such corporation and citizens of the same state. The complainant has been for a long time engaged in the business of transportation of passengers and freight between Baltimore and various landings or places on the Rappahannock river, in the state of Virginia, and for many years has been the owner or lessee of the wharves on that river, mentioned in the bill of complaint. Some time before the commencement of this suit the defendant began the transportation of passengers and freight between Fredericksburg and Urbanna, in Virginia, and along the Rappahannock river, in that state, stopping at the same wharves on that river as complainant, and engaged in the same business. In order to transact its business it made use of the wharves owned or leased by the complainant, in spite of the opposition of complainant, and against its protests, although defendant offered to make compensation for the reasonable value of the use which it made of such wharves in the prosecution of its business, which offers were refused by the complainant, and it notified the defendant to desist from the use of the wharves owned or leased by it. The action of the defendant in making use of the wharves of complainant was based upon the contention that the defendant had the legal right to do so, inasmuch as, in many cases, there were no other wharves at such places where the defendant desired to land, and that it was necessary to use such wharves in order that defendant might prosecute its business of transporting passengers and freight to and from the various landings on the river, and because the wharves had, for many years, been used by the public.

It was proved before the master (and we take the facts in the case as found by him) that the complainant was the owner in fee of five different wharves along the banks of the river and of the land under the water where the wharves were built; also that the complainant was the lessee of eight wharves owned by different persons who had, prior to the commencement of this *suit, leased[353 their exclusive use to the complainant, and

that it was during the time of the existence of the leases that the defendant entered upon and used the wharves for its own purposes. The master reported that there was no evidence of any prior dedication of any of such wharves to the public, either those owned by or leased to complainant, and, of course, none of any acceptance thereof by the public authorities, nor was there any evidence of any condemnation of any of such wharves on the part or in behalf of any public authority; that the wharves were private wharves, either owned by the complainant in fee or leased by it, for its exclusive use, from the owners in fee of such wharves. The most that can be said is that, in some cases, the former owners of the wharves now owned by the complainant, as well as the lessors of the wharves before they leased the same, and while owners thereof, had built them and had permitted the public to use them, and had frequently received compensation for such use, and in many cases the use had been without compensation. After the sales of the wharves and after the execution of the leases, neither the former owners nor the lessors made any claim to the use of the wharves or to any right to permit others to use them, either with or without compensation, and the complainant formally notified the defendant that the complainant refused to permit such use any longer. It appeared that public roads had been made from the surrounding country to the places where these private wharves had been built, sometimes before the building of the wharves, and sometimes the roads had been laid out after such wharves had been built. The use that had been made of the wharves after they had been built and prior to the purchase or leasing by the complainant was nothing more than such as was founded upon a mere license on the part of the owners and without any dedication of the wharves to the public or any acceptance on the part of the public further than by indiscriminate user, and with no taking or condemnation of the right to use the wharves as public wharves. The title to the wharves as private property remained 354] unaffected in any way, and there was nothing to prevent the withdrawal of license to use at any time. In some cases the wharves were the only ones that had been built at the places where such wharves existed, and the use of such wharves was convenient for the transaction of the defendant's business.

The complainant is in the actual possession of all the wharves, those which it has purchased and those which it has leased, and its title and right to the exclusive possession of all of them is recognized and assented to by both grantors and lessors, and not

one of them makes any claim of any interest in the wharves as against complainant.

The circuit court, in speaking of the facts as found by the master, said:

"While the said thirteen wharves involved in this proceeding by no means include all the wharves or stopping places for vessels on the river, it may be said that they embrace the important wharves from which passenger and freight business is chiefly procured in passing up and down the river, and that the business from said wharves is large. With possibly a single exception, these wharves are at the termini of public highways in the counties in which they are respectively built; the character of the business consists of passenger travel and merchandise received over said wharves, consisting of the general products of the country; and they are the usual shipping places of persons living in the immediate neighborhood of the wharves, and of the inhabitants of the country for some distance in the interior. That at said wharves United States postoffices are established, at which the mail of the people for the surrounding country is procured; and that, as to the wharves leased as aforesaid, the same were leased upon a rental of a commission of 10 per cent of all freight charges and passenger fares collected by the complainant at said wharves, the owner of said wharves maintaining an agent there to assist in mooring the vessels of the complainants making landings there, and in receiving and forwarding freight therefrom, and at some of the wharves sail vessels from time to time moor and *lade and un-[355 lade, making proper compensation to the owners of the wharves for their use."

With reference to these facts the circuit court said that "while the special master is doubtless correct in his findings as to the actual ownership of the property rights in said wharves, namely, that they are the individual property of the several owners thereof, and, as such, pass regularly by the laws of descent and purchase, it by no means follows that said wharves are private . . . [quoad] the public; that is, either the citizens desiring to use the wharves to reach the means of transportation upon and over said river, or owners of such methods of transportation plying the waters of said river; the obligation upon each being to render and pay to the wharf owner reasonable wharfage and charges for the use of his property, under such proper and reasonable regulations as might be imposed either by law or by the owner of the property."

The rights of a riparian owner upon a navigable stream in this country are governed by the law of the state in which the stream is situated. These rights are subject to the paramount public right of navigation.

The riparian proprietors have the right, among others, to build private wharves out so as to reach the navigable waters of the stream. *Dutton v. Strong*, 1 Black, 23, 17 L. ed. 29; *Yates v. Milwaukee*, 10 Wall. 497, 19 L. ed. 984; *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732; *Illinois C. R. Co. v. Illinois*, 146 U. S. 387, 445, 36 L. ed. 1018, 1039, 13 Sup. Ct. Rep. 110; *St. Anthony Falls Water Power Co. v. St. Paul Water Comrs.* 158 U. S. 349, 368, 42 L. ed. 497, 504, 18 Sup. Ct. Rep. 157. The courts of the state of Virginia affirm the same rights of the riparian proprietor. *Norfolk City v. Cooke*, 27 Gratt. 430, 435; *Alexandria & F. R. Co. v. Faunce*, 31 Gratt. 761, 765. If the wharf obstructs navigation or the private rights of others, or if it encroach upon any public landing, the wharf may be abated. Va. Code 1887, § 998. A private wharf on a navigable stream is thus held to be property which cannot be destroyed or its value impaired, and it is property the exclusive use of which the owner can only be deprived in accordance with established law; and if necessary that it or 356] any part of it* be taken for the public use, due compensation must be made. The owner of a private wharf on a navigable stream does not, on that account only, hold it by a different title from the owner of any other property which he may use himself or permit others whom he may select to use, while, at the same time, denying its use by anyone else.

The case of *Munn v. Illinois*, 94 U. S. 113, 127, 24 L. ed. 77, 84, has, in our judgment, no bearing upon the question before us. In that case and in those cited therein the discussion was in regard to the right of owners of property of the nature described to charge what they pleased for the doing of the business in which they were engaged. Their property was being used with their consent by, and its use devoted to, the public, to any extent desired, and the only question was in regard to the compensation which they were entitled to ask for the business thus done. The complaint was that the charges were too great and were a violation of a law of the state, and were not reasonable, and the answer made by the owners of the property was that it was their private property, and they had the right to charge what they pleased. The court said, "As you have devoted your property to a use in which the public has an interest, you have granted to the public an interest in that use, and the right, on the part of the state, to regulate charges which you shall make, to the end that they shall be just and reasonable." If the owner of one of these wharves had devoted it to the public use,

and permitted the public to use it as it desired, and demanded compensation for such use, the question as to the amount of such compensation might be raised, as in the *Munn* class of cases, to be determined with reference to the reasonableness of the charge. But this is no such case. The legislature has passed no law regarding rates, if that were material, and the reasonableness of the charge is not under consideration. The right to use the property has been withdrawn by the owner as to the public in general, including defendant. The only question is whether a third person has the right to use a private wharf on tendering reasonable compensation *therefor, because[357 there is no other wharf at the place, or because it would be more convenient to such third person to use it, or because the former owner of the wharf had permitted the public to use it, although the present owner refused to consent to such use. There is no more reason why such property should be held subject to the right of others to use it against the will of its owner than there is for any other kind of property to be so held.

The question as to the right of the owner to exclude others from the use of a private wharf on a navigable stream has been very recently decided by this court in *Louisville & N. R. Co. v. West Coast Naval Stores Co.* 198 U. S. 483, 49 L. ed. 1135, 25 Sup. Ct. Rep. 745, and the right of such owner to exclude any or all other persons from the use of such wharves was affirmed. The owner was not, it was also said, compelled to use the wharf exclusively for his own business or else to throw it open for the use of everyone; that he could not only use it himself and permit some others to use it, but might, at the same time, exclude still others to whom he did not choose to grant such right. The case was not decided with reference to the existence of another wharf in the harbor. No such matter was adverted to.

And so in regard to the use of a private wharf by the public, with or without compensation to the owner. The public can obtain no adverse right as against such owner by mere user. To obtain it there must be an intention on the part of the owner to dedicate the property to the use of the public, and there must be an acceptance of such dedication on the part of some public authority, which may sometimes be implied (but not in such a case as this), and, in the absence of such dedication and acceptance, the use will be regarded as under a simple license, subject to withdrawal at the pleasure of the owner. *Harris v. Com.* 20 Gratt. 833; *Gaines v. Merryman* (1898) 95 Va. 660, 29 S. E. 738; *Irwin v. Dixon*, 9 How. 10-32, 13 L. ed. 25-35. The rights of the

public must have been obtained by an adverse user so as to take away from the owner the ordinary rights of ownership. In this case there was never anything but a mere 358]*license. The mere fact that there may be no wharf in the particular place other than that owned by the complainant, and also the fact that the use of such wharf is very convenient or even necessary for the defendant in order to prosecute its business as a competitor of complainant, together with the fact that the former owners had permitted the public upon occasions to use the wharf, furnish not the slightest reason for holding that the wharf of complainant is held on the condition that it must continue to permit others to use it upon compensation, when they desire to prosecute their own business of transporting passengers or freight on the river. It was found by the master that there had never been any abandonment of the right of exclusive enjoyment of any of the wharves, and they were assessed for taxation to the owners, and taxes paid on them by the owners.

Mr. Justice Bradley in *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 699, 27 L. ed. 584, 587, 2 Sup. Ct. Rep. 732, remarked (*obiter*) that whether a private wharf might be maintained as such where it is the only facility of the kind in a particular port or harbor might be questioned. He recognized the law to be that there might be a private wharf in a navigable stream, and that the owner, in permitting its temporary use by another, would be at liberty to make his own bargain for such use. The remark was made with reference to the amount of the charges for wharfage, and the justice doubted the right, under the circumstances stated, of the owner of a wharf to make such charges as he chose, without reference to their being reasonable. It is another matter, however, to say that the owner of a private wharf must permit its use by the public simply because the wharf he has built or purchased is the only wharf in the port, or because the public had theretofore been permitted to use the wharf, with only the rights of a licensee.

We see no sufficient reason for subjecting a private wharf to the public use, which may frequently include that of a competitor with the owner, simply because there is no other wharf at the place. A public wharf, it is 359]presumed, may be built, or, *if there be no place for one, the private wharf might be taken by public authority for the public use, upon compensation being made for the taking of the property.

We are of opinion that the decree of the court below is erroneous, and it is there-

fore reversed, with directions to enter a decree for an injunction, as prayed for in the bill of complaint.

So ordered.

ALLEN R. ENGLISH and Honora English,
His Wife, Appts.,
v.

TERRITORY OF ARIZONA at the Relation and to the Use of VICTOR S. GRIF-FITH,† Treasurer and *Ex Officio* Tax Collector in and for the County of Pima, in the Territory of Arizona.

(See S. C. Reporter's ed. 359-365.)

Pleading—admission by failure to deny.

1. An allegation in the complaint in an action to collect a delinquent special assessment; that defendants' property was contiguous to the improvement, must be taken as true, where not denied by the answer.

[For other cases, see Pleading, 149-162, in Digest Sup. Ct. 1908.]

Appeal—from territorial court—error in construing statute.

2. There is no such manifest error as calls for reversal of the judgment below by the Federal Supreme Court in a decision of the territorial supreme court that the method of collecting delinquent taxes, prescribed by Ariz. Laws 1903, No. 92; *viz.*, a suit by the county tax collector in the name and for the use of the territory, is made applicable to delinquent special assessments for public improvements by reason of the provisions of §§ 84, 96, of that act, requiring, respectively, that the clerks of county boards of supervisors shall make correct lists of all tracts on which back taxes shall be due, and that all back taxes of whatever kind shall be collected by the tax collector under the authority of such statute.

[For other cases, see Appeal and Error, 4994, 4995; Courts, VII. e, in Digest Sup. Ct. 1908.]

Appeal—from territorial court—review of facts.

3. Findings of a territorial supreme court that commissioners appointed in a street-improvement proceeding examined the locality of such improvement, ascertained to what extent the public would be benefited, and to what extent there would be benefits to property, found the amounts that the property would be benefited, and apportioned and assessed such amounts on the several parcels of land in the proportion of which they were severally benefited, and that no lot was assessed for a

†Substituted for John W. Bogan, as his successor in office.

NOTE.—As to review by United States Supreme Court of territorial decisions—see note to *Miners' Bank v. Iowa*, 13 L. ed. U. S. 867.

greater amount than it was actually benefited,—foreclose any contention in the Federal Supreme Court that the assessment was made according to the front-foot rule, and not upon the basis of benefits.

[For other cases, see Appeal and Error, 4879-4888, in Digest Sup. Ct. 1908.]

Federal courts—following territorial decisions—statutory construction.

4. The Federal Supreme Court will adopt the view of the officers concerned with the administration of the law respecting a public improvement, concurred in by the court in which condemnation proceedings were conducted, and apparently, also, by the territorial supreme court, as to which of two sections of the Arizona Revised Statutes governs the appointment of commissioners, where the statute will bear that construction, although plausible objections may be urged against it.

[For other cases, see Courts, VII. e, in Digest Sup. Ct. 1908.]

Public improvements—notice.

5. Notice of the meetings of the common council on proceedings to confirm a special assessment for a public improvement is not essential, where notice was given of the meetings of the commissioners appointed to make such assessment.

[For other cases, see Public Improvements, II. e, in Digest Sup. Ct. 1908.]

Public improvements—notice—waiver.

6. No objection to the failure to give notice of the meetings of the common council upon proceedings to confirm a special assessment for a public improvement is available to a property owner who, after appearing before the commissioners appointed to make the assessment, and making a protest solely for the purpose of saving the right of review, interests himself in the sale of, and assists in disposing of, the bonds issued to pay for the improvement.

[For other cases, see Public Improvements, II. e, in Digest Sup. Ct. 1908.]

[No. 180.]

Submitted April 26, 1909. Decided June 1, 1909.

APPEAL from the Supreme Court of the Territory of Arizona to review a decree which affirmed a decree of the District Court of Pima County, in that territory, in favor of the territory in a suit to collect a delinquent special assessment for a street improvement. Affirmed.

See same case below (Ariz.) 89 Pac. 501; on rehearing (Ariz.) 90 Pac. 601.

The facts are stated in the opinion.

Messrs. A. C. Baker and Marcus A. Smith submitted the cause for appellants. Mr. James Reilly was on the brief.

Mr. Samuel L. Kingan submitted the cause for appellee:

The facts certified by the lower court are conclusive on this court, and the only ques-

tion to be determined here is whether the facts so found support the judgment or decree.

Marshall v. Burtis, 172 U. S. 634, 635, 43 L. ed. 580, 581, 19 Sup. Ct. Rep. 290; Crowe v. Trickey, 204 U. S. 234, 51 L. ed. 458, 27 Sup. Ct. Rep. 275; San Pedro & C. del. A. Co. v. United States, 146 U. S. 131, 36 L. ed. 914, 13 Sup. Ct. Rep. 94.

In special assessment proceedings, but one notice to the owner of the property assessed is required.

Paulsen v. Portland, 149 U. S. 41, 37 L. ed. 641, 13 Sup. Ct. Rep. 750.

The question of benefits, and the property to which these benefits extend, is, of necessity, a question of fact.

Spencer v. Merchant, 125 U. S. 353, 31 L. ed. 766, 8 Sup. Ct. Rep. 921.

While it is true that the ruling of the supreme court of the territory on a construction of local statutes does not in any way preclude this court from reviewing it, yet such construction is always entitled to great respect.

Fox v. Haarstick, 156 U. S. 679, 39 L. ed. 578, 15 Sup. Ct. Rep. 457; Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization, 206 U. S. 479, 51 L. ed. 1146, 27 Sup. Ct. Rep. 695; Lewis v. Herrera, 208 U. S. 314, 52 L. ed. 508, 28 Sup. Ct. Rep. 412.

Where the statute provides a special remedy it excludes every other.

Dollar Sav. Bank v. United States, 19 Wall. 238, 22 L. ed. 82; Stanley v. Albany County, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234; State v. Norton, 63 Minn. 497, 65 N. W. 935; Thomson v. People, 184 Ill. 17, 56 N. E. 383; McSherry v. Wood, 102 Cal. 651, 36 Pac. 1010; New Whatcom v. Bellingham Bay Improv. Co. 18 Wash. 181, 51 Pac. 360; Annie Wright Seminary v. Tacoma, 23 Wash. 109, 62 Pac. 444; Alley v. Lebanon, 146 Ind. 125, 44 N. E. 1003.

Mr. Justice McKenna delivered the opinion of the court:

This suit was brought in the district court of Pima county, Arizona, by the territory of Arizona, to collect a delinquent special assessment levied by the city of Tucson on the property of appellants for the payment of the improvement of Congress street in that city. The assessment was levied under the provision of chapter 2 of title 11 of the Revised Statutes of the territory. The territory obtained judgment for the amount of the assessment, \$12,533.75, which was affirmed by the supreme court of the territory.

The contentions that appellants made in the supreme court of the territory, as far as appears from its opinion, were: (1) That the territory, at the relation of the

treasurer and *ex officio* tax collector of Pima county, had no right to bring this suit, but that such right was in the city tax collector; (2) (a) that the assessment was erroneous because the cost of the improvement was divided "by the arbitrary front foot rule," and that the assessment was made upon that basis, and not the basis of benefits derived from such improvement; (b) the committee appointed under the act to make the assessment took into consideration the value to appellants of a certain narrow strip of land lying between the lot of appellants and Congress street, left open and unoccupied in the widening and improvement of the street; (3) that the appellants had no notice, actual or constructive, when the common council would act upon the report of the committee; (4) that the property was not subject to special assessment, because appellants' property was not contiguous to the improvement made. The supreme court of the territory decided all of the contentions against appellants, the last one on the ground that the complaint alleged that appellants' property was contiguous to the [361]improvement, "which allegation was not denied by the answer. That contention, therefore, we may take no further notice of.

The first contention is repeated here, and it invokes our construction of the statutes of the territory against that made by the supreme court. If there were doubt, we should certainly lean to the construction given by the supreme court. *Copper Queen Consol. Min. Co. v. Territorial Bd. of Equalization*, 206 U. S. 474, 479, 51 L. ed. 1143, 1146, 27 Sup. Ct. Rep. 695. But we think there is no doubt. There is no dispute as to the proceedings taken, so far as they could vest authority in the relator Bogan, as county tax collector, to bring this suit. The dispute turns upon the law. Paragraph 483 of the Revised Statutes of the territory, as amended in 1897, provides that "it shall be the duty of the collector of special assessments, within such time as the common council may provide, but in no event later than the 21st of December of the year in which such assessment was made, to make a report in writing to the general officer of the county authorized by the general revenue law to sell for taxes due the county and territory, of all the lands, town lots, and real property upon which he shall be unable to collect special assessments, with the amount due of special assessments and unpaid thereon, together with his warrant or a brief description of the nature of the warrant received by him, authorizing the collection thereof; . . . that he is unable to collect the same or any part thereof, and that he has given notice required by law that said warrants have been received

by him for collection." It is further provided that the report, when made, shall be prima facie evidence that all of the forms and requirements of the law have been complied with, and that the special assessments mentioned in the report are due and unpaid. "And in any action before any court, wherein the question of the validity of such assessment is an issue, no defense or objection shall be made or heard which might have been interposed in the proceedings for the making of such assessment or the application for the confirmation thereof." It is provided in the next section that the county collector shall incorporate said list with the county "delinquent list, and [362] "shall sell such delinquent city property at the same time and in the same manner for such city delinquent special assessment as real property is required to be sold by law for county and territorial delinquent taxes." The supreme court said that "this section, construed alone, might well be considered as excluding any other method of collecting delinquent special assessments." But the court further said that paragraph 488 should be considered. That paragraph reads as follows:

"The general revenue laws of this territory in reference to proceedings for the collection of delinquent taxes on real property, the sale thereof, the executions of certificates of sale and deeds thereon, the force and effect of such deeds and sales; and all other laws in relation to the enforcement and collection of delinquent taxes and redemption of tax sales, except as herein otherwise provided, shall be applicable to proceedings to collect such special assessments."

The court pointed out that the act 92 of the Laws of 1903 repealed the general revenue law of the territory in reference to proceedings for the collection of delinquent taxes, and substituted for a sale of the property by the tax collector a suit by that officer in the name and for the use of the territory. The court said: "Unless, therefore, the act of 1903 applies to delinquent special assessments, there would be no method provided by the existing statutes for the sale of delinquent city property for delinquent special assessments." And the court concluded that §§ 84 and 96 of the Acts of 1903 make "the method of collecting delinquent taxes provided for in the act applicable to all delinquent taxes which may appear on the roll." Section 84 provides:

"Within sixty days after the taking effect of this chapter, and every year thereafter, within thirty days after the settlement of the tax collector, the several clerks of the county boards of supervisors in each county in this territory shall make, in a book to be called the 'back-tax book,' a cor-

rect list in numerical order of all tracts of 363]land and town lots on which *back taxes shall be due in such county, city, or town, setting forth opposite each tract of land or town lot the name of the owner," etc.

Section 96 reads as follows:

"All back taxes, of whatever kind, appearing due upon delinquent real estate, shall be extended in the 'back-tax book' made under the chapter and collected by the tax collector under authority of this chapter."

Appellants contest the construction made by the supreme court of the territory, but we have said that, unless in a case of manifest error, this court will not disturb a decision of the supreme court of a territory construing a local statute. *Fox v. Haastick*, 156 U. S. 674, 679, 39 L. ed. 576, 578, 15 Sup. Ct. Rep. 457. There is certainly not manifest error in the ruling in the present case. Indeed, we see no reason to doubt its correctness.

Of the second contention of appellants, that the assessment was made according to the "arbitrary front foot rule," and not upon the basis of benefits derived from the improvement, the supreme court said that even if the record showed that the committee, in the respects named, had improperly assessed the property, that appellants, not having followed the remedy given by the statutes for a revision of the assessments, were precluded from complaint, citing *Stanley v. Albany County*, 121 U. S. 550, 30 L. ed. 1003, 7 Sup. Ct. Rep. 1234.

But, be this as it may, it was certainly decided in *Stanley v. Albany County*, that the question of special benefit and the property to which it extends is, of necessity, a question of fact, and the supreme court found that the commissioners appointed examined the locality of the improvement, ascertained to what extent the public would be benefited and to what extent there would be benefits to property, and found also the amounts that the property would be benefited, "apportioned and assessed such amounts so found to be a benefit to the property upon the several lots, plots, tracts, and parcels of land, in the proportion of which they were severally benefited by such improvements." It was further found that no lot was assessed for a greater amount 364]than it was actually *benefited. It may be that it is an answer to appellants' contention, and counsel recognize that it may be an answer, that appellants did not avail themselves of the remedy afforded by the law; that is, did not appeal from the order of the city council confirming the assessment. The finding of the court, however, is undoubtedly an answer to the contention if 53 L. ed.

the commissioners were legally appointed. Of this there is a diversity of views between appellants and appellee, the appellants contending that paragraph 471 (§ 7) of the Revised Statutes of the territory controls. It provides that the common council shall appoint three of its members, or any three competent persons, to "make examinations of the premises to be affected, and make an assessment of the improvements contemplated." The appellee contends that paragraph 471 is not applicable, but that paragraph 467 controls. By that paragraph, when the improvements contemplated "require the taking or damaging of property, the proceedings for making just compensation therefor shall be the same as provided in title 21" of the Revised Statutes. Such proceedings were taken, and, in course of them, the court appointed commissioners who, we have seen, examined the locality of the improvements and assessed the amount due from the property benefited. That this was the legal course to pursue was the view of the officers concerned with the administration of the law, including the court in which the proceedings for condemnation of the property were conducted, and, it may be inferred, was also the view of the supreme court of the territory. The statute will bear that construction, and, even if plausible objections can be urged against it, under the authorities which we have cited, we would not be justified in pronouncing it incorrect.

It is assigned as error that the trial court erred in not finding that no notice was given of the meetings of the common council upon the confirmation proceedings. The statute does not provide for notice of the meeting of the common council. It does provide for a notice of the meeting of the commissioners, and this notice was given, and it is found by the supreme *court that Al-[365]len H. English appeared, through his attorney or agent, and made a formal protest against his assessment, but did not produce any witnesses nor did he specify any ground of objection. The law charged appellants with notice that the report would be presented to the common council, and the report was actually filed with the common council a few days after the hearing. We think they were bound to take notice of this action. *Lander v. Mercantile Nat. Bank*, 186 U. S. 469, 46 L. ed. 1253, 22 Sup. Ct. Rep. 908. See *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 44 L. ed. 583, 20 Sup. Ct. Rep. 485. The record shows, besides, that English was a promoter of the improvement. It is true that he appeared before the commissioners and protested against his assessment, but he not only gave no reason for the protest, but his attorney expressly stated that the "protest was made for the sole purpose of saving the

question of review," and that he "did not wish to intimate that he had any objection, but wanted to save his right in case he should have any." And it is found by the court that he knew of the enactment of the ordinance providing for the collection of the assessments and the issuing of bonds to pay for the improvement, that he interested himself in the sale of the bonds, and assisted in disposing of the same. There is, therefore, ground for the contention that such conduct constituted a waiver of all objections to the assessments. It certainly precludes him from saying that he had no notice of the proceedings before the common council. *Wright v. Davidson*, 181 U. S. 371, 45 L. ed. 900, 21 Sup. Ct. Rep. 616.

Appellants pleaded that there was another action pending for the collection of the assessment against them, brought by the city of Tucson; and though conceding that the pleas were defective, urge that they were sufficient to put the court upon notice that the pending suit was not brought by the real party in interest, and that such party was the city of Tucson. The contention, however, is but a phase of the question that the general revenue law of the territory was not repealed. There are other contentions, but they are without substantial merit.

Judgment affirmed.

366]*EXPANDED METAL COMPANY and Henry Chess, Walter Chess, and Harvey B. Chess, Copartners as Chess Brothers, Petitioners,

v.

EUGENE S. BRADFORD, Joseph C. Millichamp, N. J. Schmucker, Jr., and N. J. Schmucker. [No. 66.]

GENERAL FIREPROOFING COMPANY,
Petitioner,

v.

EXPANDED METAL COMPANY.
[No. 606.]

(See S. C. Reporter's ed. 366-386.)

Patents — process — invention — anticipation.

1. A substantial improvement in the art of making expanded sheet metal, involving patentable invention, is disclosed by the Golding patent 527,242, for a process by which the metal is first simultaneously cut and stretched so as to produce a series of half-diamond meshes, which are completed by a second similar operation, coördinating with the first, although the slitting and

stretching of the sheet at the same time was not new.

[For other cases, see Patents, V. b, 7; V. c, 2, in Digest Sup. Ct. 1908.]

Patents — specification — description — process.

2. The failure to describe a complete mechanism in the specifications of a patent for a process is not material if enough is disclosed to indicate to those skilled in such matters the mechanism whereby the method of the patent can be put into operation.

[For other cases, see Patents, VII. b, in Digest Sup. Ct. 1908.]

Patents — process — mechanical operation.

3. The patentability of processes is not restricted to those involving chemical or other similar elemental action, but an invention or discovery of a process or method involving mechanical operations and producing a new and useful result is within the scope of U. S. Rev. Stat. § 4886, U. S. Comp. Stat. 1901, p. 3382, securing protection to the inventor of "any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof."

[For other cases, see Patents, V. b, 7, in Digest Sup. Ct. 1908.]

[Nos. 66 and 606.]

Argued March 18, 19, 1909. Decided June 1, 1909.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Third Circuit to review a decree which reversed a decree of the Circuit Court for the Eastern District of Pennsylvania, sustaining the validity of the Golding patent, 527,242, for an improvement in the method of making expanded sheet metal. Reversed. Also

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit to review a decree which reversed a decree of the Circuit Court for the Northern District of Ohio, holding the same patent invalid. Affirmed.

See same case below in No. 66, 77 C. C. A. 230, 146 Fed. 984; in No. 606, 164 Fed. 849.

The facts are stated in the opinion.

Mr. Ernest Howard Hunter argued the cause and filed a brief for the Expanded Metal Company:

The invention consisted in the discovery of the method, not in any particular means for practicing it. Every true method or art is one which must be independent of particular means. Instruments must be used to apply it to practice, but the invention must reside in the method, and not in the instruments.

1 Robinson, Patents, 250, § 167.

Golding's invention did not consist in a

NOTE.—On patents for processes, see notes to *Evans v. Eaton*, 4 L. ed. U. S. 433, and *Corning v. Burden*, 14 L. ed. U. S. 683.

machine or manufacture, but in a new process in the art of expanding metal; and, if it is not patentable as such, his improvement cannot be protected under the patent laws of this country.

Cochrane v. Deener, 94 U. S. 788, 24 L. ed. 141; *Boulton v. Bull*, 2 H. Bl. 496; *Bowling v. Billington*, 7 Pat. Off. Rep. 191.

Complainant's patent does not attempt to cover a "principle."

Boulton v. Bull, *supra*.

The decision in *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745, did not establish the doctrine that patentable processes were limited to those involving chemical reactions or elemental changes.

Westinghouse v. Boyden Power Brake Co. 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707; *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 46 L. ed. 968, 22 Sup. Ct. Rep. 698; *Simonds Rolling-Mach. Co. v. Hathorn Mfg. Co.* 90 Fed. 201; *Melvin v. Thomas Potter Sons & Co.* 91 Fed. 151; *Kahn v. Starrells*, 68 C. C. A. 82, 135 Fed. 532; *R. Thomas & Sons Co. v. Electric Porcelain & Mfg. Co.* 111 Fed. 923; *Baker Lead Mfg. Co. v. National Lead Co.* 135 Fed. 546; *Kirchberger v. American Acetylene Burner Co.* 124 Fed. 764; *American Tube Works v. Bridgewater Iron Co.* 65 C. C. A. 636, 132 Fed. 16; *Shepard v. Excelsior Steel Furnace Co.* 69 C. C. A. 591, 137 Fed. 399; *John R. Williams Co. v. Miller Du B. & P. Mfg. Co.* 107 Fed. 290; *Peters v. Union Biscuit Co.* 120 Fed. 679; *Re Weston*, 17 App. D. C. 431, 94 Off. Gaz. 1786; *Re Wagner*, 22 App. D. C. 267, 105 Off. Gaz. 1873; *Ex parte Patterson*, 116 Off. Gaz. 2533; *Dowling v. Billington*, 7 Pat. Off. Rep. 191; *Patentable Processes*, 19 *Harvard Law Rev.* 30.

The doctrine that processes involving mechanical operations, as distinguished from chemical reactions or elementary changes, are unpatentable, is foreign to the patent jurisprudence of other nations.

Clothworkers of Ipswich Case, *Goodb.* 252, 1 Am. & Eng. Pat. Cas. 6; *Boulton v. Bull*, *Davies*, Pat. Cas. 162; *R. v. Wheeler*, 2 Barn. & Ald. 350; *Boulton v. Bull*, 2 H. Bl. 493; *Jones v. Pearce*, 1 Webster, Pat. Cas. 123; *Russell v. Cowley*, 1 Webster, Pat. Cas. 459; *Walton v. Potter*, 1 Webster, Pat. Cas. 585; *Gibson v. Brand*, 1 Webster, Pat. Cas. 627; *Reynolds v. Amos*, 3 Pat. Off. Rep. 215; *Dowling v. Billington*, *supra*; *Tubes v. Perfecta Seamless Steel Co.* 20 Pat. Off. Rep. 77; *Gammons v. Battersby*, 21 Pat. Off. Rep. 322; *Boulton v. Adjustable Cover & B. Co.* 22 Pat. Off. Rep. 593.

Where the court has to deal with a device which has achieved undisputed success and accomplishes a result never attained before, which is new, useful, and in large de-

mand, it is generally safe to conclude that the man who made it is an inventor.

O'Rourke Engineering Constr. Co. v. McMullen, 88 C. C. A. 115, 160 Fed. 938.

Messrs. Thomas W. Bakewell and Frederick P. Fish argued the cause, and, with Mr. E. Hayward Fairbanks, filed a brief for the General Fireproofing Company:

In a method claim, in order that it may be held patentable, the patentee must have incorporated some novelty of operation which was previously unknown in the art to which his invention belongs, and this must be something different from the mere mode of operation of apparatus with which an old method is put into practice.

Corning v. Burden, 15 How. 252, 14 L. ed. 683; *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745; *Burr v. Duryee*, 1 Wall. 570, 17 L. ed. 657; *Fuller v. Yentzer*, 94 U. S. 288, 24 L. ed. 103; *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 553, 42 L. ed. 1142, 18 Sup. Ct. Rep. 707; *Knapp v. Morss*, 150 U. S. 227, 37 L. ed. 1061, 14 Sup. Ct. Rep. 81; *Wing v. Anthony*, 106 U. S. 142, 146, 27 L. ed. 110, 111, 1 Sup. Ct. Rep. 93; *Brown v. Piper*, 91 U. S. 37, 23 L. ed. 200; *Miller v. Force*, 116 U. S. 22, 27, 29 L. ed. 552, 554, 6 Sup. Ct. Rep. 204; *Dreyfus v. Searle*, 124 U. S. 60, 31 L. ed. 352, 8 Sup. Ct. Rep. 390; *Crescent Brewing Co. v. Gottfried*, 128 U. S. 158, 32 L. ed. 390, 9 Sup. Ct. Rep. 83; *Ansonia Brass & C. Co. v. Electrical Supply Co.* 144 U. S. 11, 36 L. ed. 327, 12 Sup. Ct. Rep. 601; *Lovell Mfg. Co. v. Cary*, 147 U. S. 623, 37 L. ed. 307, 13 Sup. Ct. Rep. 472; *MacKay v. Jackman*, 20 Blatchf. 466, 12 Fed. 615; *Brainard v. Cramme*, 20 Blatchf. 530, 12 Fed. 621; *Hatch v. Moffitt*, 15 Fed. 253; *Excelsior Needle Co. v. Union Needle Co.* 23 Blatchf. 147, 32 Fed. 221; *Wells Glass Co. v. Henderson*, 15 C. C. A. 84, 34 U. S. App. 19, 67 Fed. 930; *International Tooth-Crown Co. v. Bennett*, 72 Fed. 169; *Strom Mfg. Co. v. Weir Frog Co.* 75 Fed. 279; *Travers v. Hammock & Fly-Net Co.* 78 Fed. 638; *Gindorff v. Deering*, 81 Fed. 952; *Ryneer Co. v. Evans*, 83 Fed. 696; *American Strawboard Co. v. Elkhart Egg-Case Co.* 84 Fed. 960; *Stokes Bros. Mfg. Co. v. Heller*, 96 Fed. 104; *Dodge Mfg. Co. v. Ohio Pulley Works*, 101 Fed. 586; *Dodge Mfg. Co. v. Collins*, 46 C. C. A. 53, 106 Fed. 935; *Ballou v. Edward A. Potter & Co.* 88 Fed. 786; *Busch v. Jones*, 184 U. S. 598, 46 L. ed. 707, 22 Sup. Ct. Rep. 511.

In every method or process case which has received the favorable action of the Supreme Court, the claim in question has called for or contained some elemental action, chemical or otherwise, or patentable novelty has

been found in the use of one of the agencies of nature, and the action or agency was then new in the particular art to which the invention in question belonged.

Cochrane v. Deener, 94 U. S. 780, 24 L. ed. 139; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. ed. 279; *New Process Fermentation Co. v. Maus*, 122 U. S. 413, 30 L. ed. 1193, 7 Sup. Ct. Rep. 1304; *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 46 L. ed. 968, 22 Sup. Ct. Rep. 698; *Telephone Cases (Dolbear v. American Bell Teleph. Co.)* 126 U. S. 1, 31 L. ed. 863, 8 Sup. Ct. Rep. 778.

The United States courts have drawn careful and accurate distinctions between the various subject-matters of invention. Thus, a claim for a machine could not be construed as covering a method, and *vice versa*. Nor could a claim for a method be construed as covering a product. And thus it was that the United States courts have defined what is or is not patentable as a method or process, whereas no such necessity ever existed under the laws and practice of the English courts. Consequently, in that particular question, the English decisions are not in point.

Westinghouse v. Boyden Power Brake Co. 170 U. S. 557, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707; *Merrill v. Yeomans*, 94 U. S. 568, 24 L. ed. 235; *James v. Campbell*, 104 U. S. 356, 376, 26 L. ed. 786, 793; *Giant Powder Co. v. California Powder Works*, 98 U. S. 126, 25 L. ed. 77.

The distinction in principle between inventions of processes and inventions of machines is, however, as well established in Great Britain as in this country.

Neilson v. Thompson, Webster, Pat. Cas. 275; *Crane v. Price*, 4 Mann. & G. 580; *Tilghman v. Proctor*, 102 U. S. 707, 26 L. ed. 279; *R. v. Wheeler*, 2 Barn. & Ald. 349; *Cannington v. Nuttall*, L. R. 5 H. L. 205.

The decisions of the French courts also harmonize in principle with those of the United States, although the same distinction obtains in the law of France respecting claims.

Pouillet's *Traité Théoretique et Pratique des Brevets d'Invention*, 1906, pp. 30-33.

The complainant's patent is not of the nature which can be aided by proof of commercial success. The success was due to the merit of the machine; the patent for the machine is not in issue; and no amount of commercial success of the machine can prove that a patent for the method or function of the machine is patentable.

Duer v. Corbin Cabinet Lock Co. 149 U. S. 223, 37 L. ed. 710, 13 Sup. Ct. Rep. 850; *Smith v. Nichols*, 21 Wall. 112, 22 L. ed. 566.

Mr. Justice Day delivered the opinion of the court:

These cases involve opposing decisions as to the validity of letters patent of the United States No. 527,242, dated October 9, 1894, *granted to John E. Golding for [374 an alleged improvement in the method of making expanded sheet metal. In case No. 66, here on writ of certiorari to the circuit court of appeals for the third circuit, a decree of the circuit court of the United States for the eastern district of Pennsylvania, sustaining the patent, was reversed, and the patent held invalid. The opinion of the circuit judge sustaining the patent is found in 136 Fed. 870. The case in the court of appeals is found in 77 C. C. A. 230, 146 Fed. 984. After the decree in the circuit court of appeals for the third circuit, the Expanded Metal Company having filed a bill against the General Fireproofing Company in the circuit court of the United States for the northern district of Ohio, the case was heard and the patent held invalid on the authority of the case in the circuit court of appeals for the third circuit. 157 Fed. 564. The circuit court of appeals for the sixth circuit reversed the United States circuit court for the northern district of Ohio, and held Golding's patent valid and infringed. 164 Fed. 849. These writs of certiorari bring these conflicting decisions of the courts of appeal here for review.

The patent in controversy relates to what is known as expanded sheet metal. Expanded metal may be generally described as metal openwork, held together by uncut portions of the metal, and constructed by making cuts or slashes in metal and then opening them so as to form a series of meshes or latticework. In its simplest form, sheet metal may be expanded by making a series of cuts or slits in the metal in such relation to each other as to break joints, so that the metal, when opened or stretched, will present an open mesh appearance. It may be likened to the familiar woven wire openwork construction, except that the metal is held together by uncut portions thereof, uniting the strands, and the whole forms a solid piece.

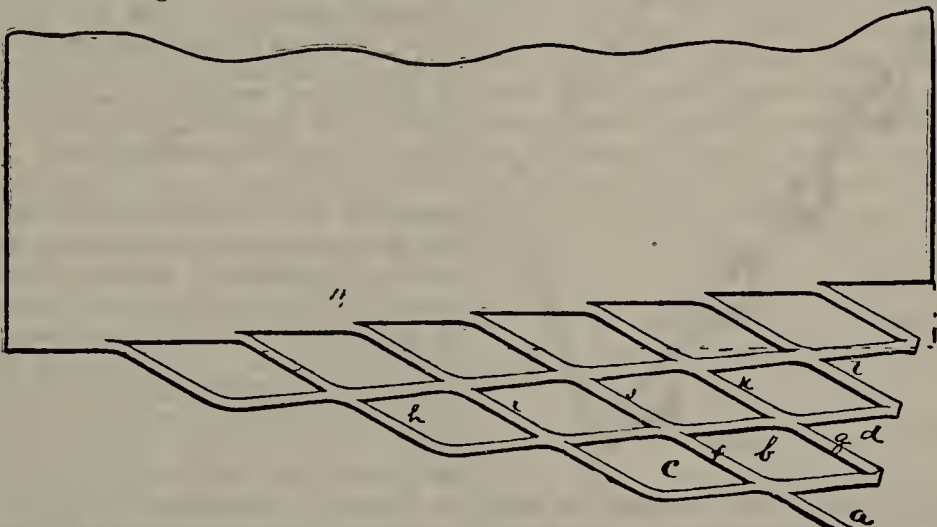
In the earlier patents different methods are shown for cutting the metal, which cuts were afterwards opened by a separate operation of pulling or stretching. These crude methods *are shown in the earlier [375 American and English patents which appear in the record. While nothing more than such methods was accomplished in the art there was little general or commercial use for expanded metal.

It was apparent that if a method could be devised by which the metal could be simultaneously cut and expanded, such method would be a distinct advance in the art, and

this record discloses that the desirable result of simultaneously performing these operations was accomplished in the Golding and Durkee patent No. 320,242. In that patent the operation was performed by means of knives arranged in a step order, the sheet to be fed obliquely. The inventors described the Golding and Durkee method as follows:

"The process consists in the employment of a flat piece of metal of any desired size, and beginning at one side and corner and making an incision within the side of the metal, thus forming a strand which is simultaneously pressed away from the plane of the metal in a direction at or near a right angle, the position the strand assumes depending upon the distance it is moved from the plane of the metal. *a* in the drawing shows the first cut made. The next step in this process is to make additional incisions, as is shown at *c*, *b*, and *d*, further within the plate of metal, and leaving uncut sections at the ends of the cuts, and simultaneously with the cutting the strands are pressed away from the plane of the metal at the angle and to the desired position, as above described. Thus each row of meshes is simultaneously cut and formed from a blank piece of metal without buckling or crimping the blank. In the act of cutting and forming the meshes, the finished article is contracted in a line with the cuts or incisions, and consequently it is shorter in this direction than the piece from which it was cut, but it is greatly lengthened in a line at an angle to the plane of the original sheet, plate, or blank."

The result was to produce expanded metal, as shown in this figure:



erally known as expanded sheet metal, it has been customary to first cut the slits in the sheet metal at short distances apart, and to open the metal at the cuts thus formed by bending the severed portions or strands in a direction at right angles substantially to the plane of the sheet. It has also been made by simultaneously cutting and opening the metal by means of cutters set off or stepped relatively so to make the slashes or cuts in different lines in the manner set forth in patents No. 381,230 or No. 381,231, of April 17, 1888. In both of these methods the product is somewhat shorter and materially wider than the original sheet, but practically no stretching or elongation of the metal forming the strands is caused.

"In my present invention I seek to avail myself of the ability of the metal to stretch or distend as well as of its ability to bend under strain or pressure, and the invention consists in the improved method of making expanded metal *viz.*, by simultaneously cutting and opening or expanding the metal at the cuts by stretching the severed portions."

*In the method further described in [377 the specifications, the expanded metal is shown to be made by the use of knives making a series of slits in a straight line at equal distances apart across the sheet, and, at the same time, carrying downward the severed portions of the metal. And this operation is performed by bending the severed portion at a time when its ends are securely attached to the main sheet, thereby expanding the sheet without materially shortening it. The sheet is then fed forward, and the slitting and stretching operation is repeated in such

376] *With this patent as the advanced state of the art, Golding set about making further improvements, and the result was the patent in suit. The specifications of the patent in suit state:

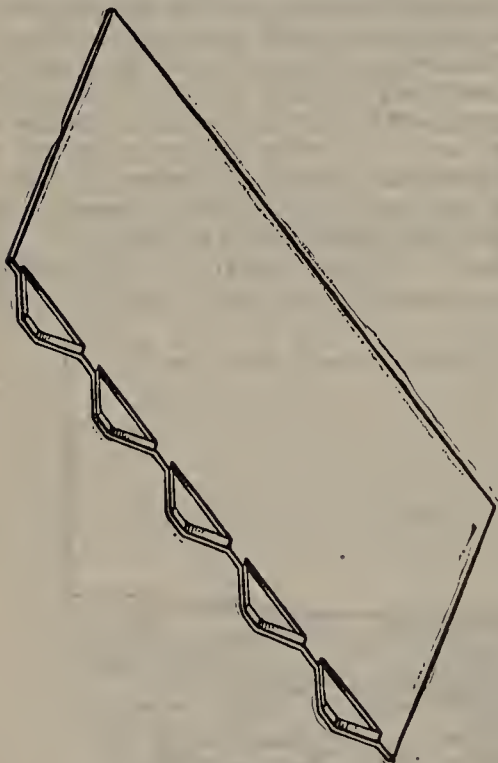
"In the manufacture of what is now generally known as expanded sheet metal, it has been customary to first cut the slits in the sheet metal at short distances apart, and to open the metal at the cuts thus formed by bending the severed portions or strands in a direction at right angles substantially to the plane of the sheet. It has also been made by simultaneously cutting and opening the metal by means of cutters set off or stepped relatively so to make the slashes or cuts in different lines in the manner set forth in patents No. 381,230 or No. 381,231, of April 17, 1888. In both of these methods the product is somewhat shorter and materially wider than the original sheet, but practically no stretching or elongation of the metal forming the strands is caused."

made back of the portion unsevered by the preceding operation, or, in other words, as the specification states, the slits and unsevered portions alternate in position in each successive operation, the bends given to the

severed portions or strands being in direction at right angles to the plane of the sheet, there is no contraction in the length of the metal, and the expansion is obtained by the stretching, distension, or elongation of the severed strand. This patent contains the single claim, which is as follows:

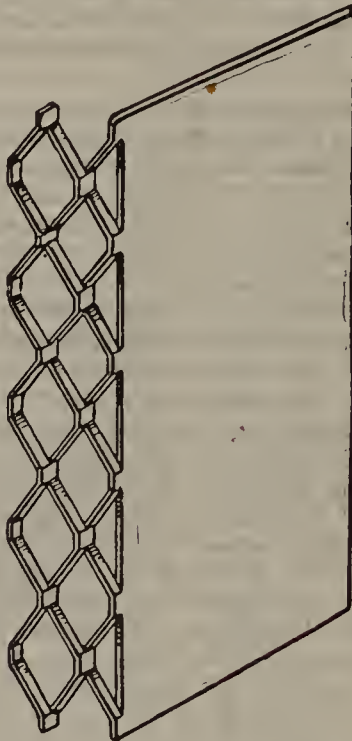
"The herein-described method of making open or reticulated metal work, which consists in simultaneously slitting and bending portions of a plate or sheet of metal in such manner as to stretch or elongate the bars connecting the slit portions and body of the sheet or plate, and then similarly slitting and bending in places alternate to the first-mentioned portions, thus producing the finished expanded sheet metal of the same length as that of the original sheet or plate, substantially as described."

It is thus apparent that the method covered by the claim of the patent is accomplished by the two operations indicated and performed in the manner pointed out in the specifications. The first operation of cutting, bending, and stretching the strands simultaneously produces a series of stretched loops or half diamonds. Thus:



378]*This series of half diamonds is then supplemented by the second operation, which consists in making a second series of cuts and expansions for stretching the strands back of and opposite the parts of the metal left uncut by the first operation. The result is that the series of one-half diamonds is converted into the series of full diamonds

and because of the manner in which the stretching is done, while the ends of the strands are still firmly attached to the sheet, there is no material shortening of the length of the sheet. Thus:



What has Golding accomplished by this alleged improvement? These records leave no doubt that there are substantial advantages in the method of the patent in suit. As the sheet is not shortened, the completed product is regular *in form and ready[379 for many uses to which the shortened sheet of the old method could not be put. The metal worked upon can be much heavier than that which could be successfully manipulated by the old process. The meshes are formed in a uniform and regular way, so that a line drawn through their intersections in one direction is at right angles with a line drawn through their intersections in the other direction. There is no irregularity in the width of the strands. Put to the test of actual use, this record discloses that while the method of the Golding and Durkee patent is still in use in some places in this country, the method disclosed in the patent in controversy is largely in use in the United States, Great Britain, and Continental Europe; that it has greatly increased the use of expanded metal in this country, and opened new fields for use where sheets of a regular shape can be used to a greater advantage than they could be when made under the old process.

The learned circuit court of appeals for the third circuit seems to have regarded the invention as consisting merely of the im-

provement of the process in the manufacture of expanded metal by stretching certain portions of the metal when the slit is cut and the mesh is opened. A broad claim of that character was made in the Patent Office, and the file wrapper and contents show that it was disallowed by the examiner. The claim in its present form, framed by the examiner as sufficient to cover the real invention of the patent, was accepted by the applicant, and is now the claim of the patent.

If all that Golding did was to show a method of simultaneously cutting and stretching the metal, the examiner was doubtless right in holding it to have been anticipated by former inventions, notably the patent to Ohl, No. 475,700, and in a degree in the previous patents to Golding and to Golding and Durkee.

But the patent in suit, embraced in the claim allowed, shows more than a mere method of making open meshes by simultaneously cutting and stretching the metal. It shows a method by which the metal is **380**] first cut and stretched in the *manner indicated to make the half diamond, and then a second operation, co-ordinating with the first, and completing the mesh by the manner in which it is performed in connection with the first. It is the result of the two operations combined which produces the new and useful result covered by the claim allowed in the Patent Office, and, which, when read in connection with the specifications, shows substantial improvement in the art of making expanded metal work.

But it is said that the patent in suit discloses no means of practically operating the method shown, and therefore, as said by the learned judge in the third circuit, "it is but the expression of a happy thought;" but the requirement of the patent law, in order to make a method or process patentable, is that the patent shall indicate to those skilled in the art the adaptation of means to put it into practice.

We think this record amply discloses, while no complete mechanism is pointed out in the specifications, enough to indicate to those skilled in such matters a mechanism whereby the method of the patent can be put into operation. As said by Judge Seversen, delivering the opinion of the court in No. 606, in the circuit court of appeals for the sixth circuit:

"But here the inventor has gone on to point out that the slitting and bending is to be done by a stationary cutter under the sheet, and upper cutters to co-operate in shearing the slit. These upper cutters are so constructed as to bend down the strand to the proper distance. It is not stated just what the form shall be, but only ordinary skill in mechanics would suggest that the outer

side of the cutter might be beveled or a shoulder might be formed thereon to carry down the strand when severed.

"Mechanism for the shifting of the sheet and of the knives was already in use in machines for expanding metal, and, indeed, was common in the mechanical arts. Moreover, experts have here testified that these devices could be arranged by any skilful mechanic, and we have no reason to doubt it." [164 Fed. 853.]

Golding testifies that he at first executed his process by *hand. Other witnesses, **[381]** skilled in the art, say that they could do likewise from the information found in the patent.

The important thing in this patent is a method of procedure, not the particular means by which the method shall be practised. Golding's machine patent was not applied for for more than a year and a half after the issue of the patent in suit.

It is suggested that Golding's improvement, while a step forward, is nevertheless only such as a mechanic skilled in the art, with the previous inventions before him, would readily take; and that the invention is devoid of patentable novelty. It is often difficult to determine whether a given improvement is a mere mechanical advance, or the result of the exercise of the creative faculty amounting to a meritorious invention. The fact that the invention seems simple after it is made does not determine the question; if this were the rule, many of the most beneficial patents would be stricken down. It may be safely said that if those skilled in the mechanical arts are working in a given field, and have failed, after repeated efforts, to discover a certain new and useful improvement, that he who first makes the discovery has done more than make the obvious improvement which would suggest itself to a mechanic skilled in the art, and is entitled to protection as an inventor. There is nothing in the prior art that suggests the combined operation of the Golding patent in suit. It is perfectly well settled that a new combination of elements, old in themselves, but which produce a new and useful result, entitles the inventor to the protection of a patent. *Webster Loom Co. v. Higgins*, 105 U. S. 580-591, 26 L. ed. 1177-1181.

To our minds, Golding's method shows that degree of ingenuity and usefulness which raises it above an improvement obvious to a mechanic skilled in the art, and entitles it to the merit of invention. Others working in the same field had not developed it, and the prior art does not suggest the combination of operations which is the merit of Golding's invention.

It is lastly contended, and this is perhaps the most important question in the case, that

382]in view of the former declaration *and opinions of this court, what is termed a process patent relates only to such as are produced by chemical action, or by the operation or application of some similar elemental action, and that such processes do not include methods or means which are effected by mere mechanical combinations, and a part of the language used in *Corning v. Burden*, 15 How. 252, 14 L. ed. 683, and *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. 68, 39 L. ed. 899, 15 Sup. Ct. Rep. 745, is seized upon in support of this contention. We have no disposition to question the decision in those cases.

An examination of the extent of the right to process patents requires consideration of the object and purpose of the Congress in exercising the constitutional power to protect, for a limited period, meritorious inventions or discoveries. Section 4886 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 3382) provides:

"Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof . . . may . . . obtain a patent therefor."

This is the statute which secures to inventors the right of protection; and it is not the province of the courts to so limit the statute as to deprive meritorious inventors of its benefits. The word "process" is not used in the statute. The inventor of a new and useful art is distinctly entitled to the benefit of the statute as well as he who invents a machine, manufacture, or composition of matter. The word "process" has been brought into the decisions because it is supposedly an equivalent form of expression, or included in the statutory designation of a new and useful art.

What, then, is the statutory right to a patent for a "process" when the term is properly considered? Curtis, in his work on the Law of Patents, says:

"A process may be altogether new, whether the machinery by which it is carried on be new or old. A new process may be invented or discovered, which may require the use of a newly-invented machine. In such a case, if both the process and the machine were invented by the same person, he could 383]take separate *patents for them. A new process may be carried on by the use of an old machine in a mode in which it was never used before. . . . In such a case, the patentability of the process in no degree depends upon the characteristic principle of the machine, although machinery is essential to the process, and although a particular machine may be required." Curtis, *Patents*, 4th ed. § 14, note,

In *Robinson on Patents*, vol. 1, § 167, it is said:

"While an art cannot be practised except by means of physical agents, through which the force is brought in contact with or is directed toward its object, the existence of the art is not dependent on any of the special instruments employed. It is a legal, practical invention in itself. Its essence remains unchanged, whatever variation takes place in its instruments, as long as the acts of which it is composed are properly performed."

And *Walker on Patents*, 4th ed. § 3, states that valid process patents may be granted for "operations which consist entirely of mechanical transactions, but which may be performed by hand or by any of several different mechanisms or machines."

It is undoubtedly true, and all the cases agree, that the mere function or effect of the operation of a machine cannot be the subject-matter of a lawful patent. But it does not follow that a method of doing a thing, so clearly indicated that those skilled in the art can avail themselves of mechanism to carry it into operation, is not the subject-matter of a valid patent. The contrary has been declared in decisions of this court. A leading case is *Cochrane v. Deener*, 94 U. S. 780, 24 L. ed. 139, in which this court sustained a process patent involving mechanical operations, and in which the subject was discussed by Mr. Justice Bradley, speaking for the court. On page 787 that learned justice said:

"That a process may be patentable, irrespective of the particular form of the instrumentalities used, cannot be disputed. . . . Either may be pointed out; but, if the patent is not confined to that particular tool or machine, the use of the others would be an infringement, the general process being the *same. A process is a mode of [384] treatment of certain materials to produce a given result. It is an act, or a series of acts, performed upon the subject-matter to be transformed and reduced to a different state or thing. If new and useful, it is just as patentable as is a piece of machinery. In the language of the patent law, it is an art. The machinery pointed out as suitable to perform the process may or may not be new or patentable, whilst the process itself may be altogether new, and produce an entirely new result. The process requires that certain things should be done with certain substances, and in a certain order; but the tools to be used in doing this may be of secondary consequence."

This clear and succinct statement of the rule was recognized and applied (Mr. Justice Bradley again speaking for the court) in the case of *Tilghman v. Proctor*, 102 U. S.

707, 26 L. ed. 279. In the course of the opinion the learned justice tersely says:

"A machine is a thing. A process is an act, or a mode of acting. The one is visible to the eye,—an object of perpetual observation. The other is a conception of the mind,—seen only by its effects when being executed or performed. Either may be the means of producing a useful result."

That this court did not intend to limit process patents to those showing chemical action or similar elemental changes is shown by subsequent cases in this court.

In *Westinghouse v. Boyden Power Brake Co.* 170 U. S. 537, 42 L. ed. 1136, 18 Sup. Ct. Rep. 707, the opinion was written by the same eminent justice who wrote the opinion in *Risdon Iron & Locomotive Works v. Medart*, 158 U. S. supra, and, delivering the opinion of the court, he said:

These cases [158 U. S. 68, and *Wicke v. Ostrum*, 103 U. S. 461, 26 L. ed. 409] assume, although they do not expressly decide, that a process, to be patentable, must involve a chemical or other similar elemental action; and it may be still regarded as an open question whether the patentability of processes extends beyond this class of inventions."

And added these significant words:

"Where the process is simply the function 385] or operative effect *of a machine, the above cases are conclusive against its patentability; but where it is one which, though ordinarily and most successfully performed by machinery, may also be performed by simple manipulation, such, for instance, as the folding of paper in a peculiar way for the manufacture of paper bags, or a new method of weaving a hammock, there are cases to the effect that such a process is patentable, though none of the powers of nature be invoked to aid in producing the result. *Eastern Paper Bag Co. v. Standard Paper Bag Co.* 30 Fed. 63; *Union Paper-Bag Mach. Co. v. Waterbury*, 39 Fed. 389; *Travers v. American Cordage Co.* 64 Fed. 771. This case, however, does not call for an expression of our opinion upon this point, nor even upon the question whether the function of admitting air directly from the train pipe to the brake cylinder be patentable or not, since there is no claim made for an independent process in this patent, and the whole theory of the specification and claims is based upon the novelty of the mechanism."

And the same learned justice wrote the opinion of the court in *Carnegie Steel Co. v. Cambria Iron Co.* 185 U. S. 403, 46 L. ed. 968, 22 Sup. Ct. Rep. 698, and sustained a process patent. If, by any construction, that process could be said to involve a "chemical or other similar elemental action," no stress was laid upon that 53 L. ed.

fact. This court, speaking through Mr. Chief Justice Waite, sustained a patent in the *Telephone Cases*, 126 U. S. 1, 31 L. ed. 863, 8 Sup. Ct. Rep. 778, for a method of transmitting electrical undulations similar in form to the vibrations of the air accompanying vocal sounds, and at the same time the patent for the apparatus by which the method was operated was sustained.

In *Leeds & C. Co. v. Victor Talking Mach. Co.* decided at this term, 213 U. S. 301, 318, ante, 495, 500, 29 Sup. Ct. Rep. 495, 500, this court said: "A process and an apparatus by which it is performed are distinct things. They may be found in one patent; they may be made the subject of different patents."

We therefore reach the conclusion that an invention or discovery of a process or method involving mechanical operations, *and producing a new and useful re-[386 sult, may be within the protection of the Federal statute, and entitle the inventor to a patent for his discovery.

We are of opinion that Golding's method was a substantial improvement of this character, independently of particular mechanisms for performing it, and the patent in suit is valid as exhibiting a process of a new and useful kind.

As to the infringement, little or no question was made in case No. 606. In case No. 66 the circuit court held that there was some evidence of infringement, enough, at least, to warrant the decree sustaining the patent and awarding an accounting. With this conclusion we agree. It follows that the decree of the Circuit Court of Appeals for the Third Circuit (No. 66) should be reversed, and that of the Circuit Court of Appeals for the Sixth Circuit (No. 606) should be affirmed, and the cases remanded to the Circuit Courts of the United States for the Eastern District of Pennsylvania and the Northern District of Ohio, respectively, for further proceedings consistent with this opinion.

Decrees accordingly.

UNITED STATES OF AMERICA, Complainant,

v.

JOSEPH F. SHIPP et al.

(See S. C. Reporter's ed. 386-438.)

Contempt—murder of prisoner pending his appeal.

1. The sheriff and night jailer in charge of a prisoner under sentence of death in a state court are chargeable with contempt of the mandate of the Supreme Court of the United States, staying all proceedings pending an appeal from an order of a Federal circuit court, denying relief by habeas corpus, where such officials made no prepara-

tion to prevent the murder of the prisoner by a mob, actuated by the intent to prevent the delay attendant upon such appeal, although such action was reasonably to be anticipated, and made no effort to resist the mob, to save the prisoner, or to identify the participants in the crime.

[What constitutes contempt, see Contempt, I. b, in Digest Sup. Ct. 1908.]

Contempt—murder of prisoner pending his appeal.

2. Participants in the murder of a prisoner under sentence of death in a state court, after an appeal to the Supreme Court of the United States from an order of a Federal circuit court denying relief by habeas corpus has been allowed and the proceedings stayed, are guilty of contempt of the Supreme Court, where their crime was actuated by the intent to prevent the delay attendant upon such appeal.

[What constitutes contempt, see Contempt, I. b, in Digest Sup. Ct. 1908.]

[No. 5, Original.]

Argued March 2, 3, 1909. Decided May 24, 1909.

INFORMATION charging a contempt of the Supreme Court of the United States in murdering a prisoner under sentence of death in the Criminal Court of Hamilton County, in the State of Tennessee, after his appeal to the Federal Supreme Court from an order of the Circuit Court for the Northern Division of the Eastern District of Tennessee had been allowed and a stay of proceedings ordered. Rule discharged as to a part of the defendants and made absolute as to the others.†

The facts are stated in the opinion.

Attorney General Bonaparte and Solicitor General Hoyt argued the cause, and, with Mr. Edwin W. Lawrence, filed a brief for complainant.

Messrs. James J. Lynch, Moses H. Clift, and Robert B. Cooke argued the cause, and, with Messrs. Judson Harmon, Robert Pritchard, and William D. Spears, filed a brief for defendant Shipp.

Mr. G. W. Chamlee argued the cause, and, with Messrs. J. A. Hood, W. H. Cummings, and W. F. Chamlee, filed a brief for defendant Ward.

Mr. T. Pope Shepherd argued the cause, and, with Messrs. Lewis Shepherd and Martin A. Fleming, filed a brief for defendants Nolan, Justice, Padgett, and Mays.

Messrs. G. W. Chamlee, W. H. Cummings, and W. F. Chamlee also filed a brief for defendant Williams.

Messrs. Moses H. Clift and Robert B. Cooke also filed a brief for defendant Galloway.

Messrs. James J. Lynch, Robert B. Cooke, and William D. Spears also filed a brief for defendant Gibson.

Mr. Chief Justice Fuller delivered the opinion of the court:

This was an information filed by the Attorney General of the United States against Joseph F. Shipp and twenty-six other defendants, which was dismissed as to eighteen of them and heard as to defendants Shipp, Galloway, Gibson, Nolan, Williams, Justice, Padgett, Mayse, and Ward.

The information charged, in substance, that February 11, 1906, Ed Johnson, a negro, was convicted of rape by the criminal court of Hamilton county, Tennessee, held in Chattanooga, and was sentenced to death; that on March 3, following, Johnson filed a petition for the writ of habeas corpus in the United States circuit court sitting in Tennessee, alleging that, in the trial, he had been deprived of constitutional rights; that on March 10 the petition was dismissed and the writ denied, petitioner being remanded to the sheriff of Hamilton county, to be detained in his custody for ten days, in which to enable petitioner to prosecute an appeal, and, in default of such appeal, to be further proceeded with by the state court under its sentence; that, on March 17, Mr. Justice Harlan, of the United States Supreme Court, allowed an appeal from the decision of the circuit court, and on March 19 an order was made by the Supreme Court allowing said appeal; that defendant Shipp, sheriff of Hamilton county, then was at once notified by telegraph of said order, which stayed all proceedings against Johnson, and required Shipp to retain custody of Johnson pending determination of the appeal; that before 6 o'clock in the evening of March 19 a full account of this action of the Supreme Court was published and circulated in the evening papers in the city of Chattanooga; that defendant Shipp was the sheriff of Hamilton county, and defendants Matthew Galloway and Jeremiah Gibson, among others, were his deputies; that the deputies as well as the sheriff were fully advised of the action of the Supreme Court, and were informed and had every reason to believe from current reports and rumors conveyed to them, that an attempt would be made on the evening of the 19th or early in the morning of the 20th, by a mob composed of a large number of armed men, to force an entrance into the county jail for the purpose of taking Johnson therefrom and lynching him; that notwithstanding said information and said re-

†Leave granted June 1st, 1909, to present petition for rehearing, see *infra*, p. 1056.

ports the sheriff withdrew from the jail early in the evening of the 19th the usual and customary guard, and left in charge thereof only the night jailer,—defendant Gibson—and committed other acts and did other things evincing a disposition on the part of said sheriff to render it less difficult and less dangerous for the mob to prosecute and carry into effect its unlawful design and purpose of lynching Johnson; that about 9 o'clock in the evening of said March 19 defendants and others conspired to break into the jail for the purpose of taking Johnson therefrom and lynching him, with intent to show their contempt and disregard for the above-mentioned order of this court, and prevent it from hearing the appeal of Johnson; that pursuant to this conspiracy, and in order to show their contempt and disregard for said order of this court, between 9 and 12 o'clock in the evening of said March 19, at Chattanooga, Tennessee, defendants, ex-405] cepting Shipp *and Gibson, assembled with others, broke into the jail, took Johnson out by force, and lynched him; that Gibson was the only officer at the jail when the mob broke in, and that, while the mob was in possession of the jail, defendant Shipp arrived, but made no effort to prevent the mob from taking Johnson from the jail; that defendants Shipp and Gibson were in sympathy with the mob while pretending to perform their official duty of protecting Johnson, and that they aided and abetted the mob in prosecution and performance of the lynching; that all of these acts were committed by defendants with the intent upon their part to utterly disregard the above-mentioned order of this court, and to prevent the court from hearing Johnson's appeal.

The answers on questions of fact consisted of a general denial, and, except in the cases of Shipp, Gibson, and Williams, the setting up of an alibi by each defendant. Williams admits that he was at the jail a short time before and at the time Johnson was taken from it by the mob, and that he followed the mob and witnessed the lynching, but denies participating in the acts of the mob.

Certain preliminary questions of law were raised by defendants and passed upon by the court. 203 U. S. 563, 51 L. ed. 319, 27 Sup. Ct. Rep. 165, 8 A. & E. Ann. Cas. 265. It was held that the complaint sufficiently set forth a contempt of this court; that it was unnecessary, for the purposes of this proceeding, to determine whether or not the circuit court had jurisdiction of the habeas corpus proceedings, or whether this court had jurisdiction to entertain the appeal, as those were questions for this court to determine, and for no other tribunal; and that the answers of the defendants, under oath, disavowing intent, did not purge them.

53 L. ed.

The case then came on to be heard on the question whether the allegations of the information were made out.

*The following is a sufficient résumé[406 of the facts admitted or undisputed:

January 23, 1906, a rape was committed upon a white woman in or near Chattanooga, Hamilton county, Tennessee.

At that time and at all times hereinafter mentioned, defendant Shipp was the duly elected, qualified, and acting sheriff of Hamilton county, Tennessee, and as such sheriff had and exercised full charge and control of the county jail located in Chattanooga, and was the legal custodian, under the laws of Tennessee, of all persons duly committed in said county under the laws of the state to confinement and imprisonment within the jail, and the defendants Matthew Galloway and Jeremiah Gibson were duly appointed, qualified, and acting deputy sheriffs under Shipp.

January 25 Shipp and his deputies arrested Ed Johnson, a negro, in or near Chattanooga, charged with the crime.

Late in the afternoon of the same day Johnson was, by order of the judge of the state criminal court, taken by Sheriff Shipp to Dayton and from there to Nashville, where he was kept until the day of his trial, February 6. Johnson was removed and kept away from Chattanooga during this period because of fear that he would be lynched.

The night of January 25 a large mob attacked the jail at Chattanooga, where Johnson was supposed to be confined.

Three of Shipp's deputies were at the jail, and, with the assistance given them by the police, the chairman of the safety committee, and others, prevented the taking of any prisoners from the jail.

At the suggestion of the deputies the mob appointed a committee to go through the jail and satisfy itself that Johnson was not there.

Even after this committee had reported that the persons whom the mob sought were not in the jail, it was necessary to use force to put the mob out of the jail yard.

The dangerous character of this committee and the mob and their anger at not being able to find Johnson is shown by the *testimony of the prosecuting officer[407 for Hamilton county, the judge of the criminal court of that county, and defendant Galloway.

One other night, about the same time, the officers though there was to be a mob. The militia was called out twice about that time to protect the jail against a mob which sought to take Johnson's life.

January 26 a special grand jury was convened, and the next day indicted Johnson for the crime above referred to.

February 6 Johnson was brought to Chattanooga from Nashville, and his trial commenced that day in the criminal court of Hamilton county. February 9 he was convicted and sentenced to death.

The date of execution was originally fixed as March 13, but, on or about March 11, was changed by the governor to March 20.

No appeal to the supreme court of the state was taken by the lawyers appointed by the court to defend Johnson.

Two daily papers were published in Chattanooga,—the Times, a morning paper, and the News, an evening paper, both having a large circulation. Three competent and leading attorneys had been appointed by the court to defend Johnson, and one of them made a statement, which was published in the Chattanooga Times of February 10, as to the reasons why an appeal was not prosecuted in Johnson's behalf. He depicts the mental strain that he and his associates had been under, and the weight of the burden of the responsibility upon them. He says that when the jury brought in a verdict of guilty "we, as the attorneys, had to settle the question whether the case would be appealed to the supreme court." He asked the trial judge to appoint three other lawyers to counsel and advise with them and help to share the responsibility, and three well-known lawyers were designated, who met with the three counsel for the petitioner and considered the matter.

"We discussed the recent mob uprising and the state of unrest in the community. It 408] was the judgment of all present *that the life of the defendant, even if the wrong man, could not be saved; that an appeal would so inflame the public that the jail would be attacked and perhaps other prisoners executed by violence. In the opinion of all of us a case was presented where the defendant, now that he had been convicted by a jury, must die by the judgment of the law, or else, if his case were appealed, he would die by the act of the uprising of the people.

"In view of all the conditions, it was the unanimous vote that the law ought to be allowed to take its course if Judge McReynolds were satisfied with the verdict, and if he were to approve it and pass judgment of death on it."

He then relates an interview had thereupon with the accused. His right of appeal was explained to him, "that the supreme court met in September next; that an appeal would stay the judgment until that time; that we did not see any reasonable ground to suppose that the supreme court would reverse the sentence, and that we

feared an appeal would cause mob violence against him."

"Without giving all that occurred at the jail, he said to us that he did not want to die by a mob; that he would do as we thought best. He said he would go over to the courthouse and tell the judge that he did not have anything more to say than that he was not the guilty man.

"I want the people to know that the foregoing facts moved us to allow the law to take its course under the verdict of the jury and the judgment of Judge McReynolds. Six lawyers settled it in this way after the calmest reflection and under the keenest sense of the great responsibility.

"In view of the awfulness of the crime committed, I beg that the sheriff and every peace officer of Chattanooga and Hamilton county will still try to get all possible further light; and if any person anywhere knows anything whatever tending to show or reflect light on either the guilt or innocence of the *defendant, I beg that such 409 person make known all that he may know to us or to Attorney General Whittaker."

On the afternoon Johnson was convicted he was secretly taken from Chattanooga to Knoxville because of fear of mob violence to him.

From the time the crime was committed until after Johnson's trial the people of Chattanooga were greatly excited over the crime and Johnson's alleged connection with it, and there was great apprehension on the part of the people as well as the officers that attempts would be made to lynch Johnson.

It was because of this intense excitement and the feeling that speedy execution of Johnson might prevent his being lynched that Johnson was so quickly indicted and tried.

While the trial was in progress extra deputies were sworn in and an unusual number of guards were kept around the courthouse and at the jail at night.

Guns to be used in protecting the jail against a mob were purchased.

March 3 Johnson filed a petition for a writ of habeas corpus in the United States circuit court for the northern division of the eastern district of Tennessee.

March 10, 1906, the petition was denied, the circuit court ordering that Johnson be remanded to the custody of the sheriff of Hamilton county, Tennessee, to be detained by him for ten days in which to enable petitioner to prosecute an appeal from said order, and, in default of the prosecution of said appeal within that time, to be then further proceeded with under the sentence.

This order was made public through the press.

Johnson was at Knoxville, where he had been kept since his conviction, for hearing upon his petition, and was taken back to Chattanooga, March 11.

Saturday, March 17, application was duly presented by Johnson to Mr. Justice Harlan of the Supreme Court of the United States (circuit justice of the sixth circuit), at Washington, asking that an appeal be allowed to that court from the order *of the circuit court, denying Johnson's petition for a writ of habeas corpus. This appeal was allowed by Mr. Justice Harlan on the same day.

March 18, the Chattanooga Times published notice that application for said appeal had been made.

The same day Judge Clark, of the United States circuit court, received a telegram from Mr. Justice Harlan, which was communicated to Sheriff Shipp on the afternoon of that day, that he had allowed appeal to accused in habeas corpus case of Ed Johnson; that the transcript would be filed the next day, and motion also be made by Johnson's counsel for formal allowance of appeal by the Supreme Court.

March 19, the Chattanooga Times published news of the allowance of the appeal by Mr. Justice Harlan, in which it said, among other things:

"From these authorities it was learned that the granting of an appeal in a case like this acted to supersede all process in the state courts. No stay is necessary, according to the authorities, and the statute is self-operative. Pending a decision of the appeal there can be no execution by any state authority."

March 19 an order was made by the United States Supreme Court, allowing an appeal to that court from the final order of the circuit court, denying petition for writ of habeas corpus, and directing that all proceedings against the appellant be stayed, and that the custody of appellant be retained pending the appeal.

About 1 o'clock in the afternoon of said March 19 the following telegram was delivered to a telegraph company for transmittal to the addressee:

Washington, March 19, 1906.

To Sheriff of Hamilton county, Tenn., Chattanooga, Tenn.

Supreme Court of United States has allowed Ed Johnson appeal from Judge Clark's order, and directed all further proceedings stayed, and custody of Johnson retained [411] pending *appeal here. See § 766, Revised Statutes of the United States.

James H. McKenney,
Clerk Supreme Court, U. S.

This was received by the telegraph office at Chattanooga about 3:30 on the same afternoon, and delivered between 4 and 5 o'clock on that afternoon.

About 2 o'clock on the afternoon of the 19th, Judge McReynolds told Sheriff Shipp that the Supreme Court had granted a stay in the Johnson case, and that thereafter Johnson was a Federal prisoner.

Between 2 and 4 of the afternoon of March 19 the following telegram was received by Judge Clark, and by his secretary communicated to Sheriff Shipp, at the jail, about 5 o'clock that afternoon, with a copy of the statute therein referred to:

Washington, D. C., March 19, 1906.

Hon. C. D. Clark, United States Court, Chattanooga, Tenn.

Court has just allowed appeal in Johnson's case, and ordered all further proceedings against him delayed and custody retained pending appeal here. It will be well to call attention of state officers immediately to § 766 of Revised Statutes, U. S. Comp. Stat. 1901, p. 597.

John M. Harlan.

The statute referred to reads (including the proviso added March 3, 1893 [27 Stat. at L. 751, chap. 226]):

"Pending the proceedings on appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void.

"Provided, That no such appeal shall be had or allowed after *six months from [412 the date of the judgment or order complained of."

Shipp understood that thereupon Johnson was held as a Federal prisoner.

There was published and circulated in Chattanooga, in the evening paper published in that city, on March 19, about 4 o'clock, an account of said action of the Supreme Court, under the headlines, "An Appeal Is Allowed. Ed Johnson Will Not Hang Tomorrow." This reads, in part:

"The gallows in the Hamilton county jail has again been disappointed in the case of Ed Johnson, convicted by the state courts of rape, and sentenced to death. The hanging will not take place to-morrow morning, as scheduled."

The news of the action of the court was also posted on a newspaper bulletin.

After hearing of the stay, Shipp says that

he made no effort and gave no orders to have deputies or others guard the jail, but left the night jailer, defendant Gibson, there alone.

The county jail at Chattanooga, in which Johnson was confined on the 19th, consisted of four stories, two above ground and two below ground. Entrance to the jail was on the third floor, counting from the bottom. In the front part of the building, on this third floor, was an office section. An iron door led from this section into the jail proper; that is, the protected part of the building, where the prisoners were kept. Johnson was confined on the top floor. To reach him from outside the jail it was necessary to go through the offices, through the iron door between the offices and the jail proper, up a flight of stairs, through a steel-barred door, right behind which was a circular door consisting of heavy steel bars several inches apart, which revolved so as to make a passage. Passing through this circular door one came into a corridor around which were cells having iron doors which could be locked. It was in one of these cells that Johnson was confined.

The jail was located in a populous neighborhood and there were houses around it.

413] *In the evening of the 19th a white male prisoner was removed from the upper floor of the county jail in Chattanooga, leaving only Johnson and a white woman on that floor.

This same man had been removed in the same way at the time of the first attempt to lynch Johnson.

About half-past 8 or 9 that night a number of men entered the jail and went directly and without resistance to the door leading to Johnson's corridor. There is a conflict of evidence as to whether the door leading from the offices to the jail proper was locked during the evening, but, if it was locked when the mob came, it was easily broken down.

Gibson was the only officer there at the time, and he was on the top floor with Johnson.

Keys were obtained from him without resistance, but, as the lock on the door leading to the corridor where Johnson's cell was located had been broken by a member of the mob, the keys would not work.

The mob, with sledge and ax, then began to break the bolts on the corridor door.

About twelve men were actively engaged in breaking down the door and in all subsequent events of the lynching. Some of these men were masked.

A crowd of spectators began to gather around the jail soon after the mob reached it, and continued to gather in and around the jail until Johnson was taken out. This

crowd was variously estimated from a few to 150 or more.

It took over an hour to break the bolts on the corridor door.

Two men then went through the circular door and in a few minutes brought Johnson out with his arms tied with a rope.

When Johnson was thus brought out, the dozen men or so composing the mob grabbed him.

This mob took Johnson from the jail to the county bridge over the Tennessee river, which was about six blocks from the jail.

Johnson was taken from the jail a little after 10 o'clock.

From the foregoing it is apparent that there was no interference *or attempt-414 ed interference of any consequence with the mob before it left the jail, and there was none after it left.

The crowd which had gathered around the jail followed the mob down to the bridge.

When the bridge was reached, the mob took Johnson a little beyond an arc light, put a rope around his neck, threw it over a beam, and swung him up.

At the bridge the mob actively engaged in lynching Johnson were close to him and separated by a space from the crowd of spectators.

The first time Johnson was swung up, the rope broke or slipped and he fell. He was swung up a second time and shot. After some shots were fired, Johnson again fell, and while lying on the ground was again shot. It was about ten minutes after the mob had reached the bridge until Johnson was killed.

It is apparent that a dangerous portion of the community was seized with the awful thirst for blood which only killing can quench, and that considerations of law and order were swept away in the overwhelming flood. The mob was, however, willing at the first attempt to accept prompt administration of the death penalty adjudged at a trial conducted according to judicial forms, in lieu of execution by lawless violence, but delay by appeal or writ of error or habeas corpus was not to be tolerated.

Under then-existing statutory provisions appeals might be taken to this court from final decisions of the circuit courts in habeas corpus in cases, among others, where the applicant for the writ is alleged to be restrained of his liberty in violation of the Constitution or of some law or treaty of the United States, and, if the restraint was by any state court, or by or under the authority of any state, further proceedings could not be had against him pending the appeal. Rev. Stat. §§ 763, 764, 766, U. S. Comp. Stat. 1901, pp. 594, 595, 597; Act of March 3,

1885, chap. 353, 23 Stat. at L. 437, U. S. Comp. Stat. 1901, p. 595.

In this instance an appeal was granted by this court, and proceedings specifically ordered to be stayed. The persons who hung and shot this man were so impatient for his **415]** blood *that they utterly disregarded the act of Congress as well as the order of this court.

As heretofore stated, the defendants to the information remaining to be dealt with on the facts are Shipp, Galloway, Gibson, Nolan, Williams, Justice, Padgett, Mayse, and Ward. Of these, Shipp was the sheriff, and Galloway and Gibson two of his deputies. The others are charged with active participation in the lynching. It is contended that the lynching was not expected to occur on the 19th, and the evidence of the United States district judge and some clergymen and others was given to the effect that they had no such anticipation. The event showed that they were wrong, and it is plain the danger might be very great and yet remain unperceived by the adherents of order and peace.

It will be remembered that the crime was committed on January 23, and Johnson was arrested January 25. That night a mob attacked the jail in which he was supposed to be, and ascertained that he was not there. Johnson was kept in Nashville from that day until his trial commenced, February 6. On his conviction, February 9, he was taken away from Chattanooga, and kept away until March 11, the day after his petition for habeas corpus was denied.

It must be admitted that intense feeling against Johnson existed from the time of the commission of the crime until after his conviction, and that this feeling frequently manifested itself, although Johnson was not in Chattanooga from the time of his arrest until his trial began. The intensity of this feeling, and the great apprehension of the officers of mob violence, is shown in the testimony of defendants' own witnesses, describing the precautions and secrecy exercised by them in the way they took Johnson in and out of Chattanooga, as well as by the fact that they kept him away from Chattanooga from the day of his arrest until March 11, two days before the time set for his execution, with the exception of the three days he was there attending his trial. Undoubtedly the public believed that Johnson would be **416]** executed on March 13, *until the reprieve to March 20 was granted on March 11; and, after the petition for habeas corpus was denied by the circuit court, believed that Johnson would then be executed on the 20th.

Sheriff Shipp testifies that inflammatory reports of the habeas corpus proceedings and efforts to appeal the case to the Supreme **53 L. ed.**

Court were sent out by the newspapers on March 11, and because of that he had fear of mob violence to Johnson. The efforts made by Johnson's attorneys to obtain an appeal were kept before the public by the newspapers.

March 16 the Chattanooga Times published a statement that a negro attorney had gone to Washington to obtain an appeal from the order denying the petition for habeas corpus. The article said:

People here are decidedly anxious as to whether Johnson is to suffer death for his crime next Monday or escape for an indefinite period by reason of intervention of the court at Washington. More unrest on the subject exists than was anticipated when Johnson was brought back to the county.

"During the recent days of suspense as to his execution, the desire for information has been feverish, and telephones at localities where information has been thought to be obtainable have been kept busy by inquirers."

In the News, published the evening of March 19, there was an editorial reviewing the local proceedings, which concluded:

"All of this delay is aggravating to the community. The people of Chattanooga believe that Johnson is guilty, and that he ought to suffer the penalty of the law as speedily as possible. If by legal technicality the case is prolonged and the culprit finally escapes, there will be no use to plead with a mob here if another such crime is committed. Such delays are largely responsible for mob violence all over the country."

The assertions that mob violence was not expected, and that there was no occasion for providing more than the usual guard *of one man for the jail in Chat-**417** tanooga, are quite unreasonable and inconsistent with statements made by Sheriff Shipp and his deputies, that they were looking for a mob on the next day. Officers and others were heard to say that they expected a mob would attempt to lynch Johnson on the 20th. There does not seem to be any foundation for the belief that the mob would be considerate enough to wait until the 20th. If the officers expected a mob at all, as they say that they did, they cannot shield themselves behind the statement that they expected it on the 20th, the day that had been appointed for Johnson to die, and did not expect it the night before. But no orders had been given and nothing had been done up to half-past 8 o'clock on the night of the 19th to protect Johnson from the mob which was, according to their present statements, expected the next day.

Testimony was given by a servant in

Shipp's house that, a week before Johnson was lynched, Shipp was heard to say that if the execution were stayed Johnson would be mobbed. This was, however, disputed by Shipp and relatives of his who were there at the time.

On May 28th, at Birmingham, Alabama, defendant Shipp himself, in an interview reported and printed the next morning in the Birmingham Age-Herald, said:

"The first I knew of the mob was through a telephone message I received from the Chattanooga Times office, for they had cut the wires at the county jail immediately upon their arrival. I dressed as quickly as possible and went to the jail, and found a crowd of about seventy-five people around it, most of them being in disguise. I made my way through the crowd into the jail and began remonstrating with them against taking any drastic steps. They seized me and took me upstairs, locking me up in a bath room. The members of the mob told me they meant no violence to me. I argued with them against doing anything at all, since the law had so far taken its proper course. *I am frank to say that I did not attempt to hurt any of them, and would not have made such an attempt if I could.* 418]*In the first place, I could have done no good, as I was overwhelmed by numbers.

"The Supreme Court of the United States was responsible for this lynching. I had given that negro every protection that I could. For fourteen days I had guarded and protected him myself. The authorities had urged me to use one or two military companies in doing so, but I told them I would land the negro in jail, which I did, individually.

"Many nights before the lynching there had been a sufficient guard around the jail. *I had looked for no trouble that night, and, on the contrary, did not look for it until the next day.* That night no one was on duty except the jailer, which is the usual guard at our jail, as well as in other counties.

"In my opinion the act of the Supreme Court of the United States in not allowing the case to remain in our courts was the most unfortunate thing in the history of Tennessee. I was determined that the case should be put in the hands of the law, as it was. The jury that tried the negro Johnson was as good as ever sat in a jury box.

"The people of Hamilton county were willing to let the law take its course until it became known that the case would not probably be disposed of for four or five years by the Supreme Court of the United States. The people would not submit to this, and I do not wonder at it.

"These proceedings in the United States Supreme Court recently appear to me to be

only a matter of politics. I do not wish to appear in the light of defying the United States court, but I did my duty. I am conscious if it, thoroughly conscious of it, and I am ready for any conditions that may come up."

The testimony of the reporter that Shipp made these statements was corroborated by the evidence of another reporter who interviewed Shipp on the following day regarding them, and is not denied by Shipp except in an immaterial particular. From this it appears that defendant Shipp looked for trouble on the 20th, but, as he says, not that night; that he did **not attempt*[419 to hurt any of the mob, "and would not have made such an attempt if I could."

He evidently resented the necessary order of this court as an alien intrusion, and declared that the court was responsible for the lynching. According to him, "the people of Hamilton county were willing to let the law take its course until it became known that the case would not probably be disposed of for four or five years by the Supreme Court of the United States." "But," he added, "the people would not submit to this, and I do not wonder at it." In other words, his view was that because this court, in the discharge of its duty, entered the order which it did, that therefore the people of Hamilton county would not submit to its mandate, and hence the court became responsible for the mob. He took the view expressed by several members of the mob on the afternoon of the 19th and before the lynching, when they said, referring to the Supreme Court, that "they had no business interfering with our business at all." His reference to the "people" was significant, for he was a candidate for re-election, and had been told that his saving the prisoner from the first attempt to mob him would cost him his place, and he had answered that he wished the mob had got him before he did.

It seems to us that to say that the sheriff and his deputies did not anticipate that the mob would attempt to lynch Johnson on the night of the 19th is to charge them with gross neglect of duty and with an ignorance of conditions in a matter which vitally concerned them all as officers, and is directly contrary to their own testimony. It is absurd to contend that officers of the law who have been through the experiences these defendants had passed through two months prior to the actual lynching did not know that a lynching probably would be attempted on the 19th. Under the facts shown, when the sheriff and his deputies assert that they expected a mob on the 20th, they practically concede the allegation of the information that they were informed and had

every reason to believe that an attempt 420] would be made on the evening *of the 19th or early on the morning of the 20th.

In view of this, Shipp's failure to make the slightest preparation to resist the mob, the absence of all of the deputies, except Gibson, from the jail during the mob's proceedings, occupying a period of some hours in the early evening, the action of Shipp in not resisting the mob, and his failure to make any reasonable effort to save Johnson or identify the members of the mob, justify the inference of a disposition upon his part to render it easy for the mob to lynch Johnson, and to acquiesce in the lynching. After Shipp was informed that a mob was at the jail, and he could not do otherwise than go there, he did not and in fact at no time hindered the mob or caused it to be interfered with, or helped in the slightest degree to protect Johnson. And this in utter disregard of this court's mandate, and in defiance of this court's orders.

Let us recapitulate the facts bearing immediately on defendant Shipp.

About 9 o'clock on the night of the 19th the judge before whom Johnson was tried, and the attorney who prosecuted him, communicated with Sheriff Shipp at his house, saying that there were persons around the jail who looked suspicious, and suggesting that the sheriff had better go down to the jail.

At that time a report was generally circulated in the city that a mob was at the jail to lynch Johnson.

Shipp lived only a few blocks from the jail. He reached the jail about 9. He was alone. A number of people were in the jail and outside of it when he arrived. He anticipated a mob was inside.

Without stopping to speak to any of these people, he rushed inside of the jail to the foot of the stairs leading to the floor Johnson was on. There he was taken hold of by five or six men and carried upstairs. The men who took hold of him had no firearms.

At first he was put in a bath room, and then was released and stood around near the corridor door, where the mob 421] *work, with three or four unarmed men around him. He made no effort to get away or use force in opposing the mob. He did not attempt to use his pistol or call for help. After the corridor had been broken in, either Shipp or defendant Gibson told the mob which cell Johnson was in. When the mob left the jail with Johnson, Shipp did not follow or make any effort to rescue Johnson or get others to help rescue him. He was not locked up when the mob left the jail, but was left entirely free.

When the crowd following the lynchers was about two blocks from the jail, Shipp

came out of the building alone and unguarded. To a request made by a man at that time to go and identify members of the mob, Shipp replied that it would be dangerous and foolish. This request was made before the shooting occurred.

A special deputy met Shipp at the jail just after Johnson had been taken out and before he was shot. Shipp told him that the mob had Johnson. Shipp was quiet, and made no effort to go after the lynchers, or to reach the police or militia or others.

When he reached the jail he could have gone about three blocks to the police station and got the police.

No alarm bell was rung at the courthouse that night, although it was rung the night of the attempted lynching, January 25, and it drew out a big crowd. No attempt was made by Shipp or others to summon a posse. He sent no one after deputies. He made no effort to send anyone for help.

It is testified that some time after the mob had left the jail for the bridge, Shipp sent Galloway and Clark down to the bridge, but he made no effort to go himself.

There was in the crowd around the jail and at the scene of the lynching a substantial number of law-abiding men of good character.

That assistance in suppressing the mob might have been easily obtained if effort had been made is shown by the testimony of the chairman of the board of safety, who testifies that, at the time of the first lynching, in going four or five *blocks to 422 the jail, he gathered about 16 men to help put down the mob.

The militia was drilling on the night of the 19th between 8 and 10:30 in the armory, a well-known place, three blocks from the jail. It was not called upon to assist in suppressing the mob, although it had been called out twice before by the governor, and was bound to respond to another call by him.

The governor had given assurances that any help asked for would be given, and we have no doubt he would have responded, for he would have had the honor of Tennessee in his keeping.

Numerous witnesses testify that no firearms were displayed by the mob except that one of their number was in the office of the jail with a Winchester rifle, and one pistol was exhibited to a reporter when the door was being broken open.

No deputies put in an appearance while the mob was at the jail or during the lynching, except Frank Jones, who approached the jail with a prisoner, but, upon seeing the mob, immediately left with the prisoner, and excepting Matt Galloway, who was seen in the crowd.

From the time he reached there, about 6 o'clock, until the mob came, Gibson was the only officer in charge of the jail. But there was much evidence that customarily many deputies were there nightly, and that several were present on the night of the 19th until just before the irruption of the mob.

Heavy iron chains were sometimes used as additional guards upon circular doors in the jail, such as that leading to Johnson's corridor. These were locked by the prisoners on the inside. During the trial of Johnson these chains were used on the circular doors. But none were on the circular door leading to Johnson's cell on the 19th. It also appears that Johnson's cell door was not locked.

Winchester rifles which were kept to defend the jail against mob violence were, at the time the mob attacked the jail on [423]*the 19th, in a show case in the office. These were taken out of the show case by the mob and unloaded.

Although Shipp was in the midst or near the members of the mob for about an hour when they were in the jail, he did not seek to obtain information so that he could identify any of them, and he testifies that he does not know any member of the mob.

Only one conclusion can be drawn from these facts, all of which are clearly established by the evidence,—Shipp not only made the work of the mob easy, but in effect aided and abetted it.

Gibson is involved in the same condemnation though under less responsibility. We think belief on his part that a mob would attempt to enter the jail and lynch Johnson on the night of the 19th must be presumed.

The day jailer left the jail some time after six o'clock, and transferred the keys to Gibson, the night jailer. Gibson's 15-year-old boy was with him, but went to the opera house at 8:30. Gibson was in charge of the jail more than two hours before the arrival of the mob, and he made no effort to summon assistance to repel the attack, although necessarily he must have known that he alone could only offer slight resistance. Mrs. Baker, a white woman, confined on the same floor with Johnson, testified that Gibson, soon after arriving at the jail, when she had gone down stairs to get a letter written, said to her that a mob was coming, and directed her to go to her room, and when the mob was at the jail came to her door and told her that no one would hurt her. Gibson admits the last statement, but denies the first.

He testifies that when he heard the mob he went into the hospital cell, located on the top floor, and sat down on a lounge, and as soon as the mob got upstairs he handed over to them his pistol and the keys, including a

key to the door of Johnson's cell; that he did not try to use the pistol, or to resist the mob by force; that from the top floor he could have gone through the kitchen into the yard and back of the jail, but he *made [424 no effort to do so, although it took the mob some ten minutes after he knew they were there to break through the door between the outer door and the jail proper; that he just gave up and made no effort at all to resist the mob or rescue Johnson after they had left the jail; that although the men were bold in their work, he failed to recognize anyone excepting Nick Nolan.

Galloway was a deputy sheriff from the time Johnson was convicted until after the lynching, and was told by the sheriff after the mob had left for the bridge to go down there, and did so, but Johnson was then dead. He was criminal court deputy, and served criminal court papers and made arrests. But he had no charge of the jail or keeping of prisoners except when officially so assigned. He had no connection with the jail or the prisoners at any time after Johnson was brought from Knoxville on the 10th or 11th of March. He testified that he had heard nothing while attending to his duties that made him think Johnson was in danger; was a member of the Eagle Club, and was there on evening of the 19th, at 7:45, not having heard prior thereto anything about any impending lynching. His first information of the lynching was after 10 o'clock, when he went to the jail at once. There he met the sheriff, who asked him to go to the bridge, which he did, but Johnson was dead. We think Galloway must be acquitted of the charges in the information.

This brings us to a consideration of the case in respect of the six defendants who are charged as members of the mob and participants in its action.

As to Williams and Nolan, there is direct testimony to their participation in the lynching, and we do not think that the evidence relied on to weaken that conclusion is sufficient to do so.

Asto Padgett and Mayse, there is testimony of statements on their part on the afternoon of the 19th and the morning of the 20th, which, if believed, demonstrates their guilt. We have carefully examined and analyzed the evidence to impeach the principal witness to these conversations, and *also to make out abilis, but we can-[425 not accept it as convincing.

We hold that the case as to Justice and Ward fails on the evidence.

In our opinion it does not admit of question on this record that this lamentable riot was the direct result of opposition to the administration of the law by this court. It was not only in defiance of our mandate,

but was understood to be such. The Supreme Court of the United States was called upon to abdicate its functions and decline to enter such orders as the occasion, in its judgment, demanded, because of the danger of their defeat by an outbreak of lawless violence. It is plain that what created this mob and led to this lynching was the unwillingness of its members to submit to the delay required for the appeal. The intent to prevent that delay by defeating the hearing of the appeal necessarily follows from the defendants' acts, and, if the life of anyone in the custody of the law is at the mercy of a mob, the administration of justice becomes a mockery. When this court granted a stay of execution on Johnson's application it became its duty to protect him until his case should be disposed of. And when its mandate, issued for his protection, was defied, punishment of those guilty of such attempt must be awarded.

The rule will be discharged as to the defendants Galloway, Justice, and Ward, and made absolute as to the other defendants.

Rule discharged as to defendants Galloway, Justice, and Ward, and made absolute as to defendants Shipp, Gibson, Williams, Nolan, Padgett, and Mayse. Attachments to issue, returnable on Tuesday, June 1.

Mr. Justice Moody did not hear the argument, and took no part in the disposition of the case.

426] *Mr. Justice Peckham, dissenting:

I dissent from the opinion and judgment of the court in this case, and I think its importance requires a statement of the reasons for my dissent. In regard to the crime which was perpetrated by the mob upon the person of the negro, there can be but one opinion. I take it that all intelligent and respectable citizens who are cognizant of the facts agree that it was murder, without one extenuating circumstance to relieve its atrocious character. The important question, however, is, first, as to the sheriff,—whether he is guilty of the charge made against him in the information filed in this proceeding. The charge, as contained in the information, upon which such a vast amount of evidence has been taken, is that the sheriff and many other persons conspired together for the purpose of breaking and entering the county jail and taking therefrom the negro Johnson, in order to lynch him, with the intent to thereby show their contempt and disregard of the order of this court, and to prevent the hearing of the appeal.

A careful consideration of the case leaves me with the conviction that there is not one particle of evidence that any conspiracy

had ever been entered into or existed on the part of the sheriff, as charged against him. It is not alone that the evidence preponderates in his favor, but it seems to me there is no material evidence against him, certainly none that rises higher than the merest possible suspicion, founded upon evidence of facts which are in themselves wholly inconclusive, and just as consistent with innocence as with guilt. His character is shown by many witnesses to be that of the highest. Not a man in Chattanooga stands better as a man and a citizen than he does. There is not a particle of evidence to the contrary. He has lived an honored and respected citizen of that city since 1874; has held honorable official positions before the one that he now holds, and yet, as an old man, he is adjudged guilty of a contempt of this court, and liable to serve *a dis-
427 graceful imprisonment because, as is insisted in this record, he did not do as much towards resisting a lawless mob as this court says he ought to have done.

The crime for which Johnson was convicted was perpetrated on a white schoolgirl on the 23d of January, 1906, and on the 25th of that month Johnson was arrested near Chattanooga and charged with the crime. After being arrested he was taken by the sheriff, by order of the state criminal court, to the jail at Nashville, where he was kept until the day of his trial, February 6. The sheriff was active and intelligent in his efforts to preserve the safety of the negro. No adverse criticism is or can truthfully be made upon his conduct at that time. At the time of the arrest of the negro there is no contradiction in the evidence that there was very great excitement, and a disposition evinced to lynch Johnson at once. A crowd of over a thousand, it is said, surrounded the jail on the night of the 25th of January, where Johnson was supposed to be, but the prisoner was not in the jail, and the deputies of the sheriff (the sheriff himself, having Johnson in custody, was taking him to Nashville) exhorted the mob to disperse, and finally people were sent into the jail on behalf of the mob, and went through it to satisfy themselves that Johnson was not there. The mob thereupon dispersed. On the 26th of January a grand jury was convened and Johnson was indicted, and on the 6th of February he was brought to Chattanooga from Nashville, and his trial was commenced that day in the criminal court. On February 9 he was convicted and sentenced to death. No appeal was taken by the lawyers appointed by the court to defend him from that sentence. The lawyers said they feared the prisoner would be lynched if such an appeal were taken. On his conviction he was taken from Chat-
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nooga to Knoxville, in the personal custody of the sheriff, to be safe from any possible violence of the mob. No mob, however, appeared, and nothing was attempted. The judge who presided at the trial of the negro, after his conviction, told the sheriff that the prisoner would be entirely safe at Chattanooga. After the trial the excitement decreased very greatly and seemed to disappear entirely. Of this fact there is no contradiction in the evidence. On the 3d of March a petition for a writ of habeas corpus was filed in the United States circuit court for the northern division of the eastern district of Tennessee on the part of Johnson. On the 10th of March the petition was denied, and the circuit judge ordered that Johnson be remanded to the custody of the sheriff of Hamilton county (at Chattanooga), Tennessee, to be detained by the sheriff in his custody for ten days, in which to permit Johnson to prosecute an appeal from the order, and, in default of the prosecution of such appeal, further proceedings to be taken in the state court of Tennessee, under its sentence. Immediately after this decision Johnson was taken back to Chattanooga, arriving there March 11. Everything was quiet and there was no evidence of excitement, nor of any intention whatever to interfere with the negro. The sheriff kept watch of public sentiment for several days thereafter. He was himself going about through the city, mixing with all manner of crowds, and found not the slightest evidence that would lead any reasonable man to believe that any assault was intended upon Johnson. The sheriff stated that he did some canvassing in his election campaign during this time, and was around in the manufacturing establishments, and saw no excitement and heard no talk of the case during the whole time. There was nothing at all, says the sheriff, that came to his knowledge during this time, that would have put a prudent and careful man on his guard.

On the 19th of March, the day preceding the night of the lynching, the same thing was noticed, of a total lack of any evidence of any excitement or of any evidence of an intention to commit any violence. Thus, from the 11th to the 19th of March,—from the time that Johnson was brought back from Knoxville to Chattanooga, after Judge Clark, the United States judge, had denied his petition for habeas corpus,—the city was entirely tranquil, and nothing was done which would have caused any man, even the most circumspect and prudent, to believe that any violence was intended. During the time from the 11th to the 19th of March, there had been no extra guards at the jail because of these facts. No demonstra-

tion had been made against the jail, and no threats made against the prisoner that anybody heard. Judge Clark, now deceased, who had been a resident of Chattanooga since 1883, was a witness in this proceeding, and stated that he had never heard anything suggested as to there being any danger to Johnson if the stay of execution were granted in his case. Judge Clark said:

"It strikes me it was absolutely absurd in view of what actually occurred." The judge was also asked whether anything said at the trial of the habeas corpus proceedings on the part of the representatives of the state, or on the part of anyone, caused him to apprehend any mob violence to this man, and the judge said, none in the least. The judge also said that he had asked his secretary on the day that he was at Chattanooga on his way to St. Augustine if he had heard of any suggestions or hints of violence or dissatisfaction with the situation, and the secretary told him that he had not. On the 19th of March, he had, he said, called up some one of the defendant's attorneys and found out that the appeal from the order denying the habeas corpus had been allowed by the Supreme Court of the United States, and the judge said to the attorney that he would be there all day at his office and would leave for Florida that night. The judge said the reason he made that announcement was that he had known that Johnson had been taken to another jail prior to this, and that he was brought out of the Knoxville jail when the petition for habeas corpus was brought up before him (Judge Clark). "Therefore," Judge Clark said, "on account of that, after getting Mr. Justice Harlan's telegram, I would have ordered the man to any jail where it was desired to send him . . . if it had appeared that the prisoner was in great or real danger—if that had appeared to me—I am quite sure that I would have made the order of my own motion, or would have called up his attorney and suggested that he make an application for 'his removal.'" [430] The following question was also put to the judge: "Q. Judge Clark, I will ask you if the attorney to whom you talked, or any other attorney for the defendant Johnson, or any other person, suggested to you the necessity or even the propriety of taking steps to protect your prisoner, the Federal prisoner Johnson? A. I never heard the remotest suggestion, and I did not think the man was in any danger. I thought it was simply the noise that is generally made by people who really do not expect to do anything. . . . I will say that I had heard no suggestion and that I had no thought that there was any danger on hand anywhere." If there had been any evidence

of danger or the possibility thereof, would not the attorneys of the negro, who were engaged in the prosecution of their habeas corpus proceedings, have responded to the judge, and asked for the removal of the negro to another jail? They did not ask for it because, as is perfectly evident, they shared the general opinion that there was no danger; that the former danger had passed, and there was no reason for further action.

The same kind of evidence was given by the most respectable men in the community, —editors, reporters, railway agents, large employers of men, clergymen, lawyers, doctors, and business men, citizens of the place, and also by the chief of police of the city. Not one of them apprehended danger of mob violence at that time. All of these men were cognizant of the facts as to the prior attempts at lynching and as to the high state of excitement which existed at that time. But they all agreed that such excitement had entirely passed, and that there was not the least danger to be apprehended. One of these ministers, the Rev. Mr. Boswell, had been a resident of the city for nearly four years, and was a member of what is termed the Pastors' Union of Chattanooga. He was also a fraternal delegate from the Pastors' Union to the Central Labor League, composed of delegates from every labor organization in the city, and, as a member of the Pastors' Union, he co-operated with the Central Labor League as a fraternal *delegate. He also preached on an average twice a week in the various shops in the city. He said that at the time of the arrest the public feeling was intense and that it subsided with the beginning of the trial. He was present during most of the trial; that after the trial was over he found no talk that would cause him to apprehend that there might be an attempt to lynch the prisoner. He had, he said, preached a sermon on lynching after the first attempt was made, and had taken the position that it was a violation of good citizenship, and did not mince his words at all, and yet, with all these opportunities to know the state of public feeling, he said that there was nothing that would arouse apprehension on his part, or, so far as he could see, on the part of any prudent man, that there was any lynching threatened. And this, too, after it was known that this court had allowed the appeal from Judge Clark's order. The evidence of the other witnesses was of the same character, and there were unanimous expressions of opinion by the witnesses upon the hearing of this case, that there was no question of danger of mob violence to be apprehended up to the very last moment; and yet counsel for the government have regarded it as part of the evidence of the

guilt of the sheriff as a conspirator that he acted as if he did not apprehend any violence, and that he took no steps to prevent it on the day in question. No one else had any idea that there was any danger and no one else was looking for it. The men who testified that there was no apprehension of mob violence were men who were specially cognizant of the state of public opinion at that time. The counsel for the government insisted that it was the duty of the sheriff to have had the jail guarded on that day by extra guards, and that his failure to do so was evidence of his being guilty of the conspiracy as alleged in the information. Although the fact was announced in the morning papers of the 19th that the allowance of the appeal had been granted by this court, there was during the day no evidence of excitement and no hostile demonstration or suspicion of it against the prisoner, and no evidence of any fact going to *show[432 any projected formation of a mob, or the least probability of any lynching or any attempt that night. Under these circumstances, on the 19th of March the sheriff went home about half-past 6 in the evening, leaving things at the jail the same as usual. Suppose, as a matter of judgment, the sheriff should have proceeded as if this almost universal sentiment as to the absence of all danger was erroneous, or not well founded, and that, as matter of good sense, he should have had the jail guarded, is it possible that he can be properly convicted of contempt while he agreed with this public sentiment and acted accordingly? At any rate, he went home as usual, and was sitting at his desk in his home when the telephone sounded, some time about 9 o'clock, and he recognized, upon going to it, the voice of the Attorney General, Whittaker, who asked him if he knew what was going on at the jail, and the sheriff said, "No," and the Attorney General said, "You had better go down there." He went down there as rapidly as he could, running most of the way and walking rapidly for the rest, and, being under the care of a physician for a difficulty of the stomach, he was much exhausted when he arrived at the jail, where a large number of men were assembled, many of them armed, and they immediately surrounded and took possession of him. Many of them were masked and were waiting for their comrades to bring Johnson down. The sheriff expostulated and remonstrated with these men and asked them to desist, when they seized him. He was seized from behind, and he testified that he did not know but that they were going to do him some violence, and he reached back for his gun, which he had in his pocket. They assured him that they did not intend to hurt him, and then

they seized and rushed him up the stairs and carried him into a hallway, where he was kept a prisoner until after the crowd had got Johnson and left the jail with him. The sheriff was sixty-three years of age at this time, and, on account of his physical condition, unable in any event to have offered any great resistance. There were at least ten or fifteen of the men around him 433] who were armed, and the *sequel proved that many more in the crowd were also armed. Others were standing back looking on. Whether the sheriff might possibly have been quicker with his gun and taken it out of his pocket and shot some of them is not certain from the evidence, but the odds of even ten or fifteen to one are somewhat large, and that he did not kill, or attempt to kill, any of them, is no evidence whatever of complicity with these miscreants, and certainly no evidence of contempt of this court. It seems to me most extraordinary that even an official under these circumstances can be found guilty of a contempt because in fact he did not resist to the death.

Argument has also been made against the sheriff, based on the fact that, on his way from the house to the jail, he did not seek out the militia, a company of which is said to have been engaged in drilling that night in its drill room, and ask for assistance immediately at the jail. It may be that such would have been a wise course, but he was acting on the spur of the moment and under a call to come immediately to the jail, and he was not sure of what was going on, and, in seeking the aid of the militia, he was not certain to succeed in obtaining immediate assistance. At any rate, the mere fact that he did not think of it or stop to do it is no evidence whatever to show that his failure to seek its aid was criminal. I think the conspiracy part of the information is absolutely without evidence to support it.

It is, however, argued that the sheriff did not otherwise do all that he should have done to prevent this infamous crime, and hence that he is guilty of a contempt. As evidence of this fact the government refers to the interview of the 28th of May between the sheriff and a newspaper reporter in Birmingham. On that day, at the time of the interview, news had been received of the action of this court ordering certain persons to show cause as for contempt. In this interview Sheriff Shipp said that the first he knew of the mob was through a telephone message; that he went to the jail and made his way through the crowd, and remonstrated with them against taking any drastic 434] steps. *They seized him and took him upstairs, locking him in a bath room. The members of the mob told him they meant no

violence to him. He argued with them against doing anything at all, since the law had so far taken its proper course, and the interview went on with this statement: "I am frank to say that I did not attempt to hurt any of them, and would not have made such an attempt if I could. In the first place, I could have done no good, as I was overwhelmed by numbers." The sheriff's statement that he made no attempt to hurt any of the mob, and would not have made such an attempt if he could, must be taken with the rest of his statement, in which he said that "in the first place, he could have done no good by it, as he was overwhelmed by numbers." There is no doubt of the truth of that statement. He was one man against, at the very least, ten or fifteen or more resolute men, armed and assembled for the purpose of getting this negro, and surrounded by a still larger crowd in the jail yard, and there is not the slightest evidence that they were unarmed. Their subsequent action shows an unnecessary supply of guns. It is true, the sheriff might possibly have drawn his gun and fired at the masked men as he came into the jail and succeeded in killing one and perhaps more of the members of the mob, but it is absolutely true that it would have done no good even then, because, with such odds against him, his struggles could have resulted only in his being actually overwhelmed and possibly killed, while the negro would not have been saved. The sheriff occupied no vantage ground from which to repel an attack and where his first assailant would stand a good chance of being killed by him. He was not only in the power of the mob who had him in custody, but he was also without anyone to appeal to for aid. Those who were bystanders knew of the sheriff's difficulty without further appeal by him, and yet they seemed to feel no desire to interfere, or else recognized the uselessness at that time of any effort.

The evidence of witnesses for the government showed without contradiction that the sheriff came to the jail running as *fast[435 as he could; that he pushed through the crowd, shoved the men aside, and entered the inside of the inclosure, never stopping at all, and the moment he arrived at the jail door he was set upon and seized by four or five men and overpowered, and he talked to and expostulated with the crowd, trying to reason with them and to get them to stop. When asked if the sheriff made any show of force, the government witness said, "Well, he didn't have any chance to," and the question being repeated, the witness said, "Well, he did, yes, but he was overpowered," that "he resisted their efforts to hold him," by "trying to pull away." (Evidence of Curtis, one of the reporters on the Chattanooga Times, and a

witness for the government.) The evidence of another reporter, Mr. Chivington, and a government witness, was to the same effect, that the sheriff was seized by four or five men and overpowered, and carried upstairs, and that he appealed to the mob not to lynch the negro. The witness also said that at this time, just as the sheriff was seized, the witness imagined he saw the sheriff "like he was going to draw a pistol, but before he could move any further there were five or six fellows grabbed him and carried him bodily to the top of the stairs."

All this time there was not an offer from a single man to aid the sheriff when they saw him seized, nor did any of them spread any alarm or ask for any outside aid, and the sheriff says he did not ask for it because he knew it would be useless to make any such appeal to the persons there, and that everyone there knew the situation, and the overwhelming numbers of the crowd surrounding the premises and in the jail.

Of course, as the witnesses heard the sheriff expostulating with and begging the crowd to do no harm to the negro, if there had been the least disposition on the part of anyone to come to his aid the opportunity to do so was quite open and plain.

The appearance of the sheriff after the taking of the negro, and the effect of the whole occurrence upon him is stated in the evidence, about which there is not the slightest contradiction. *He was greatly excited, and almost in a faint. He was as white as a sheet, and said to the witness, "My God! I did everything I could." He also said in the course of the interview with the witness, "My God! they have ruined me." He had all the appearance of a man who was ready to collapse. You could barely understand what he said. His voice was in a tremble, like a voice filled with emotion." This is the evidence of Mr. Horan, and it is nowhere contradicted. And yet the government claims that in such a case the sheriff should be imprisoned for a contempt of this court because he did not do more in the way of resistance to an overwhelming force, and did not foresee with more clearness than any one else what was to happen on the night of the 19th, and take measures accordingly to guard the safety of the negro. It seems to me that the opinion of the court is founded upon this view.

Then, again, this is not a question as to whether possibly the sheriff might have done more than he did. Some men, under such circumstances, might perhaps have earlier attempted to draw their guns, and would possibly only have ceased resistance with their lives. But when one is really overpowered, superior force makes efforts at

resistance futile, if not foolish. Other men might do less than this man did and still be absolutely innocent of a contempt. The question is not whether this invalid old man did everything that he possibly could have done up to the last extremity and at the risk of his life in the performance of his duty as sheriff. To be free from any contempt of this court it was not necessary that the sheriff should have stood by the prisoner at the peril of his own life, or that he should have sacrificed it in an unsuccessful attempt against overwhelming odds to prevent the mob from taking the prisoner out of his custody. The sheriff, under circumstances such as are detailed in this case, should be freed from the charge of contempt if he were not guilty of any conspiracy with others to lynch the prisoner, and if he honestly and fairly did what he could in the way of remonstrance and exhortation to prevent the lynching. Being in the power of the mob, he was not *called upon to sacrifice his [437] life in a desperate and hopeless attempt to save his prisoner against odds such as appeared in this case, or else take the risk of being adjudged guilty of a contempt of court. But what could the sheriff have done more than he did do? That he was in the power of these men is absolutely without contradiction from the evidence. If he had had his pockets full of pistols he could have done nothing with them, as the evidence shows, the moment he was seized by the crowd. His statement that the mob took action because of the allowance of appeal by this court, which they thought might involve great delay, and that the mob would not stand for that, is but the expression of an opinion by the sheriff as to the reason for the lynching. He does not and did not pretend to justify the action. In all probability that was the reason,—a dislike of the interference of this court,—a reason utterly without justification and disgraceful to those who entertained it. But the sheriff surely cannot be properly convicted because he simply truthfully stated the sentiments which, in his judgment, actuated the mob. It is not a crime to entertain an opinion as to what moved a mob under these circumstances, nor can this court properly, in my judgment, convict an official of contempt because he stated his belief that the mob acted from this most disgraceful reason. Nor is the opinion, as expressed, the least evidence of the guilt of the sheriff of the contempt with which he is charged, or of any conspiracy to commit it.

In the interview the sheriff also said he had looked for no trouble that night, and, on the contrary, did not look for it until the next day. It will be remembered the next day was the one appointed for carrying into execution the sentence of the state

court, and when the day should pass without the sentence being carried into execution the sheriff said afterwards that he apprehended there might be trouble. But that was the next day, and the trouble apprehended would be founded upon the happening of that day, and there was an abundance of time in which to prepare for what might then 438]be attempted. Whatever *the sheriff may have thought of the delay which might be caused by the appeal to this court, or however ill-founded his opinion as to the probable length of that delay, his thoughts on the subject furnish no evidence even tending to show that he conspired with the mob, or that he would not do what he could to protect his prisoner when the exigency arose and the time for action arrived. He may have thought there would be great delay, and for that reason did not wonder the people would hate to submit to it. All this, however, is mere evidence as to what it was supposed a mob might do the next day, but is, as I have repeated already, no evidence of conspiracy on the part of the sheriff to aid the mob, and none that he was guilty of a contempt in not resisting or attacking it up to the point of imperiling his life in a futile attempt to protect his prisoner. It seems to me that the sheriff is being held to a degree of responsibility far beyond any reasonable limit, and not justified by the evidence contained in the record.

The government based its argument for a conviction of the sheriff very largely upon the interview above referred to, and which I have commented on at some length. Strike that out, and there is really nothing whatever on which to base the shadow of a claim for a conviction. For the reasons given I think the interview itself is wholly insufficient as evidence of the guilt of the sheriff, and I think the rule to show cause should be discharged as to him. I also think the evidence is too slight upon which to convict the jailer.

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I am authorized to say that Mr. Justice White and Mr. Justice McKenna concur in this dissent.

On June 1st, 1909, upon motion by defendants for time to present petition for rehearing, defendants were given thirty days in which to prepare and present such petitions, defendants to be released in the meantime on their own recognizance.

*ED JOHNSON, Appt. [485
v.

STATE OF TENNESSEE.

(See S. C. Reporter's ed. 485.)

Appeal — abatement — death of party.

The death of the appellant abates an appeal to the Federal Supreme Court from an order of a Federal circuit court denying relief by habeas corpus.

[For other cases, see Appeal and Error, 2522-2527, in Digest Sup. Ct. 1908.]

[No. 2.]

Decided May 24, 1909.

A PPEAL from the Circuit Court of the United States for the Northern Division of the Eastern District of Tennessee to review an order denying relief by habeas corpus to a prisoner under sentence of death in the Criminal Court of Hamilton County in that state. Dismissed.

The CHIEF JUSTICE:

Appeal abated by death of appellant, and case dismissed.

NOTE.—On abatement and substitution of parties on writ of error from or appeal to the Federal Supreme Court—see note to *Wedding v. Meyler*, 66 L.R.A. 856.

On abatement generally—see note to *Green v. Watkins*, 5 L. ed. U. S. 256.

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MEMORANDA

OF

CASES DISPOSED OF WITHOUT OPINIONS.

487]*EX PARTE: IN THE MATTER OF THE HUDSON OIL & SUPPLY COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Prohibition.

Mr. De Lagnel Berier for petitioner.

March 1, 1909. Denied.

EX PARTE: IN THE MATTER OF FRANK MCWILLIAMS, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Prohibition.

Mr. Richard D. Currier for petitioner.

March 1, 1909. Denied.

SASS & CRAWFORD, Plaintiffs in Error, v. MINNIE THOMAS and Charley Thomas. [No. 112.]

Appeal—from circuit court of appeals—case arising in courts of Indian territory.

In Error to the United States Circuit Court of Appeals for the Eighth Circuit to review a judgment in the United States Court of Appeals in the Indian Territory, affirming a judgment of the United States Court for the Southern District of that territory, in favor of plaintiffs, in an action of unlawful detainer.

See same case below, 152 Fed. 627, 82 C. C. A. 19.

Messrs. W. A. Ledbetter and S. T. Bledsoe for plaintiffs in error.

Messrs. A. C. Cruce and W. I. Cruce for defendants in error.

March 22, 1909. *Per Curiam*: The Writ of Error is dismissed for want of jurisdiction, on authority of *Laurel Oil & Gas Co. v. Morrison*, 212 U. S. 291, ante, 517, 29 Sup. Ct. Rep. 394, decided on February 23, last.

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EX PARTE: IN THE MATTER OF THE CONSOLIDATED RUBBER TIRE COMPANY, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Prohibition.

Mr. Charles W. Stapleton for petitioner.

April 12, 1909. Denied.

GILA BEND RESERVOIR & IRRIGATION COMPANY, Appellant, v. W. H. LINN et al. [No. 199, of October Term, 1897.]; GILA BEND RESERVOIR & IRRIGATION COMPANY, Appellant, v. GILA WATER COMPANY [No. 226, of October Term, 1905].

Motions for leave to file petitions for leave to file bills of review in the lower court.

Mr. E. S. Clark for petitioner.

March 15, 1909. Denied.

KANSAS CITY SOUTHERN RAILWAY COMPANY, Plaintiff in Error, v. OLLIE M. HENRIE, etc., et al. [No. 648.]

Error to state court—review of facts.

In Error to the Supreme Court of the state of Arkansas to review a judgment affirming, upon remittitur of the damages above \$25,000, a judgment of the Circuit Court of Miller County, in that state, in favor of plaintiffs in an action for the death of a railway employee while adjusting a coupling. On rehearing in the state court it was contended for the first time that the undisputed evidence showed that the cars were equipped with the automatic couplers required by the Federal safety appliance act, and that it was therefore contributory negligence to go between the cars as the deceased employee did to make the coupling. The court said the objection was raised too late, and, further, that, in any event, there was evidence to sustain a finding that the coupling appliances were in such condition that they could not be operated from the outside.

See same case below, 87 Ark. 443, 112 S. W. 967.

Messrs. James F. Read, James B. McDonough, and Samuel W. Moore for plaintiff in error.

Mr. William H. Arnold for defendants in error.

April 19, 1909. *Per Curiam*: Writ of Error dismissed for want of jurisdiction. *Gulf, C. & S. F. R. Co. v. Texas*, 204 U. S. 411, 51 L. ed. 545, 27 Sup. Ct. Rep. 360; *Behn v. Campbell*, 205 U. S. 407, 51 L. ed. 859, 27 Sup. Ct. Rep. 502; *Leathe v. Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 Sup. Ct. Rep. 30; *Stickney v. Kelsey*, 209 U. S. 419, 52 L. ed. 853, 28 Sup. Ct. Rep. 508; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, ante, 417, 29 Sup. Ct. Rep. 220.

CHICAGO, BURLINGTON, & QUINCY
RAILWAY COMPANY

v.

EDGAR C. WILLIAMS.

Cases certified — sending up whole case.

Questions which involve the determination of the whole case cannot be sent up to the Federal Supreme Court by a certificate from a circuit court of appeals.

[For other cases, see Cases Certified, III. in Digest Sup. Ct. 1908.]

[No. 154.]

Argued and submitted April 16, 1909. Decided April 26, 1909.

ON A CERTIFICATE from the United States Circuit Court of Appeals for the Eighth Circuit, which, omitting the caption and formal parts, is as follows: "The judgment which the writ of error challenges was rendered after a trial and a verdict of a jury for \$5,000 damages. At the trial these facts were conclusively established: The defendant in error was injured by the negligence of the servants of the railway company while he was riding in a caboose of a cattle train under a contract between him and the railway company for the transportation of his cattle at the regular rate, in which contract the railway company had agreed to transport him free, and he had agreed, in consideration of the free transportation, that the railway company should not be liable to him for any injury or damage, from whatever cause, which he might suffer or incur while he was so carried; that the cattle should be in his charge for the purpose of attention and care, and that the railway company should not be responsible for such attention and care, but he should load, unload, water, and feed them. He was not constrained, required, or requested to make this contract, or one of

this nature, in order to secure transportation for his cattle by the railway company at the same rate and on the same terms in its care, but he had the option to have them transported at the same rate in the care of the railway company, and to ride on a passenger train from the point of shipment to the destination of the cattle for the regular fare, or to ride free in the caboose car of the cattle train under his contract to hold the railway company exempt from liability for his injuries, and to care for the cattle himself. He freely exercised this option, and chose the latter alternative. The danger of injury to one riding in the caboose of a cattle train is about four times the danger to one riding over the same railroad in the coach of a passenger train. Upon these facts, the railway company, which had pleaded its exemption from liability under the contract, requested the court to instruct the jury to return a verdict in its favor; the court refused; an exception was taken to this ruling; and this ruling and many others have been assigned as errors and are pending in this court for determination.

"And the circuit court of appeals for the eighth circuit further certifies that other questions of law which relate to the admission of evidence are presented by the assignment of errors in this case, and are pending for the decision of this court, but that the following questions of law are also presented by the assignment of errors, and their decision is indispensable to a determination of this case in this court; and that, to the end that this court may properly decide the issues of law presented, it desires the instruction of the Supreme Court of the United States upon the following questions of law:

"1. In a contract between an owner of cattle and a railway company for the transportation of the cattle at the regular rate, which contains the further agreement that the owner shall be transported on the cattle train free in consideration that he contracts that the railway company shall not be liable to him for any injury or damage which he sustains while he is being so carried, and that he will load, unload, feed, and care for the cattle during the transportation, is his agreement that the railway company shall not be liable to him for any injury or damage which he sustains while being so carried a valid contract?

2. Where the owner of the cattle is not constrained, required, or requested to make the contract described in the foregoing question in order to have his cattle transported at the regular rate, but freely chooses to make such an agreement in preference to contracting for the transportation of his

NOTE.—On the definiteness of question to be certified—see note to *Waco Water & Light Co. v. Waco*, 31 L.R.A. 392.

cattle at the regular rate at the risk of the railway company, and riding himself on a passenger train to the destination of the cattle at the regular rate, is his agreement that the railway company shall not be liable to him for any injury or damage which he sustains while being so carried a valid contract?

"3. Do the facts which were established at the trial, and which are set forth in the statement which precedes these questions, show a valid contract by the owner of the cattle, the plaintiff below, that the railway company should not be liable to him for any injury or damage which he sustained while he was riding in the caboose of the cattle train under the contract specified in the statement?" Dismissed.

Mr. O. H. Dean argued the cause, and, with Messrs. W. D. McLeod, H. C. Timmonds, O. M. Spencer, and Hale Holden, filed a brief for the Chicago, Burlington, & Quincy Railway Company.

Mr. John H. Denison submitted the cause for Williams. Messrs. John Hipp and Ralph Talbot were on the brief.

Mr. William E. Fowler also submitted the cause for Williams. Messrs. D. C. Allen, James M. Sandusky, and S. G. Sandusky were on the brief.

Per Curiam:

In the opinion of a majority of the court, this certificate is essentially the same as that disposed of in *Chicago, B. & Q. R. Co. v. Williams*, 205 U. S. 444, 51 L. ed. 875, 27 Sup. Ct. Rep. 559, and it is therefore dismissed on the authority of that decision.

Mr. Justice Holmes, dissenting:

When this case was here before I felt doubts, but deferred to the judgment of the majority, as I think one should when it does not seem that an important principle is involved or that there is some public advantage to be gained from a statement of the other side. But it seems to me that the present order is a mistake upon an important matter, and I am unwilling that it should seem to be made by unanimous consent. I think that such questions are to be encouraged as a mode of disposing of cases in the least cumbersome and most expeditious way. The former certificate was thought to invite a consideration of mixed questions of law and fact. However that may have been, the present one puts definite questions of pure law, and I think that those questions should be answered. Even if the third should be objected to, the other two are complete in themselves. It is no objection to a question of law that the case turns

upon it. That is the best of reasons for propounding it. The only objection is not to deciding the case here, but to putting questions that turn upon conclusions from evidence, or that present a general statement and ask a judgment with regard to unspecified questions of law.

Mr. Justice White and Mr. Justice Moody concur in this dissent.

GEORGE W. THOMAS, Plaintiff in Error, v. SOUTH SIDE ELEVATED RAILWAY COMPANY. [No. 157.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of Illinois to review a judgment which affirmed a judgment of the Circuit Court of Cooke County, in that state, condemning certain real property to the use of an elevated railway company, over the objection that the alleged failure of the company to proceed with the construction of the road within two years after its articles of incorporation were filed defeated its right to exercise the power of eminent domain, and that therefore such taking would be a denial of the equal protection of the laws, and without due process of law, in violation of United States Const. 14th Amendment. The state court held that whether the alleged failure of a railway company to proceed to the construction of its railway in compliance with statute operates to defeat the grant of corporate power could only be determined by a direct proceeding instituted in behalf of the state, and could not be raised and urged by a private individual.

See same case below, 218 Ill. 571, 75 N. E. 1058.

Mr. George W. Thomas, *in propria persona*.

Messrs. Monroe L. Willard and Cecil Page for defendant in error.

April 26, 1909. **Per Curiam*: [497 Writ of Error dismissed for want of jurisdiction. *Stevens v. Nichols*, 157 U. S. 370, 39 L. ed. 736, 15 Sup. Ct. Rep. 640; *Loeber v. Schroeder*, 149 U. S. 580, 37 L. ed. 856, 13 Sup. Ct. Rep. 934; *Central Land Co. v. Laidley*, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; *A. Backus, Jr., & Sons v. Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; *Ballard v. Hunter*, 204 U. S. 241, 51 L. ed. 461, 27 Sup. Ct. Rep. 261; *Tracy v. Ginzberg*, 205 U. S. 170, 51 L. ed. 755, 27 Sup. Ct. Rep. 461; *Rusch v. John Duncan Land & Min. Co.* 211 U. S. 526, ante, 312, 29 Sup. Ct. Rep. 172.

ST. PAUL, MINNEAPOLIS, & MANITOBA RAILWAY COMPANY and Great Northern Railway Company, Plaintiffs in Error, v. STATE OF MINNESOTA EX REL. CITY OF MINNEAPOLIS. [No. 162.]

Constitutional law—requiring railway company to bridge tracks at intersection of new street.

In Error to the Supreme Court of the State of Minnesota to review a judgment which affirmed, on a second appeal, a judgment of the District Court of Hennepin County, in that state, enforcing by mandamus municipal legislation requiring a railway company to construct at its own expense a bridge to carry over its tracks a street which was not extended over the right of way until after the railroad was built.

See same case below on first appeal, 98 Minn. 380, 120 Am. St. Rep. 581, 108 N. W. 261, 8 A. & E. Ann. Cas. 1047; second appeal, 101 Minn. 545, 112 N. W. 1142.

Messrs. Rome G. Brown, William R. Begg, and Charles S. Albert for plaintiffs in error.

Messrs. Frank Healy and Albert E. Clarke for defendant in error.

April 26, 1909. *Per Curiam*: Judgment affirmed on authority of Northern P. R. Co. v. Minnesota, 208 U. S. 583, 52 L. ed. 630, 28 Sup. Ct. Rep. 341.

FIDELITY & CASUALTY COMPANY OF NEW YORK, Plaintiff in Error, v. SOUTHERN RAILWAY NEWS COMPANY. [No. 165.]

Error to state court—Federal question—ruling on evidence.

In Error to the Court of Appeals of the State of Connecticut to review a judgment which affirmed a judgment of the Jefferson Circuit Court, in that state, in favor of plaintiff in an action upon an employer's liability insurance policy, over the objection that to admit parol evidence to contradict the written contract, and to substitute therefor the terms of a prior verbal agreement, denied the due process of law and the equal protection of the laws guaranteed by United States Const. 14th Amendment.

See same case below, 31 Ky. L. Rep. 55, 101 S. W. 900.

Mr. William H. Field for plaintiff in error.

Mr. Charles F. Taylor for defendant in error.

499] April 26, 1909. **Per Curiam*: Writ of Error dismissed for want of jurisdiction. Central Land Co. v. Laidley, 159 U. S. 103, 40 L. ed. 91, 16 Sup. Ct. Rep. 80; Sayward v. Denny, 158 U. S. 180, 39 L. ed. 941, 15

Sup. Ct. Rep. 777; Bacon v. Texas, 163 U. S. 207, 41 L. ed. 132, 16 Sup. Ct. Rep. 1023; Burt v. Smith, 203 U. S. 135, 51 L. ed. 126, 27 Sup. Ct. Rep. 37; Barrington v. Missouri, 205 U. S. 485, 51 L. ed. 893, 27 Sup. Ct. Rep. 582; Tracy v. Ginzberg, 205 U. S. 170, 51 L. ed. 755, 27 Sup. Ct. Rep. 461; Thompson v. Kentucky, 209 U. S. 340, 52 L. ed. 822, 28 Sup. Ct. Rep. 533.

MICHAEL DONOHUE, Appellant, v. EL PASO & SOUTHWESTERN RAILROAD COMPANY. [No. 516.]

Estoppel—by permitting expenditures—ejectment or trespass against railway company.

Appeal from the Supreme Court of the Territory of Arizona.

Mr. Charles F. Ainsworth for appellant. Messrs. A. B. Browne, Alexander Britton, and E. E. Ellenwood for appellee.

April 26, 1909. *Per Curiam*: Judgment affirmed. Roberts v. Northern P. R. Co. 158 U. S. 1, 39 L. ed. 873, 15 Sup. Ct. Rep. 756; Northern P. R. Co. v. Smith, 171 U. S. 260, 43 L. ed. 157, 18 Sup. Ct. Rep. 794.

FRANK J. LOGAN et al., Appellants, v. FARMERS' DEPOSIT NATIONAL BANK OF PITTSBURGH, PA. et al. [No. 745.]

Appeal—from circuit court of appeals—bankruptcy case.

Appeal from the United States Circuit Court of Appeals for the Fourth Circuit to review a decree which modified a decree of the Circuit Court for the Northern District of West Virginia by rejecting all but \$22,500 of a claim against the bankrupt's estate, which had been allowed by the Circuit Court at \$100,000.

See same case below, 168 Fed. 465.

*Mr. Hector M. Hitchings for appel-[501]lants.

Messrs. A. Leo Weil and B. M. Ambler for appellees.

April 26, 1909. *Per Curiam*: Appeal dismissed for want of jurisdiction, on authority of Coder v. Arts, decided April 5, 1909, 213 U. S. 223, ante, 772, 29 Sup. Ct. Rep. 436.

EX PARTE: IN THE MATTER OF ISAAC HELLER, Petitioner. [No. —, Original.]

Motion for leave to file a petition for a Writ of Mandamus.

Mr. Abraham A. Berman for petitioner.

May 3, 1909. Denied.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY OF TEXAS et al., Plaintiffs in Error, v. S. M. KENNEDY. [No. 817.]

Error to state court—Federal question.

In Error to the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas to review a judgment which affirmed a judgment of the District Court of Hunt County, in that state, in favor of a railway employee in an action against the railway company for personal injuries alleged to have been caused by its negligence. The Federal question asserted to be involved was the validity, under the due process of law and equal protection of the laws clauses of United States Const. 14th Amendment, of Texas Laws 1905, chap. 163, modifying the common-law doctrine of assumed risk in suits against railway and street railway companies.

See same case below (Tex. Civ. App.) 112 S. W. 339.

Messrs. James Hagerman, J. M. Bryson, and A. B. Browne for plaintiffs in error.

Mr. Charles A. Culberson for defendant in error.

May 3, 1909. Dismissed for want of jurisdiction.

YADKIN RIVER POWER Co., Plaintiff in Error, v. WHITNEY Co. [No. 835.]

Error to state court—Federal question.

In Error to the Supreme Court of the State of North Carolina to review a judgment which affirmed a judgment of the Superior Court of Montgomery County, in that state, dismissing proceedings to condemn a water power. The Federal question asserted to be involved was the unconstitutionality, under the Federal Constitution, of North Carolina Pub. Laws 1907, chap. 74, taking away the right to condemn water powers.

See same case below (N. C.) 63 S. E. 188.

Messrs. Wm. A. Guthrie and Frederick M. Leonard for plaintiff in error

Messrs. Thomas Patterson. Burton Craige, Thomas J. Jerome, and W. A. Way for defendant in error.

May 17, 1909. Writ of error dismissed for want of jurisdiction.

GRANITE BITUMINOUS PAVING Co., Appellant, v. JOHN LANDIS et al. [No. 528.]

Federal courts—jurisdictional amount.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri to review a decree dismissing, for want of jurisdiction, a suit in equity, brought by a contractor for a public improvement, to enjoin the bringing of suits by abutting owners, pursuant to an alleged

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conspiracy by which damages for an alleged change of grade are sought, and to foreclose the liens of the special tax bills upon the several abutting lots, none of which bills is for an amount equal to \$2,000.

Messrs. Edward P. Johnson and *W. [505] L. Sturdevant for appellant.

No appearance for appellees.

May 17, 1909. *Per Curiam*: The Circuit Court properly held that it had no jurisdiction, for want of the jurisdictional amount, and its decree dismissing the bill is affirmed with costs.

EX PARTE: IN THE MATTER OF HENRY C. PEARSON, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Messrs. Charles F. Carusi, C. D. Pennebaker, and Eugene A. Jones for petitioner.

No opposition.

May 24, 1909. Denied.

EX PARTE: IN THE MATTER OF WILLIAM J. TOBIN, Petitioner. [No. —, Original.]

Motion for leave to file petition for Writ of Mandamus.

Mr. Samuel A. Anderson for petitioner.

No opposition.

May 24, 1909. Denied.

EX PARTE: IN THE MATTER OF ANTON KRISTIANSON, Petitioner. [No. —, Original.]

Motion for leave to file petition for a Writ of Mandamus.

Mr. Samuel A. Anderson for petitioner.

No opposition.

June 1, 1909. Denied.

UNITED STATES FIDELITY & GUARANTY Co., Plaintiff in Error, v. UNITED STATES. [No. 179.]

Principal and surety—liability of surety on official bond.

In Error to the United States Circuit Court of Appeals for the Ninth Circuit to review a judgment which affirmed a judgment of the Circuit Court for the District of Montana, in favor of the United States in an action against the surety on the bond of an Indian agent, in which defendant set up the defenses that the vouchers rejected as containing material misrepresentations also contained some correct items, which reduced the actual loss to the United States to less than \$2,000, that the bond contained conditions in excess of the statutory requirements, and that the agent had been indicted and convicted for his malfeasance in office.

See same case below, 80 C. C. A. 446, 150 Fed. 550.

Messrs. Milton S. Gunn and J. Kemp Bartlett for plaintiff in error.

The Attorney General and Assistant Attorney General Russell for defendant in error.

May 24, 1909. Judgment affirmed by an equally divided court, and cause remanded to the Circuit Court of the United States for the District of Montana.

511]*BERNARR McFADDEN, Petitioner, v. UNITED STATES. [No. 720.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 165 Fed. 51.

Mr. Henry M. Earle for petitioner.

The Attorney General and the Solicitor General for respondent.

March 1, 1909. Denied.

UNITED STATES, Petitioner, v. DANIEL J. RIMEB et al. [No. 730.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

The Attorney General and the Solicitor General for petitioner.

No appearance for respondents.

March 1, 1909. Granted.

GRAND TRUNK WESTERN RAILWAY COMPANY, Petitioner, v. JOHN F. DEVINE, Administrator, etc. [No. 731.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Mr. G. W. Kretzinger for petitioner.

Mr. Edward Maher for respondent.

March 8, 1909. Denied.

LAWRENCE JOHNSON & Co., Petitioners, v. UNITED STATES. [No. 733.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 166 Fed. 728.

Messrs. Howard T. Walden and Henry J. Webster for petitioners.

The Attorney General and the Solicitor General for respondent.

March 8, 1909. Denied.

512]*DOWAGIAC MANUFACTURING COMPANY, Petitioner v. McSHERRY MANUFACTURING COMPANY et al. [No. 734.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit. See same case below, 89 C. C. A. 26, 160 Fed. 948, on rehearing, 89 C. C. A. 512, 163 Fed. 34.

Messrs. Fred L. Chappell and Morison R. Waite for petitioner.

Messrs. E. E. Wood and Joseph Wilby for respondents.

March 8, 1909. Denied.

RUBBER TIRE WHEEL COMPANY et al., Petitioners, v. GOODYEAR TIRE & RUBBER COMPANY et al. [No. 736.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 53 C. C. A. 583, 116 Fed. 363.

Messrs. F. P. Fish, Thomas W. Bakewell, Border Bowman, Charles W. Stapleton, and Clarence P. Byrnes for petitioners.

Mr. H. A. Toulmin for respondents.

March 8, 1909. Denied.

PATRICK LENNOX, Petitioner, v. ALLEN-LANE Co., et al. [No. 688]; **PATRICK LENNOX, Petitioner, v. ALLEN-LANE Co. et al.** [No. 689]; **PATRICK LENNOX, Petitioner, v. MELVILLE L. COBB et al.** [No. 690]; **PATRICK LENNOX, Petitioner, v. MELVILLE L. COBB et al.** [No. 691]; **PATRICK LENNOX, Petitioner, v. GEORGE S. ROSENCRANTZ et al.** [No. 692]; **PATRICK LENNOX, Petitioner, v. GEORGE S. ROSENCRANTZ, et al.** [No. 693].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 167 Fed. 114.

Mr. John P. Leahy for petitioner.

Messrs. William H. Dunbar and Frederick P. Fish for respondents.

March 15, 1909. Denied.

THIRD NATIONAL BANK OF CINCINNATI et al., Petitioners, v. ZELLA CONAWAY, Administratrix, etc., et al. [No. 738.] [513]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 167 Fed. 26.

Mr. George M. Hoffheimer for petitioners.

Mr. John Bassel for respondents.

March 22, 1909. Denied.

FRANK J. LOGAN et al., Petitioners, v. FARMERS' DEPOSIT NATIONAL BANK OF PITTSBURGH, PA. et al. [Nos. 745, 746.]

Petition for a Writ of Certiorari herein. See same case below, 168 Fed. 465.

Messrs. Hector M. Hitchings and Reese Blizzard for petitioners.

Messrs. A. Leo Weil and B. M. Ambler for respondents.

March 22, 1909. Denied.

SUE KIRKPATRICK et al., etc., Petitioners, v. ST. LOUIS & SAN FRANCISCO RAILROAD CO. [No. 757.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 87 C. C. A. 35, 159 Fed. 855.

Mr. Willard L. Sturdevant for petitioners.

Mr. W. F. Evans for respondent.

April 5, 1909. Denied.

FANNIE FINKS et al., Petitioners, v. FRED FLEMING et al. [No. 744.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. F. M. Etheridge and J. M. McCormick for petitioners.

Messrs. Maurice E. Locke, J. W. Perry, M. M. Crane, and William J. McKie for respondents.

April 12, 1909. Denied.

FRANK YESBERA, Petitioner, v. HARDESTY MANUFACTURING COMPANY, etc. [No. 753.]

514] Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 166 Fed. 120.

Messrs. Thomas H. Tracey and Almon Hall for petitioner.

Mr. Melville Church for respondents.

April 12, 1909. Denied.

JOHN B. HECKENDORN, Petitioner, v. UNITED STATES. [No. 763.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 89 C. C. A. 165, 162 Fed. 141.

Messrs. Everit Brown and H. J. Cookinham for petitioner.

The Attorney General and the Solicitor General for respondent.

April 12, 1909. Denied.

WOLF BROTHERS & COMPANY, Petitioner, v. HAMILTON-BROWN SHOE COMPANY, [No. 764.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 165 Fed. 413.

Messrs. Lawrence Maxwell and Simeon M. Johnson for petitioner.

Messrs. Joseph R. Edson and Paul Bakewell for respondent.

April 12, 1909. Denied.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Petitioner, v. WALTER BAKER & COMPANY, LIMITED. [No. 771.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 168 Fed. 248.

Mr. William Greenough, for petitioner.

Messrs. Eugene P. Carver and Horace L. Cheyney for respondent.

April 12, 1909. Denied.

UNITED STATES OF AMERICA, Petitioner, v. DANIEL GARRIGAN. [No. 772.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit. [515]

See same case below, 89 C. C. A. 494, 163 Fed. 16.

Messrs. Alfred S. Austrian and John B. Daish for petitioner.

No appearance for respondent.

April 12, 1909. Denied.

CORN PRODUCTS REFINING COMPANY, Petitioner, v. GEORGE F. HARDING et al. [No. 773.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 168 Fed. 658.

Messrs. Levy Mayer and John B. Daish for petitioner.

Mr. George F. Harding for respondents.

April 12, 1909. Denied.

EAGLE OIL COMPANY et al., Petitioners, v. VACUUM OIL COMPANY. [No. 788.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 89 C. C. A. 463, 162 Fed. 671.

Mr. Eugene Maekey for petitioners.

Messrs. C. Schuyler Davis and Howard L. Osgood for respondent.

April 12, 1909. Denied.

CORN PRODUCTS REFINING COMPANY, Petitioner, v. ROBERT KING. [No. 789.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 168 Fed. 892.

Mr. John B. Daish for petitioner.

Mr. Lindorf O. Whitnel for respondent.

April 12, 1909. Denied.

BROWN-KETCHAM IRON WORKS, Petitioner, v. BANK OF COMMERCE & TRUST COMPANY et al. [No. 768.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 166 Fed. 398.

Mr. Caruthers Ewing for petitioner.

Mr. J. W. Canada for respondents.

April 19, 1909. Denied.

516]*NORTH CAROLINA MINING COMPANY, Petitioner, v. G. R. WESTFELDT et al. [No. 792.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 166 Fed. 706.

Messrs. James H. Merrimon, Charles A. Moore, Joseph J. Hooker, and Thomas S. Rollins for petitioner.

Mr. Alfred S. Barnard for respondents.

April 19, 1909. Denied.

LA COMPAGNIE GENERALE TRANSATLANTIQUE, Petitioner, v. PATRICK MAGUIRE. [No. 798.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 168 Fed. 34.

Mr. Joseph P. Nolan for petitioner.

No appearance for respondent.

April 19, 1909. Denied.

UNITED STATES, Petitioner, v. BERNARD CITROEN. [No. 796.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General and the Solicitor General for petitioner.

Messrs. W. Wickham Smith and John K. Maxwell for respondent.

April 19, 1909. Granted.

ISIDORE MEYERSON, Petitioner, v. HARRY HART, et al., etc. [No. 785.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 167 Fed. 965.

Mr. George Ryall for petitioner.

Mr. Benjamin N. Cardozo for respondents.

April 26, 1909. Denied.

METROPOLITAN TRUST COMPANY OF THE CITY OF NEW YORK, Petitioner, v. CENTRAL TRUST COMPANY OF NEW YORK et al. [No. 804.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 168 Fed. 1021.

Messrs. James Byrne, Carl Taylor, L. L. Lewis, and R. B. Davis for petitioner.

Messrs. Henry W. Anderson, Arthur H. Van Brunt, Hill Carter, and John Pickrell for respondents.

April 26, 1909. Denied.

H. MUELLER MANUFACTURING COMPANY, Petitioner, v. JOSEPH H. GLAUBER. [No. 809.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

See same case below, 169 Fed. 110.

Messrs. Charles E. Pickard, A. H. Adams, and J. L. Jackson for petitioner.

Messrs. Charles C. Linthicum and W. Clyde Jones for respondent.

April 26, 1909. Denied.

O. J. HILL et al., Petitioners, v. GEORGE W. WALKER, etc. [No. 812.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 167 Fed. 241.

Messrs. George B. Webster and Clayton E. Emig for petitioners.

No appearance for respondent.

April 26, 1909. Denied.

A. J. FENN, Petitioner, v. W. H. LOUISELLE, Use, etc. [No. 786.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

See same case below, 87 C. C. A. 670, 160 Fed. 458.

Messrs. H. A. Herbert, Benjamin Micou, and Richard P. Whiteley for petitioner.

Mr. Frederick T. Myers for respondent.

May 3, 1909. Denied.

CHARLES NICKELL, Petitioner, v. UNITED STATES. [No. 794.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 88 C. C. A. 562, 161 Fed. 702; on rehearing, 167 Fed. 741.

Messrs. Thomas O'Day and Martin L. Pipes for petitioner.

The Attorney General and the Solicitor General for respondent.

May 3, 1909. *Denied.

[518

214 U. S.

WALTER S. EDDY et al., Executors, etc., Petitioners, v. CAROLINE M. EDDY. [No. 800.]
Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 168 Fed. 590.

Messrs. Watts S. Humphrey and Benton Hanchett for petitioners.

Mr. Alfred Lucking for respondent.

May 3, 1909. Denied.

J. A. SCRIVEN COMPANY, Petitioner, v. M. M. NEWCOMER et al. [No. 801.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 168 Fed. 621.

Messrs. Arthur v. Briesen and George W. Case, Jr., for petitioner.

Messrs. T. S. Webb and Lewis M. G. Baker for respondents.

May 3, 1909. Denied.

SNARE & TRIEST COMPANY, Petitioner, v. FANNIE FRIEDMAN, by Her Next Friend, Samuel Friedman. [No. 806.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

See same case below, 169 Fed. 1.

Mr. Hector M. Hitchings for petitioner.

No appearance for respondent.

May 3, 1909. Denied.

WILLIAM N. CAMP, Petitioner, v. LAKE DRUMMOND CANAL & WATER COMPANY. [No. 808.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 163 Fed. 238.

Messrs. J. H. Corbitt and T. D. Savage for petitioner.

Mr. Theodore S. Garnett for respondent.

May 3, 1909. Denied.

519]*CLAUDE W. MASON, Petitioner, v. UNITED STATES. [No. 810.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 89 C. C. A. 63, 162 Fed. 23.

Mr. G. A. Hanson, for petitioner.

The Attorney General, the Solicitor General and Assistant Attorney General Fowler for respondent.

May 3, 1909. Denied.

53 L. ed.

POCAHONTAS COAL & COKE COMPANY, Petitioner, v. JOSEPH S. GILLESPIE. [No. 811.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 163 Fed. 992.

Messrs. Joseph S. Clark and A. W. Reynolds for petitioner.

Messrs. Holmes Conrad and J. W. Chapman for respondent.

May 3, 1909. Denied.

W. S. HARLAN et al., Petitioners, v. UNITED STATES. [No. 813.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. William W. Flournoy and J. F. Stallings for petitioners.

The Attorney General and Assistant Attorney General Russell for respondent.

May 3, 1909. Denied.

ROBERT GALLAGHER et al., Petitioners, v. UNITED STATES. [No. 814.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. William W. Flournoy and J. F. Stallings for petitioners.

The Attorney General and Assistant Attorney General Russell for respondent.

May 3, 1909. Denied.

E. L. VICKERS et al., Petitioners, v. UNITED STATES. [No. 815.]

Petition for a Writ of Certiorari *to[520 the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. William W. Flournoy for petitioners.

The Attorney General and the Solicitor General for the respondent.

May 3, 1909. Denied.

FREDERICK J. LISMAN et al., Petitioners, v. MILWAUKEE, LAKE SHORE, & WESTERN RAILWAY COMPANY et al. [No. 816.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Messrs. J. J. Darlington, Delos McCurdy, and Charles K. Allen for petitioners.

Mr. Edward M. Hyzer for respondents.

May 3, 1909. Denied.

ILLINOIS CENTRAL RAILROAD COMPANY, Petitioner, v. UNITED STATES. [No. 818.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Messrs. Edmund F. Trabuc, J. C. Doolan, Attila Cox, Jr., and Blewett Lee for petitioner.

The Attorney General and the Solicitor General for respondent.

May 3, 1909. Denied.

ADOLPH KUFFLER, Petitioner, v. HINSDALE, SMITH, & COMPANY et al. [No. 832.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 168 Fed. 1021.

Mr. Max J. Kohler for petitioner.

Mr. Benjamin Tuska for respondents.

May 3, 1909. Denied.

LUFKIN LAND & LUMBER Co., Petitioner, v. BEAUMONT TIMBER Co., LIMITED. [No. 821.]

Petition for a Writ of Certiorari to the 521] United States *Circuit Court of Appeals for the Fifth Circuit.

Mr. A. P. Pajo for petitioner.

No appearance for respondent.

May 17, 1909. Denied.

J. I. CASE PLOW WORKS et al., Petitioners, v. BRYANT & BOND Co. [No. 833.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. F. M. Etheridge, and J. M. McCormick for petitioners.

No appearance for respondent.

May 17, 1909. Denied.

CENTRAL OF GEORGIA RAILWAY Co., Petitioner, v. RAILROAD COMMISSION OF ALABAMA et al. [No. 837.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Henry C. Cunningham, Alexander R. Lawton, T. M. Cunningham, Jr., and R. E. Steiner for petitioner.

Messrs. Alexander M. Garber and Samuel D. Weakley for respondents.

May 17, 1909. Denied.

WESTERN RAILWAY OF ALABAMA, Petitioner, v. RAILROAD COMMISSION OF ALABAMA et al. [No. 838.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Robert E. Steiner for petitioner.

Messrs. Alexander M. Garber and Samuel D. Weakley for respondents.

May 17, 1909. Denied.

SOUTH & NORTH ALABAMA RAILROAD Co., Petitioner, v. RAILROAD COMMISSION OF ALABAMA et al. [No. 841.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth *Circuit. [522]

Messrs. Albert S. Brandeis, Gregory L. Smith, Henry L. Stone, and Geo. W. Jones for petitioner.

Messrs. Alexander M. Garber and Samuel D. Weakley for respondents.

May 17, 1909. Denied.

NASHVILLE, CHATTANOOGA, & ST. LOUIS RAILWAY, Petitioner, v. RAILROAD COMMISSION OF ALABAMA et al. [No. 842.]

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Messrs. Albert S. Brandeis, Gregory L. Smith, Henry L. Stone, and Geo. W. Jones for petitioner.

Messrs. Alexander M. Garber and Samuel D. Weakley for respondents.

May 17, 1909. Denied.

LOUISVILLE & NASHVILLE RAILROAD Co., Petitioner, v. RAILROAD COMMISSION OF ALABAMA et al. [No. 843.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Messrs. Albert S. Brandeis, Gregory L. Smith, Henry L. Stone, and Geo. W. Jones for petitioner.

Messrs. Alexander M. Garber and Samuel D. Weakley for respondents.

May 17, 1909. Denied.

CENTRAL TRUST COMPANY OF NEW YORK, Petitioner, v. RAILROAD COMMISSION OF ALABAMA et al. [No. 845.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Adrian H. Joline for petitioner.

Messrs. Alexander M. Garber and Samuel D. Weakley for respondents.

May 17, 1909. Denied.

CORNELL STEAMBOAT Co., Owner, etc., Petitioner, v. WILLIAM K. HAMMOND et al. [No. 849.]

523] *Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 168 Fed. 693.

Messrs. J. Parker Kerlin and Amos Van Etten for petitioner.

Messrs. James Emerson Carpenter and Samuel Park for respondents.

May 17, 1909. Denied.

WEST INDIA STEAMSHIP Co., Petitioner, v. CLYDE COMMERCIAL STEAMSHIPS, LIMITED, Owner, etc. [No. 850.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Charles S. Haight for petitioner.

Messrs. J. Parker Kirlin and John M. Woolsey for respondent.

May 17, 1909. Denied.

JOHN C. LYNCH, Collector of Internal Revenue, Petitioner, v. UNION TRUST Co. OF SAN FRANCISCO et al., Trustees. [No. 851.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

See same case below, 164 Fed. 161.

The Attorney General and the Solicitor General for petitioner

Mr. H. T. Newcomb for respondents.

Mr. Barry Mohun, *amicus curiae*.

May 17, 1909. Denied.

TANG TUN et al., Petitioners, v. HARRY EDSELL, Chinese Inspector, etc. [No. 852.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Mr. James A. Kerr for petitioners.

The Attorney General and the Solicitor General for respondent.

May 24, 1909. Granted.

UNITED STATES, Petitioner, v. ALBERT ECKSTEIN. [No. 885.]

Petition for a Writ of Certiorari to 524] *the United States Circuit Court of Appeals for the Second Circuit.

The Attorney General and the Solicitor General for petitioner.

Mr. Albert H. Washburn for respondent.

May 24, 1909. Granted.

A. H. GRIGSBY, Petitioner, v. R. L. RUSSELL et al., Administrators, etc. [No. 886.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

Mr. John A. Pitts for petitioner.

No appearance for respondents.

May 24, 1909. Granted.

A. D. CLARKE et ux., Petitioners, v. T. W. HARRISON. [No. 853.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 164 Fed. 539.

Mr. Charles A. Clark for petitioners.

Mr. T. W. Harrison for respondent.

May 24, 1909. Denied.

COLORADO & SOUTHERN RAILWAY Co., Petitioner, v. J. J. SATTERFIELD. [No. 861.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Mr. Elmer E. Whitted for petitioner.

Messrs. Cone Johnson and J. M. Edwards for respondent.

May 24, 1909. Denied.

LEEDS & CATLIN Co., Petitioner, v. AMERICAN GRAPHOPHONE Co. [No. 865.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Louis Hicks for petitioner.

Messrs. Philip Mauro and C. A. L. Massie for respondent.

May 24, 1909. Denied.

*CITY OF OWOSSO, Petitioner, v. WARREN BROTHERS Co. [No. 868.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

See same case below, 166 Fed. 309.

Messrs. Henry N. Paul, Jr., and Joseph C. Frailey for petitioner.

Messrs. W. K. Richardson and James M. Head for respondent.

May 24, 1909. Denied.

NEW YORK PRODUCE EXCHANGE BANK, Petitioner, v. ROBERT PATERSON HOUSTON et al., etc. [No. 872.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. James E. Kelly for petitioner.

Messrs. J. Parker Kirlin and Chas. R. Hickox for respondents.

May 24, 1909. Denied.

UNITED STATES, Petitioner, v. RUSCH & COMPANY [No. 875] UNITED STATES, Petitioner, v. TITUS BLATTER & COMPANY [No. 876]; and UNITED STATES, Petitioner, v. W. B. QUAINANCE [No. 877].

Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 167 Fed. 523.

The Attorney General and the Solicitor General for petitioner.

Mr. Albert H. Washburn for respondents.

May 24, 1909. Denied.

TWEEDIE TRADING COMPANY, Petitioner, v. WILLIAM S. WALSH et al. [No. 879]; and TWEEDIE TRADING COMPANY, Petitioner, v. STEAMSHIP HERM, etc. [No. 880].

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. George Hiram Mann for petitioner.

Messrs. J. Parker Kirlin and Chas. R. Hickox for respondents.

May 24, 1909. Denied.

526]*W. FRANK KINNEY, Collector of Internal Revenue, Petitioner, v. SAMUEL MORRIS CONANT et al., Executors, etc. [No. 882.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

See same case below, 166 Fed. 720.

The Attorney General and the Solicitor General for petitioner.

Messrs. Walter F. Angell and Frank H. Swan for respondents.

May 24, 1909. Denied.

CHARLES W. PINKNEY et al., etc., Petitioners, v. CHURCH COOPERAGE COMPANY et al. [No. 884.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Mr. Harrington Putnam for petitioners.

Messrs. J. Parker Kirlin and Charles R. Hickox for respondents.

May 24, 1909. Denied.

NORFOLK COLD STORAGE & ICE COMPANY, Petitioner, v. NORFOLK & WESTERN RAILWAY COMPANY. [No. 887.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

See same case below, 168 Fed. 1022.

Messrs. Floyd Hughes and J. L. Jeffries for petitioner.

Messrs. Theodore W. Reath, R. M. Hughes, and John H. Holt for respondent.

May 24, 1909. Denied.

STEAMSHIP MIRAMAR COMPANY, LIMITED, Petitioner, v. MUNSON STEAMSHIP LINE. [No. 889.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 166 Fed. 722.

Messrs. J. Parker Kirlin and Charles R. Hickox for petitioner.

Mr. Charles S. Haight for respondent.

May 24, 1909. Denied.

NEW YORK & PORTO RICO STEAMSHIP COMPANY, Petitioner, v. ARCHIBALD H. BULL et al., Owners, *etc. [No. 890.] [527

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 167 Fed. 792.

Mr. Frederick M. Brown for petitioner.

Messrs. J. Parker Kirlin and Charles R. Hickox for respondents.

May 24, 1909. Denied.

F. S. KRETSINGER, Trustee, Petitioner, v. JAMES H. BROWN, as Executor, etc., et al. [No. 864.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below, 165 Fed. 612.

Mr. Henry T. Rogers for petitioner.

Mr. Henry A. Dubbs for respondents.

June 1, 1909. Denied.

UNITED STATES, Petitioner, v. BERLINGER, BROWN, & MEYER. [No. 896.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

See same case below, 167 Fed. 800.

The Attorney General and the Solicitor General for petitioner.

Mr. Joseph G. Kammerlohr for respondents.

June 1, 1909. Denied.

JOHNSON R. MORRIS, Petitioner, v. UNITED STATES. [No. 897.]

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

See same case below on first writ of error, 88 C. C. A. 532, 161 Fed. 672; second writ of error, 168 Fed. 682.

Messrs. Thomas T. Fauntleroy and Shepard Barclay for petitioner.

The Attorney General and the Solicitor General for respondent.

June 1, 1909. Denied.

TEXAS & PACIFIC RAILWAY COMPANY et al.,
Plaintiffs in Error, v. B. F. ALLEN. [No.
155.]

In Error to the Supreme Court of the
State of Texas.

See same case below, 100 Tex. 525, 101
S. W. 792.

Messrs. John F. Dillon, W. L. Hall, D. D.
Duncan for plaintiffs in error.

No appearance for defendant in error.

528] February 24, 1909. Dismissed *with
costs, on motion of Mr. W. L. Hall, for the
plaintiffs in error.

ALBERT H. RUSCH, Plaintiff in Error, v.
ESCANABA TIMBER LAND COMPANY. [No.
119.]

In Error to the Supreme Court of the
State of Michigan.

See same case below, 147 Mich. 619, 111
N. W. 345.

Messrs. O. H. Reed and E. C. Chapin for
plaintiff in error.

Mr. C. C. Lancaster for defendant in er-
ror.

February 26, 1909. Dismissed with costs
on motion of counsel for the plaintiff in
error.

EDISON ELECTRIC COMPANY, Appellant, v.
CITY OF PASADENA et al. [No. 122.]

Appeal from the Circuit Court of the
United States for the Southern District of
California.

Mr. H. H. Trowbridge for appellant.

Messrs. C. J. Willett, William J. Hun-
saker, and J. P. Wood for appellees.

March 16, 1909. Dismissed with costs, on
authority of counsel for appellant.

W. A. HUFF, Individually and as Trustee,
etc., et al., Appellants, v. WILLIAM L.
BIDWELL et al. [No. 126.]

Appeal from the United States Circuit
Court of Appeals for the Fifth Circuit.

Mr. Augustus O. Bacon for appellants.

Messrs. Minter Wimberley, Clifford L. An-
derson, N. E. Harris, Thomas B. Felder, Jr.,
and Olin J. Wimberley for appellees.

March 17, 1909. Dismissed with costs,
pursuant to the Tenth Rule.

SANTA RITA MINING COMPANY, Plaintiff in
Error, v. JAMES N. UPTON. [No. 134.]

In Error to the Supreme Court of the
Territory of New Mexico.

Mr. W. B. Childers for plaintiff in error.

No appearance for defendant in error.

529] March 18, 1909. Dismissed *with
costs, pursuant to the Tenth Rule.

53 L. ed.

GARFIELD MEMORIAL HOSPITAL, Plaintiff in
Error, v. HENRY B. F. MACFARLAND et al.,
Commissioners of the District of Colum-
bia. [No. 460.]

In Error to the Court of Appeals of the
District of Columbia.

Mr. James H. Hayden for plaintiff in
error.

No appearance for defendants in error.

March 22, 1909. Dismissed with costs on
motion of Mr. James H. Hayden for the
plaintiff in error.

PEOPLE OF THE STATE OF NEW YORK ON THE
RELATION OF THE NEW YORK ELECTRIC
LINES Co., Plaintiff in Error, v. WILLIAM
B. ELLISON, Commissioner of Water Sup-
ply, Gas, and Electricity of the City of
New York, et al. [No. 116.]

In Error to the Supreme Court of the
State of New York.

See same case below in Appellate Divi-
sion, 115 App. Div. 254, 101 N. Y. Supp.
55; in court of appeals, 188 N. Y. 523, 81
N. E. 447.

Messrs. W. B. Burnet and J. Aspinwall
Hodge for plaintiff in error.

Messrs. F. K. Pendleton and Theodore
Connolly for defendants in error.

April 5, 1909. Dismissed with costs, on
motion of Mr. Frederic D. McKenney, in be-
half of counsel for the plaintiff in error.

MARIA CRUZ DE GODINES et al., Appellants,
v. FRANCIS H. DEXTER. [No. 646.]

Appeal from the District Court of the
United States for Porto Rico.

Messrs. Willis Sweet and T. D. Mott, Jr.,
for appellants.

No appearance for appellee.

April 5, 1909. Dismissed with costs, on
motion of Mr. Frederic D. McKenney, in be-
half of counsel.

ORDER OF RAILROAD TELEGRAPHERS, Appel-
lant, v. LOUISVILLE & NASHVILLE RAIL-
ROAD COMPANY. [No. 135.]

*Appeal from the Circuit Court of [530
the United States for the Western District
of Kentucky.

See same case below, 148 Fed. 437.

Mr. Benjamin F. Washer for appellant.

Messrs. James P. Helm, Henry L. Stone,
and Benjamin D. Warfield for appellee.

April 7, 1909. Dismissed with costs, pur-
suant to the Sixteenth Rule, on motion of
Mr. T. Kennedy Helm for the appellee.

EMETERIO ALVAREZ, Potencia Mariano, et al., Plaintiffs in Error, v. SEVERINA LERMA MARTINEZ DE ALMEDA. [No. 147.]
In Error to the Supreme Court of the Philippine Islands.

Mr. John M. Thurston for plaintiffs in error.

Messrs. Marion Butler, Josiah M. Vale, and Lionel D. Hargis for defendant in error.

April 8, 1909. Dismissed with costs, pursuant to the Tenth Rule.

HUACHUCA WATER COMPANY, Appellant, v. CITY OF TOMBSTONE. [No. 160.]

Appeal from the Supreme Court of the Territory of Arizona.

Mr. Allen R. English for appellant.

Mr. H. L. Pickett for appellee.

April 14, 1909. Dismissed with costs, pursuant to the Tenth Rule.

LOUISVILLE & SOUTHERN INDIANA TRACTION COMPANY, Plaintiff in Error, v. ZACH T. LEAF. [No. 186.]

In Error to the Supreme Court of the State of Indiana.

Mr. Merrill Moores for plaintiff in error.

Messrs. George E. Sullivan and Horace L. B. Atkisson for defendant in error.

April 22, 1909. Dismissed with costs, pursuant to the Tenth Rule.

GREAT NORTHERN RAILWAY COMPANY, Plaintiff in Error, v. UNITED STATES. [No. 595.]

In Error to the Circuit Court of the United States for the Southern District of 531] New York.

Mr. Joseph G. Dudley for plaintiff in error.

The Attorney General for defendant in error.

April 26, 1909. Dismissed on motion of counsel for plaintiff in error.

C. ELMER SMITH et al., Executors, etc., Appellants, v. KING OF ARIZONA MINING & MILLING COMPANY et al. [No. 195.]

In Error to the Supreme Court of the Territory of Arizona.

Mr. J. F. Conroy for appellants.

Mr. Eugene S. Ives for appellees.

April 27, 1909. Dismissed with costs, pursuant to the Tenth Rule.

CANDIDO ACOSTA, Antonio Acosta, and Anselmo Acosta, Appellants, v. PEOPLE OF PORTO RICO. [No. 199.]

In Error to the Supreme Court of Porto Rico.

Mr. N. B. K. Pettingill for appellants.

No appearance for appellees.

April 28, 1909. Dismissed with costs, on motion of Mr. George H. Lamar in behalf of counsel for the appellants.

CENTURY MERCANTILE COMPANY, Plaintiff in Error, v. JOHN HOFMAN COMPANY. [No. 718.]

In Error to the Court of Appeals of the State of New York.

Mr. Herbert D. Bailey for plaintiff in error.

Mr. John A. Barhite for defendant in error.

April 29, 1909. Judgment reversed, upon confession of error and request of defendant in error, and cause remanded to be proceeded in according to law and justice.

JACINTHO MIGUEL, Plaintiff in Error, v. TERRITORY OF HAWAII. [No. 211.]

In Error to the Supreme Court of the Territory of Hawaii.

Mr. Jacintho Miguel *in propria persona*.

No appearance for defendant in error.

April 30, 1909. Dismissed with costs *pursuant to the Tenth Rule. [532]

TEXAS & PACIFIC RAILWAY COMPANY et al., Plaintiffs in Error, v. W. H. TUCKER, Guardian, etc. [No. 347.]

In Error to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

Messrs. John F. Dillon and W. L. Hall for plaintiffs in error.

Mr. Theodore Mack for defendant in error.

May 3, 1909. Judgment reversed with costs, upon confession of error and request of defendant in error, and cause remanded to be proceeded in according to law and justice.

TOWN OF STEAMBOAT SPRINGS et al., Appellants, v. STEAMBOAT SPRINGS ELECTRIC Co. [No. 433.]

Appeal from the Circuit Court of the United States for the District of Colorado.

Mr. Edward P. Costigan for appellants.

Messrs. Tyson S. Dines, Elmer E. Whitted, and Peter J. Holme for appellee.

May 17, 1909. Dismissed with costs, on motion of counsel for appellants.

EX PARTE: IN THE MATTER OF MARY HATCH
RIGGS, Administratrix, etc., Petitioner.
[No. —, Original.]
Motion for leave to file a petition for a
Writ of Mandamus.
March 1, 1909. Granted.

ROLLING MILL COMPANY OF AMERICA et al.,
Petitioners, v. CANTON ROLL & MACHINE
COMPANY et al. [No. 746.]

Petition for a Writ of Certiorari to the
United States Circuit Court of Appeals for
the Fourth Circuit.

Mr. Hector M. Hitchings for petitioners.
53 J. ed.

Messrs. A. Leo Weil and B. M. Amber for
respondents.

March 22, 1909. Denied.

PERE ALFREDO LUIS BAGLIN, Superior Gen-
eral, etc., Appellant, v. CUSENIER COM-
PANY. [No. 614.]

Petition and cross petition for a Writ of
Certiorari to the United States Circuit
Court of Appeals for the Second Circuit.

Messrs. Philip Mauro and C. A. L. Mas-
sie for appellant.

Messrs. Roger Foster and A. L. Pincoffs
for appellee.

April 19, 1909. Granted.

APPENDIX I.

Supreme Court of the United States.

OCTOBER TERM, 1908.

ORDER.

The Reporter having represented that, owing to the number of decisions at the present term, it would be impracticable to put the reports in one volume, it is therefore now here ordered that he publish an additional volume in this year, pursuant to § 681 of the Revised Statutes.

May 17, 1909.

APPENDIX II.

Supreme Court of the United States.

OCTOBER TERM, 1908.

ORDER.

It is now here ordered by the court that all the cases on the docket not decided, and all the other business of the term not disposed of, be, and the same are hereby, continued until the next term.

June 1, 1909.

APPENDIX III.

Supreme Court of the United States.

OCTOBER TERM, 1908.

ORDER.

It is now here ordered by the court that the Rules for Practice and Procedure under § 25 of the act to amend and consolidate the acts respecting copyright, approved March 4, 1909, to go into effect July 1, 1909, this day adopted and established by the court, be, and the same are hereby, promulgated as such.

June 1, 1909.

Rules adopted by the Supreme Court of the United States for practice and procedure under section 25 of AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT, approved March 4, 1909. To go into effect July 1, 1909.

1.

The existing rules of equity practice, so far as they may be applicable, shall be enforced in proceedings instituted under section twenty-five (25) of the act of March 4th, 1909, entitled, "An Act to Amend and Consolidate the Acts Respecting Copyright."

2.

A copy of the alleged infringement of copyright, if actually made, and a copy of the work alleged to be infringed, should accompany the petition, or its absence be explained; except in cases of alleged infringement by the public performance of dramatic and dramatico-musical compositions, the delivery of lectures, sermons, addresses, and so forth, the infringement of copyright upon sculptures and other similar works, and in any case where it is not feasible.

3.

Upon the institution of any action, suit, or proceeding, or at any time thereafter, and before the entry of final judgment or decree therein, the plaintiff or complainant, or his authorized agent or attorney, may file with the clerk of any court given jurisdiction under § 34 of the act of March 4, 1909, an affidavit stating upon the best of his knowledge, information, and belief, the number and location, as near as may be, of the alleged infringing copies, records, plates, molds, matrices, etc., or other means for making the copies alleged to infringe the copyright, and the value of the same, and with such affidavit shall file with the clerk a bond executed by at least two sureties and approved by the court, or a commissioner thereof.

4.

Such bond shall bind the sureties in a specified sum, to be fixed by the court, but not less than twice the reasonable value of such infringing copies, plates, records, molds, matrices, or other means for making such infringing copies, and be conditioned for the prompt prosecution of the action, suit, or proceedings; for the return of said articles to the defendant, if they or any of them are adjudged not to be infringements, or if the action abates, or is discontinued before they are returned to the defendant; and for the payment to the defendant of any damages which the court may award to him against the plaintiff or complainant. Upon the filing of said affidavit and bond, and the approval of said bond, the clerk shall issue a writ directed to the marshal of the district where

the said infringing copies, plates, records, molds, matrices, etc., or other means of making such infringing copies shall be stated in said affidavit to be located, and generally to any marshal of the United States, directing the said marshal to forthwith seize and hold the same, subject to the order of the court issuing said writ, or of the court of the district in which the seizure shall be made.

5.

The marshal shall thereupon seize said articles or any smaller or larger part thereof he may then or thereafter find, using such force as may be reasonably necessary in the premises, and serve on the defendant a copy of the affidavit, writ, and bond by delivering the same to him personally, if he can be found within the district, or, if he cannot be found, to his agent, if any, or to the person from whose possession the articles are taken, or, if the owner, agent, or such person cannot be found within the district, by leaving said copy at the usual place of abode of such owner or agent, with a person of suitable age and discretion, or at the place where said articles are found, and shall make immediate return of such seizure, or attempted seizure, to the court. He shall also attach to said articles a tag or label stating the fact of such seizure, and warning all persons from in any manner interfering therewith.

6.

A marshal who has seized alleged infringing articles shall retain them in his possession, keeping them in a secure place, subject to the order of the court.

7.

Within three days after the articles are seized, and a copy of the affidavit, writ, and bond are served, as hereinbefore provided, the defendant shall serve upon the clerk a notice that he excepts to the amount of the penalty of the bond, or to the sureties of the plaintiff or complainant, or both, otherwise he shall be deemed to have waived all objection to the amount of the penalty of the bond and the sufficiency of the sureties thereon. If the court sustain the exceptions, it may order a new bond to be executed by the plaintiff or complainant, or, in default thereof, within a time to be named by the court, the property to be returned to the defendant.

8.

Within ten days after service of such notice, the attorney of the plaintiff or complainant shall serve upon the defendant or his attorney a notice of the justification of the sureties, and said sureties shall justify before the court or a judge thereof at the time therein stated.

9.

The defendant, if he does not except to the amount of the penalty of the bond or the sufficiency of the sureties of the plaintiff or complainant, may make application to the court for the return to him of the articles seized, upon filing an affidavit stating all material facts and circumstances tending to show that the articles seized are not infringing copies, records, plates, molds, matrices, or means for making the copies alleged to infringe the copyright.

10.

Thereupon the court, in its discretion, and after such hearing as it may direct, may order such return upon the filing by the defendant of a bond executed by at least two sureties, binding them in a specified sum, to be fixed in the discretion of the court, and conditioned for the delivery of said specified articles, to abide the order of the court. The plaintiff or complainant may require such sureties to justify within ten days of the filing of such bond.

11.

Upon the granting of such application and the justification of the sureties on the bond, the marshal shall immediately deliver the articles seized to the defendant.

12.

Any service required to be performed by any marshal may be performed by any deputy of such marshal.

13.

For services in cases arising under this section, the marshal shall be entitled to the same fees as are allowed for similar services in other cases.



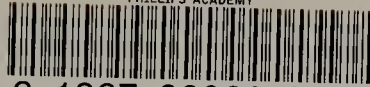




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